



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & SICHALE, J.J.A.)

CIVIL APPLICATION NO. 190 OF 2020

BETWEEN

KENYA MEDICAL LABORATORY TECHNICIANS AND

TECHNOLOGISTS & 7 OTHERS APPLICANTS

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

AND

COMMISSION OF UNIVERSITY EDUCATION 1ST INTERESTED PARTY

NATIONAL ASSOCIATION OF PRIVATE

UNIVERSITIES IN KENYA.....2ND INTERESTED PARTY

(An application for stay of execution under Rule 5(2)(b) Court of Appeal Rules pending the

hearing and determination of an intended appeal against the judgment of the

High Court of Kenya at Nairobi (Makau, J.) on 11th June, 2020

in

Petition No. 37 of 2017

RULING OF THE COURT

1. By a Notice of Motion dated 29th June, 2020 the applicants seek orders to stay the implementation of **Section 5** of the **Universities (Amendments) Act, 2016** pending the hearing and determination of the intended appeal.

2. The **Universities (Amendment) Act, 2016** was assented to on 23rd December, 2016 and came into effect on 13th January, 2017. The applicants filed a petition in the Constitutional Court on 9th February, 2017 alleging that the said **Section 5** was unconstitutional and that its implementation will have far reaching implications on the role of the applicants (professional regulatory bodies) in the regulation, licensing and supervision of professional education and as such interfere with the mandate of the petitioners/applicants to enforce the requisite quality standards in university education.

3. In response to the petition, the 1st respondent's position was that the petitioners/applicants did not disclose any threats or violations to the Constitution; and that they had failed to demonstrate how the Act violates the Constitution thereby failing to rebut the presumption of constitutionality.

4. In judgment dated 11th June, 2020, **Makau, J.** dismissed the petition in its entirety. The learned judge held that “*the petitioners have failed to demonstrate how the amendment of the Universities Act through the University (Amendment) Act, 2016 violated their fundamental rights and freedoms under the Constitution. The petitioner first set out the Articles of the Constitution without substantiation and that is not enough.*”

5. Aggrieved by the judgment, the applicants filed a Notice of Appeal dated 22nd June, 2020 and brought the present application by way of a Notice of Motion dated 29th June, 2020 under Rule 5(2)(b) of the Court of Appeal Rules and supported by the affidavit of Dr. David Okeyo, seeking stay of implementation of Section 5 of the Universities (Amendment) Act 2016.

6. The applicants urge that amongst the arguable points in the intended appeal are that the amendments introduced at Section 5A of the aforesaid Act that purport to repeal the statute that establishes the applicants by criminalizing their functions; that the impugned Section purports to take away functions from competent regulatory bodies established by statute and vest them in what the applicants describe as the incompetent Commission of University Education; and that the enactment of the Universities (Amendment) Act 2016 lacked the requisite public participation as envisaged under the Constitution.

7. On the nugatory aspect, the applicants submitted that they are already engaged in the process of indexing students and supervision over training institutions to ensure they meet the required standards hence without the intervention of this Court, the aforesaid process stands stopped. The applicants submitted that the profession shall suffer great prejudice due to the risk of producing ‘half-baked graduates’ who may then proceed to join the health profession. According to the applicants, it is against public policy to allow persons that are not well trained to attend to the health of the public.

8. In opposing the appeal, the 1st interested party, in its written submissions dated 14th July, 2020 urged that the application was incompetent both in form and substance in that the petition was dismissed and hence there is no positive order that is capable of being stayed. It is their view, that first and foremost the applicants did not annex a draft memorandum of appeal and have therefore failed to demonstrate how the appeal is arguable. They assert that the issue of public participation had been adjudicated upon by the High Court (**Mwita, J.**) who held that there had been sufficient public participation. Further, it is submitted that the applicants have also failed to demonstrate the effect that Section 5 would have on regulatory functions and powers that the applicant had prior to its enactment.

9. Submitting on the fulfilment of the nugatory limb of the application, the 1st interested party argued that the dismissal of the petition meant that the applicants remain in the same position they were in before going to court and therefore the issue of substantial loss that they are likely to suffer and/or appeal being rendered nugatory does not arise.

10. The 2nd interested party also filed its grounds of opposition on 10th July, 2020 and submitted that the application is mischievous and an outright abuse of court process aimed at perpetuating exorbitant and illegal charging of indexing fees to students, causing unnecessary burden and making the right to education a mirage due to unnecessary costs.

11. The 2nd interested party also submitted that the impugned section only amplified the supremacy, autonomy and centrality of the Commission for University Education (CUE) to approve and accredit academic programs offered by the universities and further gives CUE, where it deems appropriate, power to delegate any of its functions to any suitable qualified person or body. They argue that it is unclear what constitutional rights the applicants, government bodies run by taxpayers’ funds, have suffered and the matter before the court was not constitutional in nature but a protest against certain statutory provisions which they deem unfavourable. They further submitted that the complaint concerned an apparent overlap in functions between the CUE and the professional bodies and did not concern any justiciable rights.

12. We have considered the application before us, submissions by parties and the law. This being a motion asking the Court for an order of stay of proceedings under **Rule 5(2)(b)** of the Rules of this Court, the applicant is required to satisfy that its intended appeal is arguable and that unless we grant the stay order, the appeal will be rendered nugatory.

13. The applicant has raised two core issues on arguability of the appeal. The first relates to Constitutionality of **Section 5** of the University (Amendment) Act. It is the applicant’s contention that the impugned section criminalizes their functions and purports to take away their functions. Secondly, it is their contention that the implementation will have far reaching implications in the regulation, licensing and supervision of professional education.

14. **Section 5A of the Universities (Amendment) Act 2016** provides that:

“(1) If there is a conflict between the programmes provision of this Act and the provisions of any other Act in matters relating approval or accreditation of academic programmes offered by universities, the provisions of this Act shall prevail.

“(2) Despite the provisions of any other law, the recognition, licensing, student indexing, approval or accreditation of any academic programme including postgraduate degrees, diplomas including postgraduate diplomas and other academic certificates offered at a university shall be the exclusive mandate of the Commission to be exercised in accordance with this section at the exclusion of any other person or body.

“(3) The Commission may, before approving any academic programme consult with any relevant body established by written law to regulate the profession to which the academic programme relates where such law empowers the professional body to approve or accredit courses offered at any university or colleges.

“(4) Pursuant to section 5(2), the Commission may engage-Professional bodies and associations to carry out inspection of universities on its behalf; the Auditor-General to offer the Commission professional opinion on management and financial positions of a particular university.

(5) A person who without the authority of the Commission under this Act purports to license, accredit, recognize, audit, inspect, index students or collect a fee or a charge from a University or a student commits an offence and shall be liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding two years or both.”

15. We are satisfied that the constitutionality of Section 5 of the University (Amendment) Act has been placed at the core of the intended appeal and as such, it raises an arguable point of law. We remind ourselves that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. (See Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, [2009] Eklr). We are thus of the considered view that the applicant has demonstrated that the intended appeal herein discloses an arguable point of law.

16. On the nugatory aspect, it is the applicants’ contention that if stay is not granted, its appeal shall be rendered nugatory to the extent that the applicants have started engaging in the process of indexing students, and supervising that the training institutions meet the required standards, without the intervention of this Court, the aforesaid process stands stopped.

17. It is our view that, there is no positive order that can be stayed and secondly, the applicants have not demonstrated how the intended appeal will be rendered nugatory as they will remain in the exact position, as they were before the petition. For these reasons we find that the notice of motion has no merit. It is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 4th day of December, 2020.

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR