



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 263 of 2012

THE ENGINEERS REGISTRATION BOARD APPLICANT

AND

JESSEE WAWERU WAHOME AND OTHERS RESPONDENTS

(An application for stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules pending the hearing of the appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Majanja, J.) dated 15th October, 2012

in

H. C. PETITION NOS. 149 & 207 OF 2011)

RULING OF THE COURT

The Application

1. By an application dated 23rd October, 2012 the applicant seeks an order for stay of execution of the orders of the High Court given on the 15th October, 2012 and any other proceedings pending the hearing and determination of the appeal or intended appeal. The application is made under **Rules 5 (2) (b)** of the Court of Appeal Rules.

2. The applicant is aggrieved by the decision of the High Court given on 15th October, 2012 and has lodged a notice of appeal against that decision.

3. Some of the complaints by the applicant against the aforesaid decision of the High Court as they appear on the face of the application, are that the High Court erred:

(i) In interpreting the word “recognize” as used in Section 11 of the Engineers Registration Act.

(ii) In ordering the applicant to advertise the order and to invite every engineering degree holder who obtained the degree prior to 14th September, 2012 to apply for registration free of charge.

(iii) In awarding general damages of Kshs.200,000.00 to the petitioners and any other engineering degree holder dating back to 14th September, 2012.

4. For those reasons the applicant contends that it has an arguable appeal, which will be rendered nugatory unless the orders sought, are granted.

Background to Application

5. The respondents, who were the Petitioners in the High Court, graduated from Egerton University, Masinde Muliro University of Science and Technology and Moi University between the years 2004 and 2010 with engineering degrees.

6. Upon graduation, the respondents applied to the applicant to be registered as graduate engineers in accordance with the Engineers Registration Act, Chapter 530 of the laws of Kenya.

7. The applicant rejected the respondents' applications for registration on the grounds that the former did not meet the requirements for registration.

8. Being aggrieved by the decision of the applicant rejecting their applications for registration, the respondents petitioned the High Court for relief, which included:

- (a) A declaration that their rights to be registered as engineers had been infringed.*
- (b) A declaration that the applicant's decision not to register the respondents is discriminatory and against the law.*
- (c) Declarations that the engineering degrees obtained from Egerton University are valid.*
- (d) An order of certiorari to quash the decision of the applicant not to register the respondents.*
- (e) An order of mandamus to compel the applicant to register the respondents.*

9. The Petitions, being Petition numbers 149 and 207 of 2011, were consolidated and heard by the High Court and in a judgment delivered on 15th October, 2012, the High Court (D. S. Majanja, J) made the following orders:

- (a) The petitions against Moi University, Egerton University, Masinde Muliro University of Science and Technology and the Commission for Higher Education are hereby dismissed but with no orders as to costs.*
- (b) A declaration that the power of the Engineers Registration Board under the provisions of Section 11 (1) (b) of the Engineers Registration Act (Chapter 530 of the Laws of Kenya) to register graduate engineers does not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.*
- (c) A declaration that the Engineers Registration Board has violated the petitioners' right to fair administrative action, petitioners' right protected by Article 47 (1) of the Constitution and petitioners' right to human dignity protected by Article 28 of the Constitution as read with Article 55 (a) and (c) of the Constitution.*
- (d) An order of mandamus to issue directing the Engineers Registration Board to consider the applications of the petitioners and more particularly engineering graduates from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university who graduated prior to 14th September, 2012 in accordance with the Engineers Registration Act.*
- (e) Within fourteen days of the judgment, the Engineering Registration Board shall publish in at least two newspapers of national circulation and in a prominent manner, an advertisement of this decree and shall invite applications from any person eligible to be considered under Section 11 (1) (b) of the Engineers Registration Act and graduating with an engineering degree from Egerton*

University, Masinde Muliro University of Science and Technology and any other Kenyan public university prior to 14th September, 2012 for consideration as graduate engineers and the applications lodged with the Board free of any charge.

(f) The Engineers Registration Board to pay general damages assessed at Kshs.200,000.00 to each petitioner and every Engineering graduate from Egerton University, Masinde Muliro University of Science and Technology and any other Kenya public university graduating at least three years prior to the commencement of the Engineers Act, 2011. The said sum shall carry interest at a rate of 12% per annum from the date of this judgment.

(g) The Engineers Registration Board shall bear the petitioners' costs of these proceedings.

10. Aggrieved by that decision the applicant filed a notice of appeal.

11. It is against that background that the present application was filed and argued before us and on the basis of which the applicant seeks the intervention of this Court in terms of the prayers reproduced under paragraph 1 of this Ruling.

Applicable Test

12. In order to succeed in its application, the applicant is required to satisfy this Court on two fronts. Firstly that it has an arguable appeal. Secondly, that if the orders sought are not granted, the appeal will be rendered nugatory. There are many authorities for that proposition including the case of **Githunguri vs. Jimba Credit Corporation Limited Civil Application No. 161 of 1988**. In the case of **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd, Civil Application No. NAI. 157 of 2006** this Court stated:

“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 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 the appeal will be rendered nugatory.”

Submissions by Counsel

13. Mr. Pheroze Nowrojee, SC, who appeared with Mr. Patrick Kerongo, for the applicant submitted that the two requirements, set out in the case of **Githunguri (supra)** have been satisfied.

14. On the question of an arguable appeal, Mr. Nowrojee, SC submitted that the following grounds are arguable and require ventilation at the hearing of the appeal:

(a) Whether the respondents qualified for registration in terms of the Engineers Act?

(b) Whether a charter to a university is by itself qualification for a professional practice?

(c) Whether the judge erred in stating that applicant was supervising degrees issued by universities?

(d) Whether the learned Judge erred in stating that the only task of the applicant was to be satisfied that degree was properly issued?

15. Adverting to the question whether the appeal would be rendered nugatory if the order sought is not granted, Mr. Nowrojee, SC submitted that the High Court, in the order appealed from, ordered the applicant to pay general damages assessed at Kshs.200,000.00 to each respondent and to:

“every Engineering graduate from Egerton University, Masinde Muliro University of Science and

Technology and any other Kenyan public university graduating at least three years prior to the commencement of the Engineers Act, 2011”.

16. Mr. Nowrojee submitted that given that there are 93 respondents in the two consolidated petitions the amount payable immediately is over Kshs.27,000,000.00. He went on to say that based on the affidavit of one of the respondents, Jessee Wahome Waweru sworn on 31st January, 2012, there is another 10,000 graduate engineers from all public universities in Kenya who have been denied registration by the applicant with the result that, under the order of the High Court, the applicant is liable to pay general damages of approximately Kshs.2,000,000,000.00 to those graduates.

17. The effect of that, according to Mr. Nowrojee is to impose a hardship on the applicant, which is disproportionate, in that it would bring the operations of the applicant to a closure. If the applicant becomes insolvent, Mr. Nowrojee argued, the appeal would be rendered nugatory.

18. In support of his submission, Mr. Nowrojee referred to the case of ***Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 E. A. 227*** where this Court held that it would be too onerous to require a liquidator to deposit money in court and that a refusal to grant a stay would cause the applicant such hardship as would be out of proportion to any suffering the respondent might undergo while waiting the hearing and determination of the applicant’s appeal.

19. Mr. Nowrojee stated that the respondents have commenced contempt of court proceedings against the applicant for non-compliance with the order appealed from and that harm to the applicant is therefore imminent and urged the court to grant relief so that the contempt proceedings are not determined before the appeal is heard and determined.

20. Mr. Nowrojee submitted that the applicant is a statutory body; that this matter is one affecting public interest and that the applicant being a regulatory body should not be put out of business. He urged that this Court has discretion under **Rule 5 (2) (b)** and that consistent with the overriding objectives under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Article 159** of the **Constitution** setting out principles for carrying out its duties, this Court should grant the order sought.

21. Mr. Katwa Kigen, learned counsel for the 2nd respondent submitted that the matters complained of by the applicant as constituting arguable grounds of appeal as set out in the body of the application were elaborately addressed by the High Court and the intended appeal is therefore not arguable.

22. With regard to the contention by the applicant, for example, that the learned High Court Judge erred in his interpretation of the word “recognize” as used in **Section 11** of the **Engineers Registration Act**, Mr. Kigen submitted that learned Judge in the High Court addressed that issue exhaustively and correctly in his judgment.

23. Mr. Kigen, further submitted that the argument in the High Court was whether the applicant could decline to register students who came from universities and that the learned Judge in the High Court explained in the judgment why the applicant should not be seen to supervise the universities.

24. Mr. Kigen submitted that the finding of the High Court that degrees from universities cannot be questioned and that the applicant has no power, under **Section 11 (1) (b)** of the **Engineers Registration Act**, to go behind the degree is sound and cannot be faulted.

25. Accordingly, Mr. Kigen submitted that the applicant has not satisfied the first limb for the grant of the orders sought and that it has not demonstrated that it has an arguable appeal.

26. On the question of whether the appeal will be rendered nugatory if the stay is not granted, Mr. Kigen submitted that this Court is empowered to make a distinction between those respondents/petitioners who petitioned the court and who were awarded general damages of Kshs.200,000.00 and those beneficiaries of the award for general damages who did not petition the court.

27. Based on that distinction, the amount for which the applicant is immediately liable is therefore Kshs.27,000,000.00 for the 93 petitioners. That amount, according to Mr. Kigen, would not impose hardship on the applicant.

28. With regard to the contempt proceedings pending before the High Court, Mr. Kigen submitted that the order for mandamus issued by the High Court directing the applicant to consider applications for registration by the petitioners had not been complied with.

29. He urged that should the court be inclined to grant the orders sought, the order for mandamus issued by the High Court directing the applicant to consider applications for registration by the petitioners and the order declaring that the applicant has violated the respondents constitutional right to fair administrative action and right to human dignity under **Articles 47 (1)** and **Articles 28** and **55 (a)** of the **Constitution** respectively should not be stayed as no prejudice is indicated as likely to be suffered by the applicants and the respondents should be entitled to earn a living.

30. To grant the orders sought, Mr. Kigen submitted, would be to unfairly hold the careers of the respondents and to deprive them a means of livelihood. Accordingly, he urged the court to dismiss the application.

31. Mr. R. Molenje learned counsel for the 4th respondent associated himself with the submissions by Mr. Kigen but added that with regard to the order of the High Court granting general damages, a distinction can be made between the award in favour of the respondent/petitioners and those beneficiaries of the order of the court who were not party to the petition.

32. Mr. R. Molenje submitted that, with the possible exception of the order of the High Court granting general damages to graduates who were not privy to the petition, the applicant has not established grounds for staying other limbs of the High Court orders.

33. He submitted further that no material has been placed before the court to demonstrate that the payment of the damages ordered to be paid will affect the applicant. He urged the court to consider the plight of respondents relative to those of the applicants and balance.

34. He urged the court to consider the replying affidavit of Professor J. K. Tuitoek sworn on 16th January, 2013 in opposition to the application.

35. Mr. Simiyu learned counsel for the 5th respondent relied on the replying affidavit of Professor Sibilike Khamala Makhanu sworn herein on 29th November, 2012 and submitted that the orders sought lie in the discretion of the court and that that discretion should not be exercised in the applicant's favour as it is in breach of the orders appealed from.

36. Citing the case of ***Silverstein vs. Chesoni [2002] 1 KLR 503*** Mr. Simiyu submitted that the applicant does not have an arguable appeal and that the function of the applicant, under **Section 7 (I)** of the **Engineers Act** is to approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering and the applicant has not shown that there is an arguable appeal.

37. With regard to the amount of Kshs.200,000.00 ordered to be paid to each respondent in general damages, Mr. Simiyu submitted that that amount is affordable to an engineering graduate and each respondent would be in a position to refund that amount if the appeal succeeds.

38. On the strength of the case of ***Council of Legal Education vs. Rita Biwott Civil Application No. 238 of 1994***, Mr. Simiyu submitted that the issue of registration of petitioners is crucial and that the order of the High Court directing the applicant to consider applications for registration should not be stayed.

39. Referring to the case of ***Scott & Another vs. Kago & 2 others [1987] KLR 503***, Mr. Simiyu urged

that if the court is inclined to grant a stay of execution, it should be on terms that the total amount of Kshs.27,000,000.00 awarded to the petitioners should be secured. Mr. Simiyu urged the court to dismiss the application.

40. In his reply Mr. Kerongo submitted that the question of providing security should not arise as this court is not concerned with an application for stay of execution under the Civil Procedure Rules.

41. He submitted that the whole of the High Court decision is being appealed and there is therefore no question of severing parts of the decision for purposes of stay by ordering the applicant to comply with certain parts of the orders as regards registration. Registration, he said, can only be done under the statutes and deregistration is also regulated.

Our Decision

42. We have considered the application. We are mindful of the fact that we are not, at this stage, hearing the main appeal. However, we think it is arguable whether the High Court's interpretation of **Section 11** of the **Engineers Act** was correct. We also think it is arguable whether the High Court could grant an order for payment of general damages in rem to persons who were not privy to the petition. We think the matters raised in the appeal are worthy of ventilation at the hearing of the appeal. We do not think the intended appeal is frivolous.

43. With regard to the question whether the intended appeal will be rendered nugatory if the order sought is not granted, the applicant is required, under the impugned order of the High Court, to amongst other things, pay an amount in excess of Kshs.2,000,000,000.00.

44. The applicant through its Registrar Eng. Gilbert M. Arasa deposed in the affidavit sworn in support of the application that the amount awarded by the court in general damages is “*way beyond the economic capability of the applicant and indeed will cause irreparable loss to the applicant.*”

45. Accepting as we do that no financial statements were placed before us regarding the financial status of the applicant, the amount the applicant is required to pay under the High Court order is large by any standard. We also take cognizance of the fact that the applicant is a public statutory regulatory body.

46. In the case of **Reliance Bank Limited Vs. Norlake Investments Ltd [2002] 1 EA 231** to which we were referred, this Court stated:

***“In the Oraro and Rachier case, the Court took into account the fact that if the law firm was ordered to forthwith deposit the decretal sum the firm itself might well be forced to go out of business and such an eventuality may itself be sufficient to render the success of their appeal nugatory.*”**

The Court made this point abundantly clear in the case of Attorney General Vs. Equip Agencies Civil Application Nai 432 of 2001 (UR 231 of 2001) (UR) where the Court stated thus:

“As we have indicated in this ruling, the amount of money the subject-matter of litigation in the superior court is Kshs 1,862,302,792-50 which according to the Respondent's plaint continues to attract interest at the rate of 18% per annum from 1st March 1999 till payment in full. This is public fund and it is not an exaggeration it is colossal. It therefore bears repeating what this Court observed in the Kenya Breweries Limited V. Kiambu General Transport Agency Limited, Civil Application 100 of 2000 (UR 48 of 2000) (UR) that:

‘The sum of money involved amounting to Kshs.241,856,711-58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such large amount of money is involved owing to the damage such refusal may occasion to the Applicant. Indeed the futility of success of the Applicant's appeal to this Court may result from such a refusal, for the damage to the Applicant may be irremediable even if the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful. As Madan JA as he then was, observed in Butt V The Rent Restriction

Tribunal [1979] LLR 1247 (CAK) where an Applicant has undoubted right of appeal, a large amount of money involved in the dispute between the parties constitutes special circumstances meriting the grant of stay of execution pending the hearing and determination of an intended or already lodged appeal to this Court’.

Such is the position as obtains to this application. We think therefore, that it would ripple the operations of the Ministry of Health if we were to refuse to grant a stay of execution of the order of the superior court 15 December, 2000, a situation that would cause more hardship than would serve the cause of justice.”

47. The position in the ***Reliance Bank Limited case (supra)*** applies to the application before us. In the result, we are persuaded that the applicant has demonstrated that the appeal, if successful, will be rendered nugatory if the orders sought are not granted.

48. The upshot of the foregoing is that we grant an order for stay of execution of the Judgment and Decree of the High Court delivered on the 15th October, 2012 in Nairobi High Court Petition Numbers 149 of 2011 and 207 of 2011(Consolidated) pending the hearing and determination of the intended appeal from that decision.

49. The costs of the application will abide the outcome of the appeal.

Dated and delivered at Nairobi this 8th day of March, 2013.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR