



Malindi Law Society v Law Society of Kenya, Nairobi Branch & 5 others (Civil Application 20 of 2017) [2018] KESC 60 (KLR) (19 September 2018) (Ruling)

Malindi Law Society v Law Society of Kenya, Nairobi Branch & 5 others [2018] eKLR

Neutral citation: [2018] KESC 60 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL APPLICATION 20 OF 2017

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, JB OJWANG & N NDUNGU, SCJJ**

SEPTEMBER 19, 2018

BETWEEN

MALINDI LAW SOCIETY APPLICANT

AND

LAW SOCIETY OF KENYA, NAIROBI BRANCH 1ST RESPONDENT

THE HON ATTORNEY-GENERAL 2ND RESPONDENT

**THE CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF
KENYA 3RD RESPONDENT**

THE NATIONAL ASSEMBLY 4TH RESPONDENT

THE LAW SOCIETY OF KENYA 5TH RESPONDENT

THE NATIONAL LAND COMMISSION 6TH RESPONDENT

*(Being an Application for stay of execution of the Court of Appeal decision
(Waki, Nambuye, Musinga, Kairu and Murgor, JJ.A.) in Civil Appeal No. 287
of 2016 as consolidated with Civil Appeal No. 3 of 2017 – dated 19 October 2017)*

Supreme Court denies application for stay declaring section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015 unconstitutional

Reported by Ian Kiptoo

Civil Practice and Procedure-execution of Judgement-stay of execution-stay of execution pending determination of an appeal-whether the Application that sought to stay the Judgement of the Court of Appeal setting aside the decision of the High Court declaring section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015 unconstitutional, insofar as it related to the transfer of Judges from proceedings of the High Court to



those of the Specialized Courts, or vice versa; and insofar as it related to the role of Subordinate Courts with regard to environment and land, had merit

Brief facts

The Matter arose as a result of the Court of Appeal setting aside the decision of the High Court declaring unconstitutional section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015, insofar as it related to the transfer of Judges from proceedings of the High Court to those of the Specialized Courts, or *vice versa*; and insofar as it related to the role of Subordinate Courts with regard to environment and land.

The Applicant moved the Court by Notice of Motion under certificate of urgency seeking Orders that pending the hearing and determination of the intended appeal against the said Judgment, its execution be stayed as the intended appeal was arguable, and would be rendered nugatory if it were in the end to succeed.

Issues

1. Whether the Application that sought to stay the Judgement of the Court of Appeal setting aside the decision of the High Court declaring section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015 unconstitutional, insofar as it related to the transfer of Judges from proceedings of the High Court to those of the Specialized Courts, or *vice versa*; and insofar as it related to the role of Subordinate Courts with regard to environment and land, had merit.

Held

1. The Court had authority to issue Orders for the preservation, in an interim period, of a subject-matter of appeal. In the circumstances, the Court would expect an appeal on a significant question, and would endeavour to determine it appropriately.
2. The grounds that precious judicial time would have been lost, and costly legal services would have to be engaged, in the event the Court were to allow the forthcoming appeal were not compelling grounds rendering an appeal nugatory – especially as the appeal cause remained only conjectural.
3. The Applicant had not yet filed a substantive appeal before the Court, since filing the notice of appeal on October 30, 2017. Under section 33 (1) of the Supreme Court Rules, 2012 an appeal should be lodged within 30 days of the date of filing the notice on appeal – more than 7 months had expired since the filing of notice – and with no application seeking extension of time.
4. Grant of Stay of existing orders could not be a matter of course. It rested upon genuine conditions of urgency, merit and dispatch – which were missing in the instance. Hence there was no valid basis for the grant of stay orders.

Application dismissed.

Orders

- i. *There were no Orders of stay against the Judgment of the Appellate Court.*
- ii. *No order as to costs*

Citations

East Africa

1. *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell* Applications Nos 12 & 13 of 2012 (Consolidated) – (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 article 2(1) (3); 4; 162 (2); 163 (4) (a) (7) – (Interpreted)
2. Environmental and Land Court Act, 2011 (Act No 19 of 2011) sections 7(3); 8(d); 26(3), (4) – (Interpreted)
3. High Court (Organization and Administration) Act, 2015 (Act No 27 of 2015) – In general (Interpreted)
4. Magistrates' Courts Act, 2015 (Act No 26 of 2015) section 9(a), (b) – (Interpreted)



5. Statute Law (Miscellaneous Amendments) Act, 2017 (Act No 11 of 2017) section 2 –(Interpreted)
6. Supreme Court Act, 2011 (Act No 7 of 2011) sections 15(2), 21(1), (2); 24(1) –(Interpreted)
7. Supreme Court Rules, 2012, (Act No 7 of 2011 Sub Leg) rules 23, 26 –(Interpreted)

