



IN THE COURT OF APPEAL

AT KISUMU

CORAM: (MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 2 OF 2016 (UR.2/2016)

BETWEEN

JAMES ALWENA.....APPLICANT

AND

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Being an application for stay and grant of interim orders of stay pending the lodging, hearing and determination of the appeal from the judgment of the Employment and Labour Relations Court of Kenya at Kisumu delivered on 17th December 2015 (Maureen Onyango, J.)

in

Judicial Review No. 2 of 2015)

RULING OF THE COURT

Before us is a Notice of Motion dated 19th January 2016 that arises from the ruling and order of Maureen Onyango, J. made on 17th December 2015, in which the applicant prays for orders that:

- a. *That pending the hearing and determination of the appeal in the Court of Appeal, the applicant be granted interim orders staying the decision of the EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU on the 17/12/2015 delivered in JR APPLICATION No. 2 of 2015 during which the appellant’s application seeking to prohibit the respondent from demoting the applicant from being the PRINCIPAL of the KIBOS SPECIAL SCHOOL was dismissed.*
- b. *That pending the hearing and determination of the appeal in the Court of Appeal, an order do issue staying the ruling and consequential decree delivered on the 17/12/2015 directing the respondent to effect the transfer of the applicant on demotion.*
- c. *That the costs of and incidental to this application do abide the outcome of the Appeal.*

The application was brought on the grounds that, the Teachers Service Commission had demoted the

applicant when it transferred him from being the Principal of the Kibos Special School, on the basis of an Investigative Assessment Report of Kibos Secondary School for Learners with Visual Impairment dated 16th October 2014 for which he was not served with a notice to show cause; that as a result he was subjected to disciplinary action and condemned unheard contrary to the rules of natural justice; that in public interest **Article 54(2)** of the **Constitution** safeguards the rights a person with disability being denied his legitimate expectation; and that the Commission will in all likelihood move to have the applicant suffer the humiliation of being transferred on demotion.

The background to this application is that the applicant was employed by the Teachers Service Commission, (*the Commission*) and was the Principal of Kibos Special School. He received a letter dated 24th April 2015 from the Commission notifying him of his transfer from Kibos Special School to St. Angela Mumias School for the Deaf as a teacher to teach History and CRE, effective 30th April 2015. He was required to hand over to Perrez Jane Otieno who was to replace him as principal at Kibos Special School.

The applicant was unhappy with the decision, and applied to the Industrial Court for orders of prohibition, mandamus and certiorari to quash the decision transferring and demoting him.

The court found that the applicant had not demonstrated that the action taken by the Commission was *ultra vires* or against the law, or that it could be faulted for exercising its discretion to remove the appellant from the position of Principal to the position of a teacher at St. Angela Mumias School for the Deaf. The court also found that there was justification for removing the applicant from the position of Principal based on the findings of administrative incompetence in the various reports.

Being dissatisfied with the ruling of the High Court, the applicant filed a Notice of Appeal dated 6th January 2016 to challenge that decision and in the meantime, brought the instant Notice of Motion under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders of stay of execution pending the hearing and determination of the appeal. The application is premised on several grounds on its face and on a supporting affidavit sworn by **James Alwena**, the applicant, where it was deposed that he is a school Principal who is visually impaired, and that the transfer to which he was subjected was a demotion. He averred that the transfer and demotion was contrived at the behest of the Deputy Principal, one Mr. Joshua Makanya, from whom he faced open contempt, and who had organized a strike in the school and placed the responsibility for it on him. Furthermore, he was not afforded the right to be heard by the Commission before the decision made to transfer him.

When the application came before us, **Mr. K. Amondi**, learned counsel for the applicant, drew our attention to the draft memorandum of appeal on the record. Counsel submitted that the appeal was arguable as the learned judge went beyond the issues outlined in the Judicial Review application, which was to determine whether the decision making process transferring the applicant was correct. It was submitted that, instead, the court had dealt with the merits of the suit by finding him culpable of the allegations contained in the Investigative and Quality Assessment Report made to the Commission. Counsel further submitted that the decision to transfer him amounted to a demotion without affording him the right to be heard contrary to **Articles 41, 47, 50 (1) and 236** of the **Constitution**, and that the learned judge failed to appreciate that the demotion on a transfer would deprive the applicant of the allowances and benefits accorded to a principal, which in all likelihood he would lose upon his demotion.

As to whether the appeal would be rendered nugatory if the application for stay of execution was declined, counsel contended that if the orders sought are not stayed, the applicant would be significantly prejudiced on account of his disability. Counsel asserted that in light of **Article 54 (2)** of the **Constitution**, public institutions were required to promote affirmative action and the advancement of persons living with disabilities, a factor that ought to have been taken into account at the time the decision to transfer him was made. Furthermore, counsel argued that the demotion translated into a reduction in his salary and benefits which would be to his detriment. Counsel relied on the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd, Civil Appeal No 185 of 2001**, for the proposition that Judicial Review is concerned with the decision making process and not with the merits of the decision itself, and **David Nzue vs Teachers Service Commission [2014] eKLR**, for the notion that a demotion would result

in a loss in pay and status.

Mr Situma, learned counsel for the respondent, who appeared with Mr. F. Kaluai, opposed the application and relied on the replying affidavit of **Abdirizak H. Farah**, the Acting Senior Deputy Director in charge of Teacher Management- Post Primary at the Commission.

Counsel begun by submitting that the Notice of Appeal was invalid having been filed over 14 days from the date of the judgment and that the applicant had not sought extension of time to file and serve the Notice of Appeal.

Counsel argued that the application was not arguable on the basis of public interest, and that the applicant had entered into a private contract with the Commission, to which a remedy under public law was not applicable. Counsel posited that the Commission had the legal authority to transfer and deploy teachers, so that **Article 42** of the **Constitution** was inapplicable to the circumstances of this case, and there was nothing to show that the Commission had acted irrationally. Counsel stated that a letter of transfer had already been issued to Perrez J. Otieno deploying her to Kibos Special School, and that since the transfers were implemented, a knock on effect would affect various transfers involving other teachers and principals.

On whether the appeal would be rendered nugatory, counsel submitted that the applicant had failed to demonstrate the substantial loss that he stood to suffer if he was transferred. It was further deposed that the applicant was serving as a graduate teacher in Job Group 'M' and would not lose the allowances and benefits accorded to the relevant Job Group. It was argued that in the event the appeal was to succeed, the Commission was capable of compensating the applicant for any costs or losses incurred on account of the transfer.

In a rejoinder, Mr. Amondi stated that the Notice of Appeal was valid, as between 21st December 2015 and 13th January 2016 the Rules of this Court provided that time stopped running on account of the court vacation.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application for stay of execution brought pursuant to **Rule 5(2) (b)** of the **Court of Appeal Rules**. The principles which guide the Court in considering applications made under **Rule 5 (2) (b)** are now well settled. The two requirements that must be fulfilled are that firstly, the appeal or intended appeal should be an arguable one, and secondly, that if an order of stay or injunction is not granted, and the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory see **Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)**.

Turning to the first limb whether the applicant has an arguable appeal, it has been variously stated that we need only find one arguable ground. see **David Morton Silverstein Vs. Atsango Chesoni [2002] 1 KLR 867.**

In this case, the applicant argued that the learned judge went beyond the judicial review process, and determined the merits of the suit. It was further argued that the applicant's disability was not taken into account when the decision to transfer him was made. It was submitted that the applicant would argue in the intended appeal that he was not afforded a right to be heard on the question of his transfer. With regard to the impending transfer, it is the applicant's contention that on grounds of public interest, a stay of execution should be granted.

The judicial review application arose from the decision of the Commission to transfer the applicant. It has been stated time without number that that judicial review is concerned with the decision making process and not with the merits, see **Funzi Island Development Ltd & 2 Others vs County Council of Kwale & 20 Others [2014] eKLR** and **Commissioner of Lands vs Kunste Hotel Ltd EA [1995 – 1998] 1 EA 1.** Recently, another school of thought has developed that takes the view that the decision making process, as well as the merits of the decision should also be taken into consideration. See **Suchan Investment Limited v The Ministry of National Heritage and Culture & 3 others Civil Appeal No. 46 of 2012,**

(unreported) and the dissenting opinion of Sichale JA in ***Exclusive Estates Limited vs The Registrar of Lands, Nairobi Registry & 5 Others*** *Nairobi Civil Appeal N. 135 of 2013*.

In our view, the question of whether judicial review should be solely based on the decision making process or should also take into account the merits of the decision is a matter that requires to be ventilated on appeal. We consider that a determination of the issue will greatly enrich the jurisprudence on judicial review, and on this basis we are satisfied that the applicant has an arguable appeal.

On whether the appeal were to be rendered nugatory if the orders sought were refused, following the issuance of the letter of transfer to the applicant, the Commission simultaneously issued letters of transfer to other teachers transferring them to various schools. In the applicant's case, a letter to Perrez J. Otieno transferred her to Kibos Special School as principal to replace the applicant. Attached to the replying affidavit of Mr. Farah were the deployment letters of 28th April 2015 and 18th December 2015 showing that Ms. Otieno was required to report to the school without further delay. From the bar, Mr. Situma informed us that Ms. Otieno has already taken up her duties as Principal of the school. In view of this development, it is evident that the position of Principal of Kibos Special School is no longer available to the applicant, as a consequence his own transfer has in effect already been activated. Our hands are tied in the circumstances, and we find that there is nothing to be stayed by this Court.

The applicant's apprehensions that he would suffer a reduction in salary and allowances were allayed by the Commission's assurances that these would not be interfered with on account of the Job Group he had attained, but in any event, the Commission is capable of compensating the applicant for any accrued losses if he succeeds in his appeal.

That said, we are not therefore satisfied that the nugatory aspect has been satisfied. Since the two requirements of **Rule 5 (2) (b)** application have not been fulfilled, we dismiss this application. The costs of the application shall be in the intended appeal.

Dated and Delivered at Kisumu this 27th day of May, 2016

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR