



**Multimedia University & another v GNN (Civil Application 225 of 2013) [2014] KECA 850 (KLR) (31 January 2014) (Ruling)**

*Multimedia University & another v Gitile N. Naituli [2014] eKLR*

Neutral citation: [2014] KECA 850 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 225 OF 2013  
PN WAKI, JW MWERA & GBM KARIUKI, JJA  
JANUARY 31, 2014**

**BETWEEN**

**MULTIMEDIA UNIVERSITY ..... 1<sup>ST</sup> APPLICANT  
PROFESSOR WO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PROFESSOR GNN ..... RESPONDENT**

*(Being an application for an injunction and stay of proceedings pending the lodgment, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi – Industrial Court (nduma, J.) Dated 13th April, 2013 In Industrial Court Cause No.1200 of 2013)*

**RULING**

1. The two applicants herein, Multimedia University and Prof. WO filed a notice of motion invoking the powers donated by Rules 5(2)(b), 43 of this Court’s Rules, seeking orders paraphrased as follows that:
  - i. an injunction do issue to restrain the respondent from executing the order issued on August 13, 2013 in the Industrial Court Cause No 1200/2013;
  - ii. an injunction do issue restraining the respondent from interfering in the running and management of the 1<sup>st</sup> appellants while purporting to execute the said order above dated August 13, 2013 pending the lodging and eventual hearing of an intended appeal;
  - iii. an injunction do issue restraining the respondent from purporting to execute the functions of a Deputy Vice Chancellor (Administration and Finance) while purporting to execute the said order dated August 13, 2013 until the determination of an intended appeal;



- iv. there be stay of proceedings in Industrial Court Cause No 1200/2013 until the intended appeal is determined.
2. The grounds on which the motion was predicated as well as the supporting affidavit of the 2<sup>nd</sup> appellant together with the respondent's replying affidavit plus the submissions from either party, will form the basis of our determination.
3. The background to these proceedings is that by their notice of motion dated April 10, 2013, the present respondent who held the post of Deputy Principal (Finance & Administration) with the 1<sup>st</sup> appellant was, we were told, "constructively" dismissed from his duties when the 1<sup>st</sup> applicant created two posts of Acting Deputy Vice-Chancellor and assigned the duties formerly performed by the respondent to occupants of those two new posts – Prof. Njoroge and Prof. Shitanda. The office of Deputy Principal (Finance and Administration) thus became extinct. The respondent therefore filed the notice of motion in the Industrial Court for orders, among others, that until his case was heard and finally determined, the appellants be restrained from advertising his post of Deputy Principal; the applicants should not frustrate or harass him in office, or interfere with his performance of duties of Deputy Principal by appointing the two Acting Deputy Vice-Chancellors aforesaid to take over his duties during currency of his five-year contract from February 8, 2011. The other ground was that the applicants should not interfere with the respondent's duties as Associate Professor, Faculty of Business and lastly that the applicants be restrained from suspending or dismissing the respondent. Essentially the respondent applied for injunction orders from the court. After arguments before Hon. Justice Nduma, the following orders were granted:
  1. That the respondents be and are hereby restrained by themselves and their servants and/or agents from advertising in the media or in any other manner the claimant's post of Deputy Principal (Finance & Administration) until trial and further orders of this Honourable Court.
  2. That the respondents be and are hereby restrained by themselves, their servants and/or agents from intimidating, harassing, frustrating the claimant until trial or further orders of this Honourable Court.
  3. That the respondents are hereby restrained by themselves, their servants and/or agents from interfering with the claimant's discharge of his duties as Deputy Principal (Finance and Administration) pursuant to Internal Memorandum of the 1<sup>st</sup> respondent dated April 4, 2013 purporting to appoint Professor Charles Njoroge Acting Deputy Vice Chancellor – Administration and Finance until trial or further orders of this Honourable Court.
  4. That the respondents be and are hereby restrained by themselves, their servants and/or agents from interfering with the claimant's discharge of his duties as Deputy Principal (Finance & Administration) under his five years (sic) contract of employment dated February 8, 2011 as amended in July 2011 until trial or further orders of this Honourable Court.
  5. That the respondents be and are hereby restrained by themselves, their servants and/or agents from interfering with the claimant's discharge of his duties as Associate Professor, Faculty of Business under his contract of employment dated June 23, 2010 until trial or further orders of this Honorable Court.
  6. That the respondents be and are hereby restrained by themselves, their servants and or agents from suspending the claimant or dismissing him until trial or further orders of this Honourable Court.
  7. That the costs of this application."



4. At the time of hearing this motion Mr. Achach, learned counsel for the applicants intimated that his clients were more interested in challenging order (1), (3) and (6) of the Industrial Court (above).
5. In determining this matter The first issue for determination is whether the applicants by citing Rule 5(2)(b) above desired to have injunction orders as pleaded in their motion, or orders of stay of execution. The respondent obtained injunction orders from the Industrial Court – the subject of the present motion. Yet the applicants have come before us again seeking injunction orders to restrain the respondent from executing the injunction orders the Industrial Court gave him against them! All that sounded rather anomalous and, if not, inelegant pleading. But after hearing the parties we concluded that the applicants, in essence, were seeking stay of execution orders as provided for under Rule 5(2)(b) which also mandates this Court to issue injunction orders.
6. When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & Others* [2013] eKLR as follows:
  - i. In dealing with Rule 5(2)(b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this Court.
  - ii. The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
  - iii. The Court becomes seised of the matter only after the notice of appeal has been filed under Rule 75.
  - iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
  - v. An applicant must satisfy the Court on both the twin principles.
  - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
  - vii. 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.
  - viii. In considering an application brought under Rule 5(2)(b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
  - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
  - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
  - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim.



7. Having the foregoing in mind, we now turn to what each side said for or against the present application.
8. Mr. Achach told us that the orders granted to the respondent in the Industrial Court on August 13, 2013, were on account of Section 76(2) of the *Universities Act* regarding the position of university chancellors, vice-chancellors and councils when this Act came into force. Subsection (2) reads:
  - (2) Any person who immediately before the commencement of this Act is a Vice-Chancellor of a public university or Principal of a constituent college of a public university, shall remain in office for the remaining period of his or her term of office.”
9. Counsel’s position is that if this provision of law is left to apply in this case, the 1<sup>st</sup> appellant’s mandate to appoint vice-chancellors and their deputies under ss.34, 35 of the said Act would be frustrated or contravened. To him, the post of Principal or Deputy Principal ceased to exist when the 1<sup>st</sup> appellant became a full university in March 2013.
10. On his part Mr. Nganga, learned counsel for the respondent, argued that Section 76(2) preserved and protected his client’s position of Principal when the 1<sup>st</sup> applicant became a fully-fledged university in March 2013. With those two varying stand-points in law, we are satisfied that indeed there is an arguable ground of appeal to be ventilated at the hearing of the appeal.
11. Mr. Achach continued that the orders of the Industrial Court stopped the 1<sup>st</sup> applicant from disciplining its staff, the respondent, be it by way of suspension or even dismissal. The respondent was still teaching at Multimedia University and earning a salary and therefore was a staff member amenable to the disciplinary procedures of that University. At any rate, he contended, an injunction should not have issued in the circumstances because if the respondent was aggrieved in any way, with the industrial relations between him and his employer, the more efficacious remedy lay in damages – not an injunction. Finally, he asserted that the respondent had threatened by letter of September 10, 2013 to cite the 1<sup>st</sup> appellant’s council for contempt and they risked jail terms if convicted.
12. To these submissions Mr. Nganga responded that when the whole saga started, the respondent moved the Industrial Court for conservatory orders to preserve the *status quo* until his claim was determined. He presented a *prima facie* case and the Court gave temporary orders. They are not permanent. The injunction was the best order to issue in the circumstances and the Industrial Court issued it as it is mandated by Section 3 of the Industrial Court Act. Mr. Nganga held the position that Hon. Nduma J applied the correct principles governing injunctions and that was not under challenge.
13. Coming to the threatened contempt proceedings, we heard that the questioned injunction is still in force and if the 1<sup>st</sup> applicant’s council has disobeyed it, then it is open to contempt proceedings.
14. In our view whether an injunction is appropriate to issue in employer-employee dispute or whether the 1<sup>st</sup> appellant should not be restrained from disciplining his employee lies in the province of the Appellate Court. As set out in principle no.(viii) in the Stanley Kangethe case (supra), we should not make definitive findings at this stage which may embarrass the ultimate hearing of the appeal itself. Being mindful that even a single bona fide arguable issue can be proper a basis for grant of orders for stay, we are satisfied that the applicants have gone above that bar. They have presented more than one ground to demonstrate that their appeal is not frivolous.
15. The next point that the applicants have to demonstrate is that if the orders for stay are not granted, their appeal will be rendered nugatory particularly in terms of orders 1, 3 and 6, following the ruling of August 13, 2013.



16. Mr. Achach argued that having two people, the respondent and Prof. Njoroge running functions of the finance and administration department of the 1<sup>st</sup> applicant at one and the same time, will cause confusion and there is a likelihood that the functions will be run down to the detriment of the 1<sup>st</sup> applicant and those the 1<sup>st</sup> appellant serves. Furthermore, restraining the 1<sup>st</sup> applicant from in any way disciplining the respondent, who could be handling the sensitive financial docket can be destructive and prejudicial. The threat to cite the Council members for contempt with a real prospect of their imprisonment and loss of liberty will result in loss which is incalculable in damages.
17. Mr. Nganga told us that the respondent had actually been stopped from executing the duties in the finance and administration department. All that the respondent had sought and obtained were the orders to preserve the *status quo* until his case is heard. The 1<sup>st</sup> applicant can as well have more than two deputy vice-chancellors performing duties as allocated. The respondent would join Prof. Njoroge and Prof Shitanda in that regard without harm.
18. Counsel then addressed the prayer for stay of proceedings and said that if granted the order would prejudice the respondent, for instance, if the dispute persisted beyond his contract period. The respondent would rather the proceedings go on so that his case is finalized. There were peculiar circumstances in his case as set out in the *Stanley Kangethe* case (supra).
19. In response, *Mr. Achach* repeated that save for the three orders (above) the applicants are interested in as at this stage, they did not intend to interfere with the remaining orders of the Industrial Court.
20. Having heard what is set out above, we have found as follows in respect of the 3 of the 7 orders following the ruling of August 13, 2013.
  1. An arguable appeal has been made out to warrant stay orders.
  2. Regarding whether the appeal shall be rendered nugatory:
    - (i) Order 1: Advertising the respondent's post: An order for stay will issue. Not to advertise the respondents' post will not render the intended appeal nugatory;
    - (ii) Order 3: The order which virtually stopped the appointment of Ag. Deputy Vice-Chancellor (Prof. Njoroge) to carry out the functions in the finance and administration is stayed. Having two individuals, who appear antagonistic running one department could cause confusion or even damage; and
    - (iii) Order 6: This order restrained the applicants from taking any disciplinary action against the respondent, who is still in their employment. We do grant a stay of this order. The employer ought to have and exercise lawful disciplinary power over the respondent until the appeal is heard.

In all, the application is allowed to the limited extent set out above. Costs of this application will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2014.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

