



Kenya School of Law v Kitsao; Council of Legal Education (Interested Party) (Civil Miscellaneous Application E105 of 2024) [2024] KEHC 6352 (KLR) (Civ) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E105 OF 2024**

AN ONGERI, J

MAY 31, 2024

BETWEEN

KENYA SCHOOL OF LAW APPLICANT

AND

ANTHONY WAZIRI KITSAO RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION INTERESTED PARTY

RULING

1. The applicant approached this court via application dated 23/1/2024 brought under Article 159 (2) (d) of the [Constitution of Kenya](#), 2010, Sections 1A,1B (3) (A), 63(e), 79G of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya; Order 42 Rule 6, Order 50, Rule 6, and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 seeking the following orders;
 - i. That this application be certified as urgent, service of the same be dispensed with and heard ex-parte in the first instance.
 - ii. That the Honourable Court be pleased to stay execution of the decree from the judgment delivered on 5th April, 2023 by Honourable Tribunal in LEAA No. E013 of 2023 pending the hearing and determination of the instant application.
 - iii. That the Honourable Court be pleased to enlarge time within which the Applicant may file the intended appeal.



- iv. That the Honourable Court be pleased to grant leave to the Applicant to file the attached memorandum of appeal and the same be deemed as regularly filed upon payment of the requisite fees.
 - v. That the Honourable Court be pleased to grant leave to the Applicant to file the attached Record of appeal and the same be deemed as regularly filed upon payment of the requisite fees.
 - vi. That the Honourable Court be pleased to stay execution of the decree from the judgment delivered on 5th April, 2023 by the Honourable Tribunal in LEAA No. E013 of 2023 pending the hearing and determination of the intended appeal.
 - vii. That the costs of this application be in the cause.
2. The application is supported by the supporting affidavit of Fredrick Muhia sworn on 6/2/2024 in which he deposed as follows;
- i. “That I am a male of sound mind and the Academic Services Manager, working for the Applicant herein and therefore familiar with the facts at hand and authorized to swear this affidavit thus competent to swear this affidavit.
 - ii. That I am aware that the Legal Education Appeals Tribunal made a judgment ordering the Applicant herein to admit the Respondent to the Advocates Training Programme vide judgment delivered on the 5th April 2023. (Annexed hereto and marked "TM I" is a copy of the judgment).
 - iii. That the Appellant/Applicant herein being aggrieved by the decision delivered on the 5th April 2023, intended to lodge an Appeal against the decision. (Annexed hereto and marked "FM2" is a copy of the Memorandum of Appeal)
 - iv. That the intended appeal raises serious questions of law and fact for the Appellate Court's consideration and determination.
 - v. That I am informed by my Advocates on record which information I verily believe to be true that the advocate on record fell ill and was hospitalized during that time and this was followed by a period of convalesce.
 - vi. That I am informed by my Advocates on record which information I verily believe to be true that the advocate left her log in information to an intern with directions to file the appeal which task she was informed to have been done.
 - vii. That the Advocate upon resuming proceeded to undertake the task of preparing the record of appeal. It was only when the Respondent served the Applicant with an application demanding to be admitted to the ATP did it come to light that the intern did not complete the task (Annexed hereto and marked "FM3"/ is a copy of the record of appeal).
 - viii. That the advocate only became aware of the fact that the appeal had not been filed when the Respondent herein sought to enforce the judgment via a Judicial Review Application JR EOOI of 2024 at Malindi. (Annexed hereto and marked "FM4" is a copy of the Pleadings from the Respondent and his advocate).
 - ix. That I am informed by my Advocates on record which information I verily believe to be true that the record of appeal is complete and ready for filing.



- x. That I am informed by my Advocates on record which information I verily believe to be true that there was no reason to believe indeed suspect that the appeal had not been filed.
 - xi. That I am informed by my Advocates on record which information I verily believe to be true that the applicant ought to be punished nor should the public suffer an unqualified person joining the legal profession due to the Appellant's advocates oversight and error in assuming her directions had been followed.
 - xii. That the admission process for the 2023/2024 academic year is underway and the applicant herein being compelled to admit the respondent herein.
 - xiii. That I am informed by my Advocates on record which information I verily believe to be true that the Respondent has commenced enforcing the judgment against the Appellant/Applicant. (Annexed hereto and marked "FM4" is a copy of letters from the Respondent and his advocate)
 - xiv. That if the Respondent is admitted in the ATP, the applicant will be forced to present a candidate who has not met the requirements for sitting the bar examination.
 - xv. That I am advised by my advocate which advise I verily believe to be true that if the judgment is not stayed pending the hearing and determination of the application herein, and pending the hearing and determination of appeal, the appeal will be rendered a mere academic exercise and the Applicant, the Public funded entity with a duty to prepare qualified candidates to take the bar examination, stands to suffer irreparable harm as it will be forced to admit unqualified student to the Advocates Training Programme which would be a threat to the legal professions.
 - xvi. That I am informed by my Advocates on record which information I verily believe to be true that it is in the interest of justice, fairness and equal treatment of all the applicants to have the appeal heard and determined by the Appellate Court.
 - xvii. That I am advised by my advocates which advise I verily believe to be true that if the stay is not granted, it will render the appeal null as it will have been overtaken by events which appeal raises serious questions of law and fact for the court's consideration and determination.
 - xviii. That I am advised by my advocates on record which advise I verily believe to be true that the grant of orders for stay is in the public interest to protect the quality, standards, and professionalism of the legal profession.
 - xix. That I have been advised by my advocates on record which advise I verily believe to be true in view of the foregoing, it's in the interest of well-being and maintenance of the standards of the profession and in the general public interest that the application be allowed.
 - xx. That I am informed by my Advocates on record which information I verily believe to be true in view of the foregoing, it is in the interest of justice that the execution of the decree herein be stayed in the interim pending the hearing and determination of the application herewith and thereafter pending the hearing and determination of the appeal".
3. The respondent filed grounds of opposition and a replying affidavit dated 27/3/2024 in which he deposed as follows; the instant application has been rendered nugatory by the judgement of Hon. M. Thande J which has compelled the appellant/applicants to comply with the judgement of the Legal Education Appeal Tribunal dated 5/4/2023. The lapse of about 9 months without any indication that the Appellant/Applicant would appeal is too long a period since section 38 of the [Legal Education Act](#),



- 2012 provides for 30 days and as such will be highly prejudicial to the Respondent who was consistently assured of admission by Ms. Mbuthu, the Principal Legal Officer of the Appellant/Applicant.
4. The respondent deponed that on 28/11/2022 he applied to join the Advocates Training Programme for the 2023/2024 academic year offered by the appellant/applicant. On 4/1/2023 the applicant through its director rejected his application citing that he had not attained the minimum KCSE grade and that no letter of admission to LLB was attached. He appealed against the decision and on 5/4/2023 the Legal Education Appeal Tribunal set aside the decision made on 4/1/2023 and on 10/1/2023 and directed that he is admitted to the Advocates Training Programme.
 5. He deponed that after the 30 days appeal period as provided under section 38 of the Legal Education Act lapsed he called Ms. Mbuthu the Principal Legal Officer of the applicant inquiring on the procedure of joining ATP and was informed that time had lapsed and that he should apply afresh. He did so and after inquiring several times he was told to wait for a letter of admission for 2024/2025 ATP which was scheduled to begin on 5/2/2024. On 8/1/2024 he called Ms. Mbuthu, the principal Legal Officer of the applicant who informed him that he could not be admitted and that he should wait for the ongoing amendments of the Kenya School of Law Act.
 6. By letter dated 8/1/2024 he demanded that the applicant comply with the judgement and orders of the Legal Education Appeal Tribunal. However on 11/1/2024 he received a letter from the applicant dated 10/1/2024 stating that the interpretation of the Second schedule of the Kenya School of Law Act, by the court of appeal in Kenya School of Law vs. Otienol Richard Akomo and 41 Others (Civil Appeal No. E472 of 2021) confirmed that Kenya Certificate of Secondary School requirements are mandatory.
 7. There being no stay orders, appeal or review of the judgment, decree and orders of the Legal Education Appeals Tribunal dated 5/4/2023 for about 9 months and also aggrieved by the decision dated 10/1/2024, he filed a Judicial Review Application No. E00I of 2024 dated 15/1/2024 before the High Court at Malindi for an order of Certiorari to quash the decision of the Appellant/Applicant dated 10/1/2024 and an order of Mandamus to compel the Appellant/Applicant to comply with the judgment and orders of the Legal Education Appeals Tribunal dated 5/4/2023. On 22/3/2024 the High Court in Malindi rendered its judgement and quashed the decision made by the applicant and issued an order of Mandamus compelling the applicant and its director to comply with the judgement and order of the Legal Education Appeals Tribunal delivered on 5/4/2023.
 8. The applicant filed a further affidavit sworn by Fredrick Muhia on 2/3/2024 as follows; he deponed that the respondent has not disputed the reasons offered for delay. The conduct of the applicant in preparing a record of appeal can reasonably lead one to conclude that it was the Applicant was proceeding on the assumption that the memorandum of appeal had been filed. The respondent has admitted that the applicant has been consistent in informing the respondent that he could not be admitted due to the upcoming appeal.
 9. He averred that admission to the ATP is the first step in a long process of training and preparing candidates for the bar examination and therefore admitting a student does not mean that the matter is extinguished, overtaken by events or becomes a mere academic exercise. The appellant seeks to exercise its right of appeal in this matter and has proffered strong, compelling reasons demonstrating to why the orders sought out to be granted and consequently, this application is not frivolous, vexatious or otherwise an abuse of the Court.
 10. The parties filed written submissions as follows; the appellant/applicant submitted that it has not abused the court process but has moved the court to use its discretion to grant it leave to exercise its right to challenge the decision of the tribunal before an appellate court with jurisdiction which is provided for in law.



11. On enlargement of time the applicant submitted that the circumstances leading to the lapse of time are that the advocate fell ill and was hospitalized with a lengthy sick off for convalesce thereafter. Believing that once the memorandum of appeal which is dated 20/4/2023 was ready, filing the same was a simple task and being the sole advocate left the assignment with an intern to complete. Upon the return the advocate has no reason to doubt that such a simple task had not been complete and proceeded to pursue the proceedings for the record of appeal. Only when the record of appeal was ready to be filed did the oversight come to light. The applicant argued that it would be punitive to punish the applicant for the mistakes of their advocates.
12. On substantial loss the applicant submitted that the tribunal determined that the respondent ought to be admitted to the Advocates training Programme despite the respondent's lack of proper academic qualifications, the determination was made despite the fact that matter relating to admission of students to ATP are exclusively governed by the *Kenya School of Law Act* No. 26 of 2012 which the jurisdiction is limited to matters relating to the *Legal Education Act* No. 27 of 2012.
13. The substantial loss and harm the applicant will suffer is due to the fact that the Applicant is, a public funded entity, with a duty to prepare qualified candidates to take the bar examination and be prudent and responsible in its care and use of public money, stands to suffer substantial loss as it may be forced to admit an unqualified student to the Advocates Training Programme which would cause harm to the legal profession and would not be able to reverse his training and having taken the bar examination on a successful appeal.
14. Finally, the applicant submitted that they are ready and willing to offer security on whatever terms that may be imposed by court. The intended appeal is arguable as the tribunal acted *ultra vires* to its jurisdiction in hearing and determining this matter. The applicant further indicated that the appeal will be rendered nugatory if the orders sought are not granted.
15. The respondent alternatively submitted that the court has jurisdiction to hear an appeal on a point of law from a judgement of the Legal Education Appeals Tribunal. However, this court does not have the requisite jurisdiction to stay execution of the Judgement and orders of the Legal Education Appeals Tribunal made on 5/4/2023. The respondent argued that Article 165 of the constitution does not give this court any powers to set aside or review orders or findings of courts of concurrent jurisdiction. In the case of *Bellevue Development Company Ltd -vs- Gikonyo and 3 Others* (Petition 42 of 2018) [2020] KESC 43 (KLR) (15 May, 2020) (Judgment) at paragraph 25 and 26 of the Judgment the Supreme Court stated as follows; -
 - “(25) In rendering their judgment on the appeal, the Court of Appeal held inter alia, that the contentious issue emerging succinctly out of the appeal was that of judicial immunity of judges and judicial officers in their exercise of their mandate as judges and judicial officers as well as the supervisory role of the Courts in relation to judges and judicial officers of concurrent jurisdiction.
 - (26) In the lead judgment, Kiage JA held that there was absolutely no doubt that the Superior Court judge had no jurisdiction to enquire into or review the property of the decisions of judges who were of concurrent jurisdiction as himself, and that therefore, he did not possess supervisory jurisdiction over the 1st and 2nd Respondents under Article 165(6) of the Constitution”
16. The respondent argued that the orders of the High Court at Malindi By Honorable Justice Thande on 22/3/2024 compelling the applicant to comply with the judgement orders of the Legal education



Appeal Tribunal made on 5/4/2024 deprive this court of jurisdiction to stay execution of the same as it already a crystallized action.

17. The respondent further submitted that the instant application has not met the threshold for orders to enlarge time to file an appeal and for stay of execution. The respondent argued that after the delivery of judgement by the tribunal the applicant did not seek a stay of execution nor an appeal on a point of law within 30 days as required under section 38 of the [Lega; Education Act](#) 2012. After the lapse of time the respondent engaged the applicant through Ms. Mbuthu the principle officer who assured him that he would be admitted to the Advocates Training programme for the year 2024/2025.
18. He was asked to apply a fresh which he did on 22/8/2023 and the applicant never replied to his application. In January 2024 the respondent sought to be issued with an admission letter to the ATP and the applicant through its director letter dated 10/1/2024 rejected his application basing its interpretation of the 2nd schedule of the [Kenya School of Law Act](#). The respondent would be utterly prejudiced as his right to education as enshrined under article 43 shall be curtailed if once more the applicant is allowed to delay the respondent from enjoying the fruits of the judgement dated 5/4/2023.
19. The respondent argued that the reason that the applicant submitted any evidence supporting the reason he gave for not filing the appeal on time. There were no treatment notes attached to the supporting affidavit and the education qualifications and work experience for the intern have not been disclosed. Further the period of 9 months that it took for the applicant to find out that the intern had not filed the appeal is inordinate, inexcusable and unjustifiable in the circumstances of this matter.
20. The respondent argued that the Applicant is contradicting itself as there is no decretal amount that was awarded to the Respondent. Further, the Applicant is a public institution whose mandate is to train lawyers. Does the Applicant train lawyers for free? The answer is in the negative. In fact, it is the Respondent who has already suffered in delays and money spent on instituting the appeal before Tribunal at the High Court at Malindi and shall continue to suffer substantial loss if the Application is allowed because he shall be unable to enjoy the fruits of his judgments. The applicant has failed to prove any details of pecuniary or tangible loss.
21. The issues for determination are as follows;
 - i. Whether the applicant should be granted enlargement of time to file the appeal.
 - ii. Whether stay of execution pending appeal should be granted.
22. The governing provision for leave to file an appeal out of time is section 79G of the [Civil Procedure Act](#) which states as follows;

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal.”
23. I find that there is good reason to grant the applicant leave to file this appeal out of time.
24. On the issue as to whether stay pending appeal should be granted, I find that this is not a money decree and the same will be rendered nugatory unless stay is granted pending appeal.
25. I allow the appeal on the following terms;



- i. That the appeal is filed within 30 days of the is date.
- ii. That stay is granted pending appeal.
- iii. That the appeal be prosecuted within 60 days of this date.
- iv. That costs of this application to abide the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
31ST DAY OF MAY, 2024.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

..... For the Interested Party

