



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, MWILU & KANTAI, JJ.A)**

**CIVIL APPLICATION NO. NAI. 176 OF 2015 (UR 142/2015)**

**BETWEEN**

**PROF. KIAMA WANGAI ..... APPLICANT**

**AND**

**EGERTON UNIVERSITY .....RESPONDENT**

*(An application for stay of execution of the Judgment and Orders of the High Court of Kenya at Nakuru and a stay of all further proceedings in the Egerton University Council Disciplinary Committee pending hearing and determination of an intended appeal from the said Judgment and Orders of the High Court of Kenya at Nakuru (Janet Mulwa, J) dated 11<sup>th</sup> June, 2015 In Judicial Review Misc. Civil Appl. No. 9 of 2014)*

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**RULING OF THE COURT**

This is an application under **sections 3A** and **3B** of the Appellate Jurisdiction Act, and **Rule 5 (2) (b)** of the Court of Appeal Rules for stay of execution pending the hearing and determination of an intended appeal.

The applicant is a lecturer and full time employee of the Faculty of Health Sciences at the respondent University (“the University”). Sometimes in the year 2012, the University received several complaints relating to the mis-conduct of some of the faculty, and in pursuance of those complaints, the University invited the concerned faculty to a meeting to discuss the allegations. By a letter dated 6<sup>th</sup> March, 2014 the respondent was invited to the University’s Disciplinary Committee meeting scheduled for 20<sup>th</sup> March, 2014 to answer various charges including, in the main, insubordination, neglect of duty and sexual harassment.

The respondent did not honour the invitation to attend the aforesaid meeting. Instead, he filed judicial review proceedings in the High Court of Kenya at Nakuru, and obtained leave to apply for judicial review orders of certiorari to remove to that court to quash the decision of the University contained in the letter of 6<sup>th</sup> March, 2014, requiring him to appear before the University’s Disciplinary Committee on 20<sup>th</sup> March, 2014. Such leave that he obtained, was to operate as a “stay” of the disciplinary proceedings against him. This order was obtained ex-parte, as is normally the case with judicial review applications.

At the hearing of his substantive motion, in the presence also of the University’s counsel, the applicant

essentially challenged the process and grounds upon which he was required to attend the disciplinary proceedings, and the composition of the board, all members of which were respondents in a defamation case that he had instituted separately in the High Court; and arguing that he would not get a fair hearing.

The University, on the other hand, argued that the grounds upon which the applicant's application was based, were unsubstantiated; that the University had, in fact, made no "decision" that could be quashed; that the letter of 6<sup>th</sup> March, 2014 was a mere "invitation" to the applicant to appear before the disciplinary committee; and that the entire "process" relating to disciplinary proceedings against the applicant was conducted fairly and in accordance with the law.

In dismissing the applicant's motion, the learned Judge (Mulwa, J) held, inter alia, that the University had not acted in excess of its powers, or in breach of the principles of natural justice; and that the University had made no "decision" capable of being quashed.

That is the decision that is the subject of an intended appeal, and for now the applicant seeks the following order:

***"THAT there be an issue of conservatory orders and/or stay of execution of the Ruling and Orders of the High Court of Nakuru (sic) (Jane (sic) Mulwa, J) made on 11<sup>th</sup> June, 2015 and a stay of all further proceedings in the Egerton University Council Disciplinary Committee pending hearing and determination of an intended appeal from the said Judgment and Orders of the High Court of Kenya at Nakuru made on 11<sup>th</sup> June, 2015 pending the hearing and determination of the applicants intended appeal against the Ruling and Orders of the High Court (Janet Mulwa, J) made on 11<sup>th</sup> June, 2015."***

In his submissions before us, the applicant submitted that he had an arguable appeal and that if stay was not granted, he would be subjected to disciplinary proceedings, rendering his appeal nugatory. Although the applicant has not stated the grounds he relies upon in the body of the application, he has enumerated several grounds in his supporting affidavit, essentially faulting the learned Judge for ignoring several facts that he believes were relevant to the determination of his application. We do not consider it necessary to reproduce those grounds given the reasons for our decision that will be evident shortly.

Mr. Kisilah, learned counsel for the University, opposed the application, arguing essentially that the High Court's decision being a "negative" order, was incapable of being stayed; that any conservatory orders sought, by way of an injunction, were extraneous to the proceedings and ruling of the High Court, and that the applicant already enjoyed "stay" orders given in the High Court arising from other proceedings, and accordingly that this application was an abuse of the court process.

The principles applicable to the determination of applications under **Rule 5 (2) (b)** of the Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006** in **Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd** (unreported) in these terms:

***"The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory." {See Githunguri vs Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-88)}***

Given the particular facts of this case, it is not necessary to consider at this stage whether this appeal is arguable, because the orders sought cannot be granted.

The prayer to stay the "execution" of the order issued by the High Court cannot be granted because the order is a negative order, incapable of execution, and therefore incapable of stay (See **Western College of Arts and Applied Sciences vs Oranga [1976] KLR 63**). The High Court having declined to grant the

orders of certiorari, there is nothing left for us to stay.

In addition, we agree with the University's counsel, that conservatory orders, by way of an injunction, cannot be issued in this case, because they are extraneous to the proceedings and ruling of the High Court and do not emanate from the said Ruling which simply responded to, and addressed, the judicial review application for an order of certiorari.

Accordingly, and for reasons outlined, we dismiss the motion dated 25<sup>th</sup> June, 2015 with costs to the respondent.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of October, 2015.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**