



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI 159 OF 2004

- 1. THE STAFF DISCIPLINARY COMMITTEE MASENO UNIVERSITY**
- 2. THE COUNCIL, MASENO UNIVERSITY**
- 3. THE VICE CHANCELLOR, MASENO UNIVERSITY.....APPLICANTS**

AND

REPUBLIC

Ex-parte PROF. OCHONG' OKELLORESPONDENT

(Application for stay of execution pending the filing hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya Kisumu (Warsame, Ag. J) dated 10th June, 2004

in

H.C. MISC. APPLICATION NO. 227 OF 2003)

RULING OF THE COURT

This is an application, brought under *rule 5(2) (b)* of the Court of Appeal Rules. It is dated 1st July 2004, and was filed by the Staff Disciplinary Committee of Maseno University, (hereinafter the “*First Applicant*”), The Council, Maseno University, (hereinafter the “*Second Applicant*”), and the Vice Chancellor, Maseno University, (hereinafter the “*Third Applicant*”).

The respondent to the application is the Republic (ex-parte Professor Ochong' Okello) hereinafter referred to as “*the Respondent Professor*”.

The relief sought in the application is for ***Orders that:-***

- 1. There be a stay of execution of the orders of the High Court bringing before it and quashing the decision of the first applicant of 19th June 2003 and as conveyed in the letter dated 20th June 2003 and the order of the High Court prohibiting the applicants from taking any further adverse proceedings against the respondent with regard and in connection with the sum***

of Kshs.1,238,698/= alleged to have been paid to Fahari Contractors pending the lodging and the determination of the applicants' proposed appeal from the decision of the High Court made on the 10th June 2004.

2. And for an order that the costs of and incidental to this application abide the result of the said proposed appeal.

The *Notice of Appeal* was dated 14th June 2004 and was lodged in the Registry of the High Court of Kenya at Kisumu on 15th June 2004.

The letter dated 20th June 2003 addressed to the respondent professor conveying the decision of the first applicant dated 19th June 2003 referred to in *Order 1* above read as follows:-

“This is to inform you that Staff Disciplinary Committee Meeting of Council held on Thursday, 19th June, 2003 to which you were invited but failed to attend, considered your case in absentia and found you guilty of the following charges:

i) Abuse of office by making the University incur a loss of Kshs. 1,238,698/= paid to Fahari contractors when you were Deputy Principal, PADASA.

ii) Behaving in a scandalous manner by taking the Chairman of Maseno University Council to court when the above recovery was instituted, knowing full well that the directive for recovery emanated from The Office of the President and the Ministry of Education Science and Technology. This you did before exhausting dispute solving machinery in the University, thereby portraying the Chairman of Council negatively and with a view to bringing the name of the Council into disrepute.

It was decided that you be summarily dismissed from employment with Maseno University from the date of this letter.

You are therefore required to hand over University property and clear the University immediately.

Yours sincerely,

Professor David Serem.

Deputy Vice Chancellor (A&F)”

The orders sought as already stated are under *rule 5(2) (b)* of the Rules of this Court and the principles that guide the Court in considering such applications are now well settled. The applicant, in order to succeed, must satisfy the Court that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal. Secondly, that if an order of stay or injunction, as the case may be, is not granted, the appeal were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction – see *RELIANCE BANK LTD (IN LIQUIDATION) V. NORLAKE INVESTMENTS LTD* Civil Application No. NAI. 93/02 (unreported), *GITHUNGURI VS JIMBA CREDIT CORPORATION LTD* (No.2) (1988) KLR 838 and *J.K. INDUSTRIES LTD VS. KENYA COMMERCIAL BANK LTD* [1987 – 88] 1 KAR 1688.

We have come to the conclusion that the respondent has raised an issue which is at least arguable as to whether or not, in the circumstances of this case, the failure to give the respondent a hearing before reaching the decision to dismiss him, amounted to a breach of natural justice. It is not for us, on the present application for stay, to give any indication as to our views as to which way the issue is likely to be resolved.

It is next necessary for us to consider whether or not, if no stay is granted, the appeal will be rendered nugatory

The stay application before us seeks, *firstly*, to stay the quashing of the decisions by the Maseno University contained in the letter dated *20th June 2003*. The effect of granting the stay application would be to prevent the quashing of the summary dismissal taking effect.

The stay application before us seeks, *secondly*, to stay the order of the superior court prohibiting the applicants from taking any further adverse proceedings against the respondent with regard (sic) and in connection with the sum of Kshs. 1,238,698/= alleged to have been paid to Fahari Contractors pending the lodging and determination of the applicants' proposed appeal from the decision of the High Court made on 10th June, 2004.

In our view if the intended appeal were to be successful the results of such success would not be rendered nugatory since the applicant will be still in a position to pursue the alleged payment to third parties, and, in any event the applicant will still be in a position to have the respondent dismissed.

For the foregoing reasons this application cannot stand and is dismissed with costs.

Dated and delivered at 12th day of October 2007

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL