



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI J.J.A)**

**CIVIL APPLICATION NO. 20 OF 2013**

**BETWEEN**

**THE CHAIRMAN (BOG) SIGALAGALA POLYTECHNIC ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**EXPARTE**

**NELSON OGWERO ..... RESPONDENT**

**THE DEPUTY PRINCIPAL SIGALAGALA POLYTECHNIC )**

**THE PRINCIPAL )**

**THE DEAN OF STUDENTS ) ..... INTERESTED**

**PARTIES**

**THE REGISTRAR )**

**THE HEAD OF DEPARTMENT )**

*(An application for stay of execution against the judgment and order of the*

*High Court of Kenya at Kakamega (Chitembwe J.) dated 29th May, 2013*

**in**

**JUDICIAL REVIEW NO. 6 OF 2013)**

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**RULING OF THE COURT**

The record before us shows that the respondent in this Notice of Motion dated 24th June, 2013, and filed on the same date was as on 3rd October, 2012, a student at **Sigalagala Polytechnic** of which Board of Governors (BOG) was chaired by the applicant and was administratively run by all the interested parties. The respondent was supposed to register and sit for his Diploma **C** and **G** final Examinations in the **November/December 2012 series** . In a letter dated 3rd October, 2012, he wrote to the Head of Department, ICT and stated:-

*“RE DEFERMENT OF MY DIPLOMA C & G FINAL EXAMS*

*NOV/DEC 2012 SERIES TO JULY/AUG 2013 SERIES.*

*It is with apology that I write to bring to your attention that I would not be able to beat the exam registration deadline due to lack of registration fee. I would like to let you know that I will sit for the same exam next year July/Aug series but as from Jan 2013 I would wish to take Diploma in Information Communication Technologies since Kenya National Examination Council lowered their entry grades that I qualify to study the same course. I am sorry for any inconveniences. Looking forward to your assistance.*

*Yours*

*Nelson Ogwero.”*

Before the applicant responded to that letter, the record shows that a new principal, **Mrs. Bernadette Canute** was posted to the Polytechnic to replace one **Mr. Josephat Sawe** who had been the principal. That did not go well with the students who protested against the move. Unfortunately for the respondent, he was the Chairman of the Students' Council. The respondent wrote a letter dated 6th December, 2012, addressed to the Director of Technical Education and copied to several officers expressing their displeasure. That letter was signed by the respondent in his capacity as the Chairman. It is not certain as to what took the centre stage in the principal's reaction whether it was the respondent's letter seeking to defer his taking exams to July/August series from November/December series, or the letter from the students council protesting the posting of Bernadette Canute to the Polytechnic, for at the time the applicant reacted, Bernadette was the principal. Whatever was at the bottom of it all, in a letter dated 11th January, 2013, addressed to the respondent by the Principal/Secretary to the Board of Governors, who was now Mrs. Bernadette Canute, and headed **“Decline of Admission,”** the Principal stated as follows:-

*“RE DECLINE OF ADMISSION*

*You were admitted to this institution to undertake a Diploma course in IT systems support examined by City and Guilds in January 2012.*

*You were required to sit for C & G exams in November/December 2012. You deliberately refused to sit for the examination as per the college academic Policy.*

*You have applied again for another different course at this institute. We find this irregular and therefore the institute declines to accept your application. The institutes effort to reach your sponsor/guardians have been frustrated by your not providing contact details of the same.*

*On Thursday 10th January 2013, you mobilized students to demonstrate and interfere with the institute's programs. In effect your studentship at this institute ceased in December 2012.*

*Following the Executive Board of Governors meeting of Friday 11th January 2013, it has been noted that you are not a student of this institute. You are therefore required upon receipt of this letter to immediately leave the institute and its environs. You will come for clearance at a date that will be communicated to you.*

*Yours faithfully,*

Mrs. Bernadette Canute (HSC)

PRINCIPAL/SECRETARY, BOG/PTA.”

The contents of the above letter explain why we stated above that it was not easy to decipher what had informed its issue, whether it was in reply to the letter of 3rd October, 2012, from the respondent or a disciplinary action against the respondent for “mobilising students to demonstrate” against the appointment of Bernadette as principal in place of Josephat Sawe the former principal.

Whatever informed the issue of the letter, the respondent was not amused by the contents of the same letter. He moved to the High Court at Kakamega vide *Miscellaneous Civil Application No. 6 of 2013* and filed Exparte Chamber Summons dated 16th January, 2013, in which he sought leave to commence judicial review proceedings specifically leave to apply for orders of certiorari and prohibition against the respondent and the interested parties to remove into the High Court and quash proceedings and resolution passed by the Executive Board of Governors meeting passed on 11th January, 2013 in respect of his admission at the Polytechnic and his expulsion. He also sought orders that such grant of leave operates as stay of the said decision on his expulsion and consequently that he be readmitted to the applicant's institution. That application was granted and consequently vide a Notice of Motion dated 5th February, 2013, the respondent applied pursuant to **Order 53 Rule 3 (1) (2) and (3)** of the **Civil Procedure Rules** for:-

**“(a) Prerogative Orders of Certiorari and prohibition do issue against the Respondent and interested parties herein to remove into this Court and quash proceedings and resolutions passed by the Executive Board Governors (sic) meeting passed on 11th January 2012, in respect to decline of admission of the ex-parte applicant and including his expulsion from Sigalagala Polytechnic hereinafter in these proceedings referred to as the Polytechnic.**

**(b) The costs hereof be provided.”**

The grounds for that application were that the applicant and interested parties acted ultra vires their powers; that no fair hearing as envisaged under the rules of natural justice and constitution was accorded to the respondent; that the decision of the Board was an infraction of the provisions of the Education Act, 2012; that the Board acted maliciously and arbitrarily, and that the decision was not ratified by the full Board nor by the Permanent Secretary. The application was opposed and replying affidavit filed in opposition.

The application was heard by *Said Chitembwe J.* who after full hearing allowed it in part stating as follows in his conclusion:-

**“The applicant sought orders of certiorari and prohibition. I do find that only the order of certiorari is relevant to the applicant and the same is hereby granted. An order of certiorari shall issue removing the decision of the respondents to expel the applicant and not to register him for another course shall be brought to this court and the same shall be quashed. The applicant shall continue to be a student of Sigalagala Polytechnic and is free to register for another course of his choice. There shall be no orders as to costs.”**

The applicant herein, the Chairman (BOG) Sigalagala Polytechnic, feels aggrieved by those orders. He has challenged it in this Court vide Civil Appeal No. 13 of 2013, which is yet to be heard. In the meantime he filed this Notice of Motion before us dated 24th June, 2013 seeking, on the main, only one order which appears as prayer three (3) in the Notice of Motion and which seeks:-

*“That there be a stay of execution of the decree in High Court Judicial Review No. 6 of 2013 at Kakamega pending the hearing and determination of the appeal herein.”*

He is also seeking costs to be provided for. Four grounds are cited in support of the application.

These are:-

*“1. That the judgment herein was delivered by Honourable Learned Justice Said J. Chitembwe on 29th day of May 2013 and applicant (sic) are apprehensive which apprehension is real that the Respondent may take out execution any time.*

*2. That the applicant herein has an arguable appeal with good chances of success.*

*3. That the intended appeal would be rendered nugatory unless a stay of execution herein is granted.*

*4. That the balance of convenience lies in favour of the applicant.”*

The respondent opposed the application vide a short replying affidavit sworn by him on 18th July, 2013, in which he stated that the application lacks merit; is frivolous and vexatious and does not meet the mandatory requirements for the grant of the orders sought. He added that the balance of convenience was in his favour and that the application has been overtaken by events but did not explain what facts give rise to that deponement.

Before us, Mr. Ojienda learned counsel for the applicant urged us to grant the application referring us to the Memorandum of Appeal annexed to the record and submitting that the appeal already filed was arguable and if the orders sought are not granted, the success of the appeal would be rendered nugatory. Neither the respondent nor his advocate appeared for hearing though the advocate was duly served with the hearing notice.

The application is brought pursuant to **Rule 5 (2) (b) of this Courts Rules**. The Principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under **Rule 5 (2) (b) of the Rules of this Court** are well known – see cases of **Butt vs Rent Restriction Tribunal (1982) KLR 417**; **JK Industries vs Kenya Commercial Bank Ltd and another (1987) KLR 506**. In the case of **Johnsons Wax (EA) Limited vs John Mbai Mburu and two others - Civil Application No.NAI 99 of 2005 (33/2005 UR)** this Court stated:-

**“In exercising its unfettered discretion, the Court must be satisfied that the appeal or intended appeal is an arguable one, that is, that it is not frivolous, and that if an order of stay or injunction as the case may be, is not granted the appeal or the intended appeal would have been rendered nugatory by the refusal to grant the stay or injunction sought,”**

it is against the above legal Principles that we must now consider this application. We have perused and considered the annexed memorandum of appeal as well as the minutes of the special Executive Board of Governors' meeting held on Friday 11th July, 2013 and particularly Minute **No. Ex/E.S/019/13** as read with Minute **No Ex/E.S./022/13** to both of which the second ground of appeal refer. We have also considered all the four grounds of appeal as well as the ruling of the High Court. Without saying any more as this is not the stage at which a full decision should be made and for fear of prejudicing the main hearing, we are not persuaded as of now and only on the basis of the record before us that the appeal is arguable. In any event, even if we were to accept for the purposes of argument that it is indeed arguable, we find it difficult to appreciate to what extent the success of the appeal would be rendered nugatory were we to refuse this application. As yet all there is, is an apprehension that the respondent may seek to execute the orders that were granted to him by the High Court, but he has not executed the same. If he executes the same orders, all that will happen is that he will resume his position as a student and will be registered for the examination, in respect of the course he wanted as per his letter of 3rd October, 2012. If the applicant's appeal succeeds, the respondent will leave the Polytechnic and will not sit the exam if by the time the appeal is finalised he will still be a student. In that scenario, it is the respondent who will have suffered having paid for registration for the exams and having wasted his time for an examination which he eventually would not sit.

We cannot see and we have not been told how the success of the applicant's appeal will be rendered nugatory in the circumstances.

In short, we find no merit in the application as both limbs have not been satisfied. Even if we were to accept that the first limb was satisfied, still we are certain the second limb has not been satisfied. In law, under **Rule 5 (2) (b)**, both limbs must be satisfied before an applicant can benefit from the provisions of the Rule.

The application is dismissed. There shall be no orders as to costs.

***Dated and delivered at Kisumu this 26th day September of 2013.***

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**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**