REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 1048 of 2007

DR. PRAXADES OKUTOYI …….....…….. APPELLANT

VERSUS

THE MEDICAL PRACTITIONERS AND DENTISTS BOARD...RESPONDENT

An appeal from the Ruling of the Medical Practitioners and Dentists Board sitting at Nairobi dated the 29th day of November, 2007

IN

MEDICAL PRACTITIONERS AND DENTISTS BOARD P. I. C. CASE NO. 4 OF 2005

BETWEEN

DR. JOHN ONDEKO (on behalf of Jacob Ondeko)..COMPLAINANT

AND

DR CHIMMY OMAMO OLENDE ……..…… 1ST RESPONDENT

DR. PRAXADES OKUTOYI ……. 2ND RESPONDENT

NAIROBI HOSPITAL ……...…..... 3RD RESPONDENT

RULING

By its Ruling handed down the 29th November, 2007, the Medical Practitioners and Dentists Board (hereinafter "the Board") suspended the Appellant/Applicant, Dr Praxades Okutoyi (hereinafter "the Applicant") from practicing medicine and as a paediatric anaesthetist, for a period of three years, and ordered that she undergo remedial training before being re-admitted to practice.

The above Ruling, which is now the subject of challenge in this appeal, followed an inquiry initiated by the Board pursuant to a complaint by Dr John N. Ondeko, whose young 17 year old son, suffered cardiac arrest and permanent brain damage while in the medical care of the Applicant, among other people. Young Jacob (Dr. Ondeko's son) had been admitted to the Nairobi Hospital on 15th February, 2005 for a simple day surgery to correct his nose structure. Unfortunately he left the hospital with a permanent brain damage.

The Board found the Applicant guilty of "infamous or disgraceful conduct" and suspended her from

practicing medicine for three years. As I stated before, that Ruling (and suspension) is the subject of appeal here. For now, what is before me, is an application to "stay" the Board's Ruling pending the hearing and determination of the Appeal. It is brought under Order 41 Rule 4 the Civil Procedure Rules, and Section 3A of the Civil Procedure Act and is based on 17 grounds stated on the body of the application. Most of these grounds relate essentially to the appeal itself, and are irrelevant to consider at this time. For example, the Applicant states, that the Board's Ruling is unlawful because it is tainted with bias; that the Board misdirected itself in law; that it erred in its findings of facts, and so forth. All these issues go to the merit of the Appeal, and are irrelevant for consideration of this application.

As I stated not too long ago in the case of ***David Mwenje vs Jubilee Insurance Company Ltd*** ***(2005) eKLR*** what I am required to ascertain at this time is whether the Applicant has complied with Order 41 Rule 4. That is the Rule that governs this application and its outcome. It is also the rule that "fetters" my discretion in this matter, as clearly my discretion is not absolute [See ***Visram Ramji Halai vs Thornton Turpin*** ***(1963) Limited*** {***Civil Application No Nairobi 15 of 1990 (U R)***}].

Order 41 Rule 4 (2) of the Civil Procedure Rules states as follows:

"(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

For the Applicant to succeed in this application she must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that she has filed this application without delay; and that she is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of the Rule, and the onus is on the applicant to satisfy all the conditions through her deposition, and not through bold statements from the bar.

Now, let us examine if the Applicant has satisfied all the three conditions outlined above. First, and not necessarily in that order, has this application been made without unreasonable delay?

The Board's Ruling in this case was handed down the 29th November, 2007; the Memorandum of Appeal was filed on 20th December, 2007; and this application was filed on 24th January, 2008, all within reasonable time, and without any undue delay at any stage.

As this is not a money decree, and no financial obligations are involved on either side, the issue of security does not arise.

That leaves us with the only remaining issue to be dealt with: **substantial loss.**

Has the Applicant demonstrated that she will suffer substantial loss if the order for stay is not granted? What indeed, is the definition of "substantial loss" in the context of this case? In the case of a "monetary" decree, "substantial loss" has been seen from a specific prism. This is what I said in the ***David Mwenje*** case (supra):

"Substantial loss" may be demonstrated in various forms, as Platt, J A observed in the leading Court of Appeal authority of ***Kenya***

Ltd vs Benjamin Karuga Kibiru & Others ***(1982 – 88) I KAR 1018***. He said as follows:

"*An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in Order 41, Rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of*

paying damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts."

Although the application for stay in the ***Kenya Shell*** case was based on Rule 5 (2) (b) of the Court of Appeal Rules, Platt, J A observed that:

"*Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."*

Platt, J A held in that case that because there was no evidence of substantial loss and as such loss cannot be "inferred" he would not grant stay of execution.

Hancox, J A, in the same case observed as follows:

"***Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgment no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects".***

Here, at this Court, my brother Judge Mwera, came to same conclusion in ***Glencore Grain Ltd vs Kabansora Millers (H C Milimani 400 of 2002)*** when he observed that:

"***a stay order does not lie as a matter of course because one has appealed. One has to show likelihood of suffering substantial loss in case the order is refused."***

Now, this not being a money decree, I must look elsewhere to determine what constitutes substantial loss.

In his submission before this Court, Prof. Githu Muigai, has argued that:

"***(i) The Applicant stands a grave risk of suffering not just substantial but also irreparable harm, which will vitiate any vindication that may ensue if the appeal is ultimately successful;***

(ii) The Applicant's professional standing, goodwill, credibility and reputation continue to be eroded by negative publicity given to her because of the Ruling;

(iii) The loss of professional standing, goodwill, credibility and reputation brought about by the continued suspension of the Applicant will vitiate any vindication that may come if the appeal is successful. Accordingly, continued suspension of the Applicant will render the appeal nugatory, even if it were to be successful in the end;

(iv) The sensational negative publicity so far accorded to the Applicant both in the print and electronic media will leave an indelible impression in the minds of many Kenyans, which impression may not be erased even by the success of the appeal herein;

(v) The Applicant's professional practice, employment and only source of livelihood have been stopped due to suspension and cancellation of her licenses;

(vi) Further, the country also continues to suffer substantial loss from the illegal conviction and suspension of the Applicant. In particular, there being only three paediatric anaesthetists, the country is forced to rely on the remaining two who cannot meet the high demand for paediatric anaesthetists."

On the other hand, Ms Mwihaki, Counsel for the Respondent, argued that the Applicant had not demonstrated what substantial loss she would suffer if stay was not allowed as she was already gainfully employed at Kenyatta National Hospital, a fact that the Applicant had failed to disclose to this Court; that

the Applicant had withheld material facts from this Court, specifically her previous suspension from practice at the Nairobi Hospital and, therefore, she was not entitled to the Court's discretion; and that on a "balance of convenience", the public interest here should prevail.

Mr Wekesa, Counsel for the Complainant, adopted Ms Mwihaki's submission, and argued strongly that the Applicant had not satisfied all the three requirements of Order 41 Rule 4, and more particularly that the Applicant, who is already employed at Kenyatta National Hospital, will not suffer substantial loss, should stay be denied. Substantial loss, Mr Wekesa argued, applies to the Applicant, and not the country in relation to the Applicant's argument that there were only three paediatric anaesthetists in Kenya, including herself.

So, then, has the applicant demonstrated substantial loss? What constitutes substantial loss in the context of this case?

Prof. Muigai talked of "irreparable harm" to the Applicant's professional standing, credibility and reputation, if stay is not granted. I have difficulty with that argument. Until this appeal is fully determined on merit, the issue of the Applicant's professional standing will remain alive - both in the minds of her professional colleagues, patients and the public. A grant of a Stay Order cannot, and will not change that.

Prof. Muigai next agued that continued suspension of the Applicant will "render her appeal nugatory". This argument would have been valid if this application was made before the court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules. However, Order 41 Rule 4 of the Civil Procedure Rules that apply to this application, has no such criteria. Prof. Muigai's argument that "sensational negative publicity" will hurt the Applicant, is certainly not the reason to grant stay, even if that were true. The negative media publicity, if any, will not just "disappear" if stay is granted. That is a continuing risk that the Applicant faces until this appeal is heard and determined.

Prof. Muigai's argument that **the country** would suffer substantial loss, there being only three paediatric anaesthetists, is certainly not the reason to grant stay. I agree with Mr Wekesa that "substantial loss" here means substantial loss to the Applicant, not the country. In any event, it is highly disputed that there are only three paedriatic anaesthetists in Kenya, and even if that were so, it would be no reason to expose the Applicant to her patients in circumstances where she could be considered a danger to those patients.

And, finally, Prof. Muigai's argument that the Applicant's "only source of livelihood" has been stopped, is probably the most powerful argument, and would certainly constitute "substantial loss" as defined in Order 41 Rule 4. In interpreting this Rule (Order 41 Rule 4) the Courts always attempt to find a happy balance between two competing interests. In the case of a monetary decree, the Courts want to ensure that the funds are available to the successful litigant, and that in the event of an **unsuccessful** appeal such funds are not lost to the other side. That is precisely why the courts would order that the funds be deposited in a neutral account pending determination of the appeal.

Similarly, in a non-monetary decree, the Courts ought to take into account the two conflicting interests – in this case the Applicant's interest to earn her living, and the Respondent's interest to safeguard the public against possible dangers. Ms Mwihaki, Counsel for the Respondents argued that "**the balance of convenience"** tilted in favour of her clients. Although, this is an interesting argument, let me make it clear that "**balance of convenience"** is **not** a principle separate and independent from the usual three principles outlined in Order 41 Rule 4. Just as the Court of Appeal clarified this point in the case of ***Reliance Bank Limited vs Norlake Investments Ltd (C. A. 93 of 2002, Nairobi)***, I do so here that in considering "substantial loss" the Court is bound to consider the conflicting claims of both sides. In the Reliance Bank case, the Court of Appeal, in considering an application under its Rule 5 (2) (b), stated:

"***All these are legitimate factors for the Court to take into account when it is considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted. Whether one designates it as "a balance of convenience" or "weighing the claims of both sides" it is clear from the decisions of the Court that they do not constitute a distinct and separate head***

from the two principles applied by the Court, but rather they are some of the legitimate elements which the Court has to take into account when considering the second principle, namely whether an appeal or an intended appeal would be rendered nugatory if a stay of execution or an injunction, as the case may be, is not granted."

In my view, the public interest here, as expounded by the Respondent, far outweighs that of the Applicant, and must be given preference. Some sixteen eminent members of the Respondent Board, who unanimously ruled to suspend the Applicant, also called for the Applicant to undergo **remedial training**, which the Applicant has failed to do. In the absence of that it would not be appropriate or responsible on the part of this Court to lift this suspension temporarily as such an action could seriously compromise the interests of the public. I reject the Applicant's argument that because she had been allowed to practice for some two years since this incident took place, and before the Ruling suspending her was delivered, that she should be so allowed to continue her practice until this appeal is determined. That would be taking a chance. The fact that nothing wrong had happened in the two years preceding the Board decision, does not mean that nothing wrong would happen in the future. If the Applicant had indeed undergone the remedial training ordered and was working under supervision, I may have thought differently. However, for now, I am satisfied that the public interest must outweigh that of the Applicant.

All in all, I am of the view that the Applicant has not satisfied the requirements for the grant of an Order for stay of execution under Order 41 Rule 4, and I disallow the application with costs to the Respondent. However, this is an appropriate case that should be heard on priority, and I direct that the hearing dates be taken at the Registry on priority basis.

Dated and delivered at Nairobi this 11th day of March, 2008.

ALNASHIR VISRAM

JUDGE