



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAL. 147 OF 2020

(CORAM: NAMBUYE, KOOME & MUSINGA, J.J.A)

BETWEEN

MOI UNIVERSITY.....APPLICANT

AND

VIOLET OMBAKA OTIENO.....1ST RESPONDENT

OBEGI MALAK OCHWERI.....2ND RESPONDENT

NDIRANGU TABITHA.....3RD RESPONDENT

VERAH SHAWIZA MANYONYI.....4TH RESPONDENT

MAUREEN KWAMBOKA.....5TH RESPONDENT

YVONNE AKHAGO BULUMA.....6TH RESPONDENT

OMONDI LINDA AKINYI.....7TH RESPONDENT

KAMAU MUTHONI.....8TH RESPONDENT

SARAH KARANJA WANJIKU.....9TH RESPONDENT

JAKOYO PAULLETE AKINYI.....10TH RESPONDENT

RUTH WAMBOI MWANGI.....11TH RESPONDENT

KARANJA SUSAN WAITHIRA.....12TH RESPONDENT

PATIENCE MBITHI KAMUTU.....13TH RESPONDENT

(Being an application for stay of execution of the orders and decree of the High Court of Kenya

at Nairobi (Nyamweya, J.) dated 21st August, 2019 in Const. Pet. No. 321 of 2019)

RULING OF THE COURT

1. On 21st August, 2019, *Nyamweya, J.* issued the following orders against the applicant:

“1. A declaration be and is hereby issued that the Respondent’s action of not including the Petitioners in the final list of

graduands for the Respondent's 38th Graduation Ceremony scheduled for 22nd August 2019 was discriminatory, and violated the Petitioners' rights to non-discrimination, dignity, freedom from psychological torture, and fair administrative action contrary to Articles 27, 28, 29(d) and 47 of the Constitution.

II. A declaration be and is hereby issued that the Respondent's action of not including the Petitioners in the final list of graduands for the Respondent's 38th Graduation Ceremony scheduled for 22nd August 2019 is a violation of the Petitioners' legitimate expectations.

III. An order be and is hereby issued granting each of the 1st to 13th Petitioners herein an award of Kshs.50,000/= as nominal damages for infringement of their rights under Articles 27, 28, 29(d) and 47 of the Constitution.

IV. The Respondent be and is hereby compelled to avail each of the 1st to 13th Petitioners herein the reasons for their non-inclusion in the final graduation list of the Respondent's the 38th Graduation Ceremony scheduled for 22nd August 2019 within 30 days of this judgement.

V. The Respondent be and is hereby compelled to undertake all the necessary internal procedures required to include the Petitioners in the next graduation list and graduation ceremony within 90 days of the date of this judgment.

VI. The Respondent shall file a written report to this Court on the progress made in compliance with Orders V and VI hereinabove within 90 days of the date of this judgment.

VII. The costs of the Petition shall be borne by the Respondent."

2. Aggrieved by the said orders, the applicant timeously filed a Notice of Appeal on 23rd August, 2019 and, on the 10th June, 2020 filed a Notice of Motion under **Rule 5 (2) (b)** of this Court's Rules seeking a stay of execution of the above judgment and decree thereto. Briefly, the respondents were students at the applicant's University school of Information Sciences Communication Department. The respondents were scheduled to graduate during the 38th Graduation ceremony of the Moi University which was then scheduled for 22nd August, 2019. However, the respondents got concerned during the last week of July, 2019 that their marks for Editing and Publishing skills unit which they had done in their 3rd year (2016 - 2017) could not be traced.

3. The respondents sent their class representative to follow up the case of missing marks with the University, but that did not yield any success. They also lodged their complaint of missing marks with the Office of the Cabinet Secretary, Ministry of Education but it was not until 10th August, 2019 when they knew they had hit a dead end as the final graduation list was published and their names were not included in the list of graduates. They therefore filed a Constitutional Petition before the High Court claiming that their constitutional rights to equality and equal treatment, freedom from discrimination, fair administrative action, right to freedom from psychological torture and dignity were violated by the applicant. They therefore sought several orders among them an order of prohibition to stop the Moi University 38th graduation unless their names were included in the list of graduands and damages for harm and loss suffered.

4. The petition was opposed by the applicant who contended *inter alia*, that under the University Act and Charter, it is the Senate that is in charge of all academic matters of the applicant and that examination process, release of results and preparation of the graduation list are all covered by the University's Regulations. Thus, at the end of June, 2019, the applicant issued a communication to all graduating students to confirm their marks, names and spelling with their respective departments by 18th July, 2019 to allow time for preparation of the graduation. The records provided from the respondent's department showed that the respondents had issues with various marks. The respondents sent their class representative to meet with the University administration and he was advised that each of the affected respondent needed to deal with the department individually. Thus, the applicant claimed that the dispute of missing marks was supposed to be sorted out through an internal mechanism which the respondents did not invoke. As far as the orders of prohibition and injunction were concerned, it was stated that the graduation ceremony was fully organized and stopping it would inconvenience over 3000 other graduands; the applicant had also incurred costs and it would not be in the interest of justice or even public interest to grant the said orders.

5. The application before us was filed electronically under the COVID-19 Pandemic Court Practice Directions and was urged through written submissions by both parties. The applicant submitted that the appeal is arguable and listed several grounds that they intended to pursue in the appeal to wit; that the learned Judge failed to uphold the doctrine of exhaustion of internal dispute resolution mechanism before invoking the jurisdiction of the court; holding that the issue of non-fulfilment of the requirements for graduation were not central to the petition which was an error and granting damages without any justification. On the nugatory aspect, counsel for the applicant submitted that in the event the decretal sum was released to the respondents it will be difficult to recover the same; and that the entire decretal sum has already been deposited in an interest earning account and it is sufficient security in the event that the appeal will be unsuccessful. On the other hand, if the appeal were to succeed, it will be difficult to recover the sum from the respondents who have left the University and are located in many parts of the country.

6. The application was opposed by the respondents, through written submissions. Counsel argued that the appeal was not arguable as the learned Judge correctly found the respondents' rights under **Article 47** of the Constitution were violated. The respondents were also not to blame for non-exhaustion of the internal administrative mechanism to resolve the issue of missing marks; that it was the responsibility of the applicant to set the same in motion as the respondents had presented their complaint; they had sat their examinations and left the University therefore they had no role to play in finding the missing marks. Moreover, the application was already overtaken by events, as the applicant filed a report in court on 19th November, 2019 indicating that the matter of missing marks was resolved. On the nugatory aspect, counsel submitted that the applicant has not demonstrated that the respondents who were able to pay tuition fees of about Ksh.500,000 as well as accommodation and transport for the duration of their studies, would be unable to refund the decretal sum as they were not people of straw. Counsel urged us to dismiss the application.

7. We have considered this application against the background of established principles under **Rule 5 (2) (b)** of this Court's Rules, that for an applicant in an application of this nature to succeed, it must establish that; the appeal is arguable and not frivolous; and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported).

8. We have applied the said principles to the rival arguments in the circumstances of this case, we are satisfied that our jurisdiction has been properly invoked as there is a notice of appeal in place dated the 23rd August, 2019. Our next task is to determine whether the applicant has brought itself within the ambit of the twin prerequisites for the grant of a relief under the said rule. In support of the first prerequisite, the applicant has set out the grounds to be urged in the appeal as already stated above. We have considered them and we reiterate the principle that even one arguable point will suffice and also an arguable point may not necessarily succeed but one which is not frivolous but bona fide and sufficient for the court to interrogate.

9. On the second prerequisite, the burden is on the applicant to satisfy the Court that the success of an intended appeal will be rendered nugatory if the stay order sought is not granted. The grounds fronted by the applicant in support of this precondition are mainly that once the decretal sum ordered by the learned Judge is paid and the appeal is successful, it will be difficult to recover the same from the respondents who are no longer students at the University. Secondly, the applicant has already deposited the decretal sum in an interest earning account, which is sufficient security in the event that the appeal is dismissed.

10. It is common ground, that there are thirteen (13) respondents who come from different parts of the country and they are no longer students at the University. For this reason, we are persuaded that unless the judgment is stayed and the applicant succeeds on appeal, recovery of the decretal sum might be difficult as the current financial status of the respondents is unknown. Moreover, the applicant has deposited the decretal sum in an interest earning account pending the hearing and determination of the appeal. We think this is sufficient security in the event that the appeal is not successful, and even execution will be effortless as the sum is secured. Consequently, we find that the applicant has also demonstrated the second limb and satisfied us that the intended appeal would be rendered nugatory if we do not allow this application.

11. Due to the nature of the dispute, we direct that the appeal (if not already filed) be filed within 60 days from the date hereof, and it be fast tracked for hearing and disposal. The application is therefore merited, and we allow it as prayed. The costs of the application shall abide the outcome of the appeal.

Dated and Delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR