



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTION PETITION NO. 4 OF 2020

IN THE MATTER OF

ARTICLES 10, 21 (1) & (2) (C) 23, 24 AND 25B (1) & (2) OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

RIGHTS AND FUNDAMENTAL FREEDOMS UNDER

ARTICLES 27,28,35,43 AND 73 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

ALLEGED VIOLATION OF THE FAIR ADMINISTRATIVE ACTIONS

SECTION 3, 4, 5(2) (C) OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF

BREACH AND THREATENED CONSTITUTIONAL BREACH OF

THE BILL OF RIGHTS UNDER ARTICLES 47 OF CONSTITUTION OF KENYA 2010

BETWEEN

JOYCE KEMUNTO OBARA

T/A SURGICAL SUPPLIES COMPANY..... PETITIONER

AND

DR. OTIENO ENOCK ONDAIU.....1ST RESPONDENT

DR. ROBERT RIPNG'ENO CHERUIYOT 2ND RESPONDENT

KISII GALAXY MEDICAL CENTRE LIMITED.....3RD RESPONDENT

THE KISII TEACHING AND REFERRAL HOSPITAL..... 4TH RESPONDENT

RULING

1. The petitioner, Joyce Kemunto Obara, who trades under the name and style of Surgical Supplies Company filed the petition against the respondents on behalf of orthopedic patients at the Kisii Teaching and Referral Hospital, the 4th respondent herein.

2. Together with the petition, she filed a Notice of Motion dated 6th March 2020 which is the subject of this ruling. In her application, the petitioner sought the following orders;

1) Spent

2) **THAT** the internal memo given by the 1st Respondent be stayed and/or its implementation be suspended pending the hearing and determination of this petition

Or in the Alternative

3) **THAT** a temporary injunction be issued against the Respondents jointly or each one of them from implementing the directive in the internal memo issued by the 1st Respondent wholly or in part pending the hearing and determination of the petition.

4) **THAT** pending the hearing and determination of this petition this honourable court be pleased to grant a conservatory order in the nature of an injunction directing the Respondents jointly or severally or by their agents or any person acting under them to provide health services to all Orthopedic patients attending the 4th Respondent's Hospital notwithstanding that they have obtained surgical implants from any other source other than from the 3rd Respondent and Nefris Company Limited in as long as it's the required description and quality.

5) **THAT** this Honourable Court be pleased to issue such further relief as it may deem fit.

6) **THAT** the costs of this application and include thereto be provided for.

3. The petitioner listed the grounds in support of her application in the body thereof and swore an affidavit in support of the application. She also relied on an affidavit sworn by Josephat Abuga Onsare to further bolster her application.

4. The petitioner stated that she was involved in the supply of orthopedic implants to the 4th respondent. However, in December 2018 she was publicly reprimanded by the 2nd respondent never to sell surgical implants to the 4th respondent's patients as per the directive of the 1st respondent. The 1st and 2nd respondents were the Chief Executive Officer of the 4th respondent and the doctor in charge of the Orthopedic Department respectively.

5. In a meeting held on 22nd August 2019, it was communicated that the petitioner's staff were not allowed to set foot in the 4th Respondent's surgical ward and if they contravened the directive they would be arrested. On 23rd October, 2019 an internal memo was circulated and copies affixed at the 4th respondent's premises disowning the petitioner's surgical implants.

6. The petitioner claimed that despite the adverse effects of the contents of the internal memo, no prior notice of the nature or reason for the administrative action was given despite her demands for an explanation.

7. She claimed that the 1st and 2nd respondent had rejected the orthopedic implants she sold to patients at the hospital and had directed them to get a refund and obtain similar orthopedic implants from other suppliers such as the 3rd respondent where they were shareholders. Patients who bought implants from her were denied surgery and were thus forced to collect refunds and buy from the 1st and 2nd respondent's preferred suppliers the 3rd Respondent or NEFRIS Limited.

8. The petitioner asserted that the implants she supplied were approved by the Kenya Bureau of Standards. She accused the 1st and 2nd Respondents of using their respective positions as public officers to make partial decisions influenced by improper motives and corrupt practices in breach of Chapter Six of the Constitution.

9. Josephat Abuga Onsare added that his father, the late Joseph Onsare had sustained a broken hip, leg and hand when he was attacked by thugs in the evening of 22nd November, 2018. His father was taken to Kisii Teaching and Referral Hospital for medical treatment, where the doctors stated that they required surgical implants from NEFRIS or Galaxy medical suppliers to rectify the broken bones.

10. Josephat, averred that the sum of Kshs. 60,000/= demanded from the recommended retailers was too exorbitant for their family. Another patient at the hospital advised him that the petitioner sold similar implants at a cheaper price.

11. He purchased the implants from the petitioner at Kshs. 38,000/= and paid the theatre fees but the doctor who was to operate on his father told the supporting staff that the patient could not proceed to the theater as the implants had not been purchased from either NEFRIS or Galaxy Medical Supplies as directed.

12. Josephat claimed that his father died on 4th February, 2019 as a result of an infection on the injured bone which should have been replaced with the proximal femur nail and plate. He was convinced that his father had died as a result of professional negligence and improper motive arising from the business rivalry between Surgical Supplies, NEFRIS and Galaxy Medical Suppliers. He urged the court to intervene, as the business rivalry between persons supplying orthopedic implants had caused loss of lives at the 4th Respondent hospital, defeating the essence of the existence of the public Hospital under the control of the 5th Respondent.

13. In response, the 4th and 5th respondents filed grounds in opposition to the application dated 17th April 2020 contending;

- 1) THAT the Petitioner had not made any allegation of any infringement and/or violation of her rights by any of the Respondents.
- 2) THAT the Petitioner had failed to plead any particulars of such infringement as required for a case to meet the constitutional threshold.
- 3) THAT prayers 2, 3 and 4 of the Motion against the 4th and 5th Respondents were not capable of being granted by this Honorable court for granting the same would leave patients in need of the 4th and 5th Respondents with no alternative and their lives would be put in danger.
- 4) THAT such orders being sought directly affected the patients on the 4 respondent's operating table who had not been involved in these proceedings hence they would be condemned unheard.
- 5) THAT the Petitioner's application was therefore bad in law, an abuse of court process and ought to be dismissed with costs.

14. The 1st, 2nd and 3rd respondents did not file a response to the application despite being given adequate opportunity to do so.

15. Directions were given to dispose of the application by way of written submissions but none of the respondents filed submissions.

16. For his part, the petitioner's learned counsel distilled the following issues in his submissions in support of the petitioner's application.

- 1) Whether stay should be issued against the Respondents jointly from implementing the directive in the internal memo?
- 2) Can a conservatory order in the nature of injunction issue, directing the Respondents not to deny any orthopedic patients treatment?
- 3) Has the petitioner established a prima facie case?
- 4) Whether the petitioner stands to suffer irreparable loss.
- 5) Does the balance of convenience tilt towards granting the injunction?

17. From the application, the parties' depositions, the response and the petitioner's submissions, there are two main issues arising for determination. The first is whether a stay should issue against the respondents' internal memo and the second is whether a conservatory order should be issued directing the respondents not to deny any orthopedic patients treatment notwithstanding that they have obtained surgical implants from other sources other than the 3rd respondent and Nefris Company Limited.

ANALYSIS AND DETERMINATION

18. In an internal memo dated 23rd October 2019, the 1st respondent directed the orthopedic department, the male and female surgical ward and the orthopedic theatre at Kisii Teaching and Referral Hospital not to accept surgical implants from Surgical Supplies Company until further notice. The Memo did not give an explanation for the decision to halt the use of the medical equipment supplied by the petitioner.

19. The petitioner's counsel submitted that the 1st, 2nd and 4th respondents had since withdrawn the internal memo and were allowing patients who had obtained the surgical implants from the petitioner to get treated.

20. That notwithstanding, counsel urged the court to issue a stay of execution to preserve the subject matter pending the hearing and determination of the matter. Counsel referred to the decisions of the Court of Appeal in the case of *Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai No. 322 of 2006* and *House Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji another [2015] eKLR* to emphasize that even in an application involving a money decree, a stay of execution pending appeal could be granted so as to alleviate any undue hardship the applicant would suffer if stay was refused.

21. The applicants in the cases of *Kenya Hotel Properties Limited* and *House Finance Company of Kenya* had sought stay of execution of the decrees of the High Court pending the hearing and determination of their appeals before the Court of Appeal. In contrast, the decision challenged in this case does not stem from an order or decree made by the court. Stay of execution does not therefore apply to this case.

22. On the other hand, conservatory orders are issued to prevent further violation of rights and fundamental freedoms and to preserve the subject matter pending the hearing and determination of the matter.

23. The Supreme Court elucidated the scope of conservatory orders in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014]eKLR**, thus;

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

24. In the case of **Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR**, the court identified the factors to be considered in determining whether to grant interim conservatory orders. It held;

[92] *The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.*

25. According to the authorities cited above, the following elements should be met before granting an application for a conservatory order; Firstly, the establishment of a *prima facie* case with a reasonable chance of success; Secondly, a demonstration that the grant of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights; Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory; and lastly the court should consider whether public interest will be served by granting a conservatory order.

26. To succeed in her application for a conservatory order, the petitioner had to first satisfy this court that she has an arguable *prima facie* case with a likelihood of success. A *prima facie* case is a case in which a court properly addressing itself to the material presented before it would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. (See **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others CA MSA Civil Appeal No 39 of 2002 [2003] eKLR**)

27. Learned counsel for the petitioner submitted that the petitioner has a legal right to property as established under Article 40 of the Constitution as she is the owner of the surgical supplies. He argued that the petitioner’s rights under Article 40 have been limited by virtue of the restrictive order issued by the 1st Respondent which was in contravention of Article 27(4) of the Constitution.

28. The petitioner had averred that the 1st and 2nd respondents’ actions would adversely affect the rights to the highest attainable standards of health of orthopedic patients as protected under Articles 43 (1) (a) and 43 (2) of the Constitution. She accused the 1st and 2nd respondent of using their positions as public officers to make partial decisions in breach of Chapter Six of the Constitution. She also complained that the respondents’ action of writing an internal memo and warning patients against purchasing her surgical implants without reason amounted to a violation of her right to fair administrative action as guaranteed under Article 47.

29. The petitioner claimed that she severally sought an explanation for the decision to bar her from selling her equipment but none was offered. She annexed a copy of the impugned internal memo dated 23rd October 2019, requests for reasons for the decision and a copy of records for the Registrar of Companies to show that the 1st and 2nd respondents were shareholders of the 3rd respondent company, which was one of their recommended suppliers for surgical implants.

30. The 1st, 2nd and 3rd respondents have not given their version of the facts as they are yet to respond to the petition or the application.

31. From the above summary, it is evident that the petitioner’s case is not a frivolous one. It raises arguable issues concerning not only her constitutional rights but the rights of the orthopedic patients at the Kisii Teaching and Referral Hospital. The petitioner has thus established a *prima facie* case with a likelihood of success.

32. Having surmounted the first hurdle, the petitioner was then required to demonstrate that the petition or its substratum would be rendered nugatory if the conservatory orders were not granted. The petitioner argued that the respondents had already barred her from entering the 4th respondent hospital and had issued directives which were detrimental to her business. It was submitted that the injuries sustained by the petitioner and the patients in general were serious and unlikely to be compensated by way of damages as the lives of patients were at stake and the petitioner was at the verge of losing her source of livelihood.

33. The petitioner has put forward a satisfactory argument that she and the 4th respondent’s orthopedic patients will suffer prejudice if a conservatory order is not granted. She has shown that the 1st respondent issued a directive barring surgical implants from Surgical Supplies Company which would undoubtedly be detrimental to her business.

34. In support of the petition, Josephat deposed that his father had sought medical attention at the 4th respondent hospital where he was directed to acquire surgical implants from the 3rd respondent or NEFRIS Company to rectify broken bones he had sustained as a result of an attack by thugs. Josephat averred that his family was unable to afford the surgical equipment sold by the respondent’s recommended retailers. They purchased cheaper implants sold by the petitioner but the respondents rejected them and his father died as a result of lack of medical attention.

35. Josephat and the petitioner asserted that the 1st and 2nd respondents' directives had a potential to endanger the lives of the 4th respondent's patients. They have demonstrated that there is a real danger that the substratum of the petition will be rendered nugatory without the intervention of this court.

36. On the consideration of public interest, I am guided by the decision of the Court of Appeal in **Tom Mboya Odege vs. Edick Peter Omondi Anyanga & 2 Others Nairobi Civil Appeal No. 364 of 2017 [2018] eKLR** where the court defined public interest litigation as follows;

“A legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

... The best examples are in Articles 22(2)(a) and 258 of the Constitution which grant every person the right to move to court in ‘public interest’ where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution.”

37. The public interest in this case lies in favor of granting conservatory orders. The 4th respondent's argument that the orders sought by the petitioner will endanger the lives of its patients, has no backing. The petitioner has in fact shown that the converse is true. She asserts that her medical equipment is of good quality and is more affordable. Enabling the 4th respondent's patients to choose from a variety of medical equipment will enhance their access to healthcare which will serve the interest of the public.

38. In the end, I find that the petitioner has satisfied all the requirements for issuance of the conservatory orders sought. I accordingly grant the application, dated 6th March 2020, in terms of prayer 3 and 4 thereof.

39. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF SEPTEMBER, 2021.

A. K. NDUNG'U

JUDGE