RULING

1. The Applicant moved this Court by Notice of Motion under certificate of urgency, seeking Orders as follows:
 - (a) Pending the hearing and determination of the application, execution of the Judgment/Orders of the Appellate Court in Civil Appeal No. 287 of 2016 as consolidated with Civil Appeal No. 3 of 2017, be stayed;
 - (b) Pending the hearing and determination of the intended appeal against the said Judgment, its execution be stayed;
 - (c) Costs of the instant application do abide the conclusion of the intended appeal.
2. The Question of certificate of urgency came up, on 31 October 2017, before Ojwang, SCJ who declined to grant the same, directing that a hearing date for the application be set in normal Registry operations.
3. The Matter arises from the decision of a three-Judge Bench of the High Court, in Malindi Petition No. 3 of 2016, which held to be unconstitutional certain sections of the Environmental and Land Court Act, and the *Magistrates' Courts Act*. In the background to the High Court decision was the enactment of the Statute Law (Miscellaneous Amendments) Act, 2015, the *Magistrates' Courts Act*, and the *High Court (Organization and Administration) Act*, 2015 – entering into force on 2 January 2016. By the enactments, Parliament had amended the *Environment and Land Court Act*, conferring upon the Chief Justice the power to transfer Judges from proceedings of specialized Courts to those of the High Court, and vice versa – apart from clothing Magistrates' Courts with authority to hear and determine disputes relating to employment and labour relations, the environment, and title to, and occupation of land.
4. The Gravamen of the applicant's cause is: Does it fall within Parliament's competence to enact legislation bringing under the jurisdiction of Magistrates the determination of disputes relating to labour relations; the environment; land title and land use? Or is the jurisdiction in respect of such issues reserved to the specialized Courts, under Article 162 (2) of *the Constitution*?
5. The High Court had declared unconstitutional Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015, insofar as it related to the transfer of Judges from proceedings of the High Court to those of the Specialized Courts, or vice versa; and insofar as it related to the role of Subordinate Courts with regard to environment and land. The High Court held Sections 7(3), 8(d) and 26(3), (4) of the Environment and Land Courts Act, and Section 9(a), (b) of the Magistrate's Courts Act, 2015 to be unconstitutional.
6. The Said Decisions occasioned the lodgement by the Law Society of Kenya, Nairobi Branch of Civil Appeal No. 287 of 2016, while the Attorney-General filed Civil Appeal No. 3 of 2017 – which appeals were consolidated and determined by the Court of Appeal.
7. The appellate court set aside the High Court Judgment on 19 October 2017; and the aggrieved applicant then filed a notice of appeal in the Supreme Court (dated 30 October 2017), followed by



an application before this Court on 31st October 2017, under Articles 2(1), (3), 4 and 163 (4) (a) and (7), of *the Constitution*; Sections 15(2), 21(1), (2) and 24(1) of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011*), as well as Rules 23 and 26 of the Supreme Court Rules, 2012, seeking Orders as set out hereinabove.

8. The Affidavit of Lucy Mwangi, an Advocate, avers that the intended appeal is arguable, and would be rendered nugatory if it were in the end to succeed, and that it is meet that the Orders sought be granted.
9. The Deponent avers that the public interest would favour grant of stay Orders, as the respondents stand to suffer no prejudice thereby.
10. This Court, at this stage, notes that it indeed has authority to issue Orders for the preservation, in an interim period, of a subject-matter of appeal: Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell, Supreme Court Applications Nos. 12, 13 (2012).
11. This Court, in the circumstances, would expect an appeal on a significant question, and would endeavour to determine it appropriately. But, would the terms of the findings of appeal be rendered nugatory – so that it becomes proper to issue the Orders sought at this stage? It is the applicant’s case that, precious judicial time will have been lost, and costly legal services will have to be engaged, in the event this Court were to allow the forthcoming appeal. These, in our perception, are not compelling ground rendering an appeal nugatory – especially as the appeal cause, so far, remains only conjectural.
12. We Take Note that the applicant has not yet filed a substantive appeal before this Court, since filing the notice of appeal on 30 October, 2017. By Section 33 (1) of the Supreme Court Rules, 2012 an appeal should be lodged within 30 days of the date of filing the notice on appeal – i.e., more than 7 months have expired since the filing of notice – and with no application seeking extension of time.
13. Grant Of Stay of existing Orders cannot be a matter of course. It rests upon genuine conditions of urgency, merit and dispatch – which are missing in this instance. Hence there is no valid basis for the grant of stay orders.
14. We make Orders as follows:
 - (a) There shall be no Orders of stay against the Judgment of the Appellate Court.
 - (b) There shall be no Order as to costs;

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2018.

D. K. MARAGA P. M. MWILU

CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE &

OF THE SUPREME COURT VICE-PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM J.B. OJWANG

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

S. N. NDUNG’U

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya.

