Kibegwa & 7 others v Kenya School of Law; Council for Legal Education (Interested Party) (Appeal 8, 9, 10, 11, 12, 13, 14 & 15 of 2021 (Consolidated)) [2021] KELEAT 452 (KLR) (Civ) (16 June 2021) (Ruling)

John Kibegwa & 7 others v Kenya School Of Law; Council For Legal Education (Interested Party) [2021] eKLR

Neutral citation: [2021] KELEAT 452 (KLR)

REPUBLIC OF KENYA

IN THE LEGAL EDUCATION APPEALS TRIBUNAL

CIVIL

APPEAL 8, 9, 10, 11, 12, 13, 14 & 15 OF 2021 (CONSOLIDATED)

R.N MBANYA, CHAIR, EO ARWA, R.W KIGAMWA & SM GITONGA, MEMBERS

JUNE 16, 2021

BETWEEN

JOHN KIBEGWA ..... 1ST APPELLANT

NELLY GATIE JARA ..... 2ND APPELLANT

KIBORE WANGUI LUCIA ..... 3RD APPELLANT

MURABULA EMILLY AKWANYI ..... 4TH APPELLANT

JACOB ODANGA ODHIAMBO ..... 5TH APPELLANT

MBOTE NELLY MWIKALI ..... 6TH APPELLANT

GELATIUS MWANGANGI MWENDWA ..... 7TH APPELLANT

OBOTE MICHAEL SAVAI ..... 8TH APPELLANT

AND

KENYA SCHOOL OF LAW ..... RESPONDENT

AND

THE COUNCIL FOR LEGAL EDUCATION ..... INTERESTED PARTY

(Being an application for stay of proceedings of the Tribunal pending the hearing and determination of an intended appeal to the Court of Appeal based on the ruling in Nairobi Court of Appeal Civil Applications no.s E417 of 2020 and E002 of 2021 – Kenya School of Law v Otene Richard Akomo & 41 Others)

RULING

1. Introduction.

1. The Kenya School of Law lodged before the Tribunal a certificate of urgency dated the May 17, 2021 by Dr. Henry Mutai, an unsigned notice of motion dated the May 17, 2021 and an affidavit in support of the motion sworn by Mr. Fredrick Muhia – the Academic Services Manager of the respondent. Accompanying the affidavit was the decision of the Court of Appeal in Nairobi Court of Appeal Civil Applications No.s E417 of 2020 and E002 of 2021 – Kenya School of Law v Otene Richard Akomo & 41 Others. The motion seeks for orders:-

    a) That the application be certified urgent, be heard ex – parte and service be dispensed with in the first instance.

    b) That there be a stay of proceedings herein pending the hearing and determination of the intended appeal before the Court of Appeal.

    c) That the Tribunal be pleased to issue any other orders as it may deem mete and just to issue.

3. The application was opposed by the appellants who lodged with the Tribunal grounds of opposition. The interested party did not file any documents in opposition to the motion dated the June 2, 2021. The Tribunal directed that the motion be disposed of on priority basis intandem with prayer a) therein, parties to lodge written submissions and the matter to proceed for highlighting on the 4th June, 2021. During the highlighting of the submissions the respondent who was the applicant in the motion was represented by Ms. Pauline Mbuthu, the Appellants by Mr. Charles Ouma and the interested parties by Ms. Mutugi Mugure together with Mr. Moses Muchiri. The Tribunal retired to consider the matter and now renders itself as hereunder.

. The motion by the respondent.

4. The background to the motion which on the face of it does not disclose any enabling provisions is that it is predicated on the fact that the respondent being dissatisfied with the award made in the judgment by the Judicial Review Division of the High Court at Milimani Law Courts in the consolidated petitions no.s 7, 8, 13, 20 and 21 all of 2020 – Republic v Kenya School of Law and the Hon. Attorney General ex – parte Otene Richard Akomo & Others. has lodged a notice of appeal against the decision and has formally requested the Registrar for copies of the typed proceedings and certified copies of the decree. The intended appellant made an application to the Court of Appeal for orders of stay of execution pending the hearing and determination of the intended appeal which was found to be raising arguable issues. The subject matter of the appeal is substantially identical in facts, issues and circumstances before the Tribunal. The Court of Appeal has indicated its intention to pronounce itself on the dispute. If the proceedings are not stayed and the appeals before the Tribunal succeed the respondent will be obliged to admit students in a similar category as those affected by the stay granted by the Court of Appeal, which will occasion an injustice and unfair treatment. There will be a peril of embarrassment of contradicting determinations between the Tribunal and the Court of Appeal. It is in the interest of justice that the proceedings be stayed.

3. The appellants' opposition to the motion.

5. The appellants have vehemently opposed the motion on the basis that the Tribunal lacks the jurisdiction to entertain the motion. It is contended that the respondent has not placed before the

Tribunal the material required for it to make a determination on the motion for stay of proceedings. The applicant has done little to expedite the prosecution of its appeal and is only using the notice of appeal as a ploy to delay the expeditious disposal of these appeals. There is no demonstration that the respondent stands to suffer any irreversible loss.

4. The respondent's written submissions.

6. The respondent has taken up three issues in seeking to persuade the Tribunal to grant the motion to wit: the existence of grounds to stay the proceedings, it is in the interests of justice to grant the stay, the existence of arguable matters to grant the stay and the application of the doctrine of *stare - decisis*. The respondent relies on the decision of Sir Charles Newbold, P in *Dodhia v National & Grindlays Bank Limited and Another*, (1970) EA. 195, where he pronounced himself;

> " A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of stare decisis would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it."

7. The respondent also relies on the judicial precedents in *Republic v Business Premises Rent Tribunal & Another ex parte Albert Kigera Karume*, (2015) eKLR, *Rift Valley Sports Club v Patrick James Ocholla*, (2005) eKLR and *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*, (2013) eKLR.

8. The respondent has also called to aid the celebrated decision espousing the tenets on stay of proceedings *In Re. Global Tours & Travels Limited*, (2000) LLR 1061,where Ringera J as he then was stated;

> " From a textual analysis it appears that the court has a discretion to order stay of proceedings pending appeal from its order or decree and such discretion is unfettered. The strictures, that sufficient cause be shown and that no order for stay should be made unless the court is satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay and further that such security as may be ordered for the due performance of the order or decree has been given, are on a plain reading of the rule, applicable only to applications for stay of execution."

9. It is further contended that the Court of Appeal examined the draft memorandum of appeal and indeed determined that there were arguable issues in the intended appeal and granted the order for stay. The standard for grant of a stay includes that the intended appeal have arguable issues failure to meet this requirement will lead to the prayer for a stay to be declined. Reliance is placed in the case of

Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, Civil Application No. NAI. 31/2012, where it was observed;

> " This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied."

5. Appellants written submissions.

10. The appellants in vehement opposition to the motion submit that the respondent has not established the legal basis for the grant of the orders sought. It is a novel motion unknown to the Civil Procedure Act. The applicant has not cited a single authority where a court granted such an order. All the authorities cited are for stay of execution or proceedings pending an appeal from the court whose decree or proceedings is sought to be stayed. There is as yet no appeal from any decree or proceedings of the Tribunal. The Court of Appeal has pronounced itself in an analogous situation in *Benson Khwatenge Wafula v Director of Public Prosecutions; Ethics and Anti-Corruption & 2 others*, (2020) eKLR the Court of Appeal expressed itself as follows;

> " The interlocutory reliefs of stay of execution and stay of proceedings must relate to orders or proceedings of the court appealed. Where, as here, what are sought to be stayed are proceedings, not of the High Court whose orders are subject of the intended appeal, but the subordinate court, this Court ought to decline the invitation."

11. The appellants also rely in the authorities of *Mary Ngechi Ngethe v the Attorney General & Another*, Court of Appeal Civil Application no. Nai. 157 of 2012 (UR); *Eng. Michael Sistu Mwaura Kamau v The Ethics & Anti-Corruption Commission & 2 Others* – Nairobi Civil Application no. 173 of 2015 and *Diana Kethi Kilonzo v Republic*, (2016) eKLR where the courts were even more emphatic on the point and went as far as to state that they did not have jurisdiction to stay proceedings at Magistrate's Courts.

12. It submitted that the Tribunal was being invited to stay its proceedings pending the hearing and determination of an appeal not from the Tribunal but from the High Court. The appellants in this application were not even parties to those proceedings. The appellants have no right of audience in those proceedings. The proceedings are entirely in the hands of the applicant who can even compromise or settle the same as it deems fit. There are no exceptional circumstances in this matter. Judicial time and resources will not be wasted by disposing of the appeals.

6. Highlighting of the submissions.

13. For the respondent it was submitted that it had brought an application for stay of proceedings based on a stay granted by the Court of Appeal in Civil Applications no.s E417 of 2020 and E002 of 2021 – *Kenya School of Law v Otene Richard Akomo & 41 Others*. The issues in the matter were similar in nature to the appeals in this matter. There were reasonable grounds to grant the stay of proceedings sought. The power to grant stay should be exercised judiciously. In *Global Tours & Travels Limited*, (2000) eKLR Ringera – J as he then was addressed the grounds for stay of proceedings. The decisions of the courts vary on the criteria for admission to the School and they ought to be aligned in order to have a way of granting admissions to the Advocates Training Programme in future. Unless the stay sought was granted the appellants were likely to join the Advocates Training Programme before the appeal is heard and determined. The respondents in the intended appeal will be prejudiced as they await the decision in the appeal while the appellants herein will be already admitted to the School.

14. The intended appeal has a prima-facie level of success. The intended appeal has already been found to be arguable by the Court of Appeal. Use of judicial time would be best put to use by the stay. It was an exceptional case and the stay sought ought to be granted in exceptional cases. The integrity of legal training would be addressed by the Court of Appeal. Article 27 of the *Constitution of Kenya* will have been met as the appellants in the appeals will be treated equally to those who are in the Court of Appeal. The appeal was yet to be filed as the respondent was awaiting the proceedings from the High Court. The same were bulky. The respondent conceded that the appeals before the Tribunal were only appealable to the High Court with finality.

15. For the appellants it was submitted that it was the first time such a motion was being filed. The Tribunal had no jurisdiction to hear the application. The appellants were not parties in the Court of Appeal matter. They had no audience before the Court of Appeal. It would be a gross injustice to grant a stay. They will not have been heard. The appellants would be condemned unheard on their appeals while they have no control on how the appeal in Court of Appeal would proceed. The motion was strange. The Tribunal could not stay its proceedings awaiting an appeal in the Court of Appeal. The appellants relied in the authority in *Benson Khwatenge Wafula v The Director of Public Prosecutions & Others*, (2020) eKLR in which an application of a similar nature was made and the Court of Appeal declined it. It found it had no powers to stay a matter in the Magistrate Court.

16. No pleadings in the matter before the Court of Appeal had been placed before the Tribunal and all that had been given was a ruling. The commonality was only on the interpretation of the *Kenya School of Law Act, 2012*. No commonality of facts had been laid before the Tribunal on the appeal before the Court of Appeal and these appeals. It was not enough to have common questions of law but also facts must be consistent. No appeal had been lodged but only an intended appeal existed in the Court of Appeal currently. The decision in the High Court was made in August, 2020 and to date no appeal had been formalized. No letters from the High Court to show the stage where the proceedings have reached had been tendered before the Tribunal. The inordinate delay had not been explained for the last 10 months as to why no record had been lodged in the Court of Appeal. The traditional timetable for the Court of Appeal was to lodge an appeal within 60 days. No intention to dispose of appeal on priority had been demonstrated by the respondent as no appeal had been filed.

17. Even if the appellants were to wait for the appeal in the Court of Appeal, the appeals herein would still be decided one way or the other. The Court of Appeal would want to know what the Tribunal had to say about the matter of admission to the Advocates Training Programme. Assuming the Tribunal was to decide the matter differently from the Court of Appeal the respondent can appeal to the High Court. Litigation would be stifled by allowing the motion as litigants cannot wait for others.

18. Nothing exceptional to require stay had been brought out. The Tribunal ought to pronounce itself and whoever is aggrieved to proceed to the High Court. The respondent did not apply for stay of proceedings when these matters came before the Tribunal previously. It instead relied on other technicalities to bar the appeals from being heard. The appellants had no control on the appeal before the Court of Appeal. Tribunals exist for expeditious disposal of disputes and they are specialists. The matter in the Court of Appeal may even end up in the Supreme Court. The appellants would wish to know their fate so that they can plan themselves. The matter places the appellants in an indefinite wait.

19. In a brief rejoinder the respondent reiterated that the Tribunal regulates its own procedure based on its establishing statute. The statute of the Tribunal had provisions for the motion. The Tribunal was being asked to stay itself. The doctrine of stare-decisis should stay intact. The matter before the Court of Appeal involved a judgment which the Tribunal had relied upon before. The Court of Appeal ought to be allowed to pronounce itself in the matter. The ruling by the Court of Appeal confirmed

the validity of the notice of appeal. Inordinate delay could not be imputed against the respondent. The application was not a technical objection but, it was a plea to allow the appellants to be treated equally to others before the Court of Appeal. Expeditious disposal of matters ought not to come at the expense dispensation of justice. Should the stay sought be granted the School would proceed with admissions normally for instance for applicants who have qualifications from foreign universities as they are governed by section 1 b) of the First Schedule to the *Kenya School of Law Act, 2012*. However, for applicants governed by section 1 a) of the First Schedule to the *Kenya School of Law Act, 2012* where there is a disagreement on qualifications the school will stop admissions and inform them to await the pronouncement of the Court of Appeal. Finally, the respondent confirmed its intention to seek stays in all other matters before the High Court in similar related cases.

7. Analysis and determination of the Tribunal.

20. The respondent has presented an interlocutory motion for stay of proceedings of the consolidated appeals before the Tribunal awaiting a determination of the outcome of an intended appeal against the decree of the Judicial Review Division of the High Court at Milimani Law Courts in the consolidated petitions no. s 7, 8, 13, 20 and 21 all of 2020 – Republic v Kenya School of Law and the Hon. Attorney General ex – parte Otene Richard Akomo & Others in the Court of Appeal. The Tribunal lacks jurisdiction to grant such a prayer based on its establishing juridical regime. The mandate of the Tribunal based on section 31 (1) of the *Legal Education Act*, no. 27 of 2012 is well spelt out as being;

> " The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned."

21. The said law obligates the Tribunal to inquire into any matter the subject of an appeal like has been lodged by the appellants and notify the parties concerned. The Tribunal's powers and well espoused jurisdiction empowers it to deal with appeals *sui generis*. The Tribunal exercises independence of decision making being a specialized Tribunal based on the facts before it and the law.

22. The Tribunal has no interlocutory jurisdiction to grant a stay of proceedings as sought by the respondent awaiting the outcome of an intended appeal in the Court of Appeal from a decision that does not arise from the tribunal. The Tribunal's jurisdiction on matters of stay is only anticipated in instances when an appeal has been lodged against its decision to the High Court under section 38 (2) of the *Legal Education Act*, no. 27 of 2012. The same provides;

> " The Tribunal may of its own motion or on the application of an interested person, if it considers it appropriate in the circumstances, grant a stay of execution of its award until the time for lodging an appeal has expired or where an appeal has been commenced until the appeal has been determined."

23. Currently no determination has been made in the appeals before the Tribunal, which would be the subject of an appeal to the High Court solely on a point of law under section 38 (1) of the *Legal Education Act*, no. 27 of 2012. The same provides;

> " Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court."

24. The Tribunal therefore cannot enter an order of stay of proceedings awaiting a determination of an intended appeal which does not arise from its order or decree. The Tribunal is so guided by the authority relied on by both the appellants and the respondent in Re. Global Tours & Travels Limited, (2000) LLR 1061, where Ringera J as he then was stated;

> " From a textual analysis it appears that the court has a discretion to order stay of proceedings pending appeal from its order or decree and such discretion is unfettered."

25. The appellants are not parties to the appeal in the Court of Appeal and it will be a clear breach of the right to heard which is well postulated in article 50 of the *Constitution of Kenya, 2010* to have them be bound by an order of the Court of Appeal of which they are not parties to and have no control of the proceedings of the Court of Appeal. The appellants have no means to fast track its determination and, the tribunal takes into account that 10 months have already lapsed since the making of the order by the High Court and no record of appeal is in place .

26. The order if issued will also infringe the right to access of justice under article 48 of the *Constitution of Kenya, 2010* as the respondent has made it clear that it will continue to take decisions on applications on the Advocates Training Programme as received while the intended appeal abides and the aggrieved applicants will be informed to await the Court of Appeal in a matter to which they are not parties or were not aware it existed when they sought admission to the School and have no control over. The motion militates against the overriding objective on expeditious disposal of justice.

8. Disposition.

a) The motion dated the May 17, 2021 is dismissed and costs shall be in the cause.

b) The consolidated appeals will proceed for hearing.

It is so ordered by the Legal Education Appeals Tribunal.

DATED AT NAIROBI THIS 16TH DAY OF JUNE, 2021.

ROSE NJOROGE – MBANYA - (MRS.)

CHAIRPERSON

EUNICE ARWA - (MRS.)

MEMBER

RAPHAEL WAMBUA KIGAMWA (MR.)

MEMBER

STEPHEN GITONGA MUREITHI (MR.)

MEMBER

I certify this is a true copy of the original ruling of the Tribunal.

GILBERT ONYANGO - REGISTRAR