Mombasa Hospital v Karuga & 2 others (Civil Appeal 216 of 2021) [2023] KEHC 61 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEHC 61 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 216 OF 2021

OA SEWE, J

JANUARY 18, 2023

BETWEEN

MOMBASA HOSPITAL ..... APPELLANT

AND

NAOMI MWIHAKI KARUGA ..... 1ST RESPONDENT

KT KAGUTA ..... 2ND RESPONDENT

ELIZABETH AWIMBO ..... 3RD RESPONDENT

RULING

1. The appellant was the 1st respondent in a disciplinary matter before the disciplinary and ethics committee of the Kenya Medical Practitioners and Dentists Council (hereinafter "KMPDC"). The said complaint was filed by M/s John Mburu & Company Advocates on behalf of Naomi Karuga against the appellant (as 1st respondent), Dr Kujoga T Kaguta (as 2nd respondent) and Dr Elizabeth Awimbo (as 3rd respondent). Upon listening to the parties to the complaint the committee delivered its ruling on October 21, 2021, whereby it issued a raft of orders; including an order for payment of Kshs 350,000/= to the KMPDC by the Mombasa hospital and Dr Kujoga T Kaguta within 30 days of the date of ruling. The committee further ordered that, in the event of non-compliance, the KMPDC would be at liberty to suspend, withdraw or cancel the practice licence for Dr Kujoga T Kaguta as well as the operating licence for the Mombasa hospital.

2. Being dissatisfied with the decision of the committee, which was approved by the KMPDC, the appellant filed this appeal on November 16, 2021 seeking that the ruling and orders of the KMPDC and its ethics committee be set aside; and that the costs of the appeal be awarded to the appellant. Concomitantly, the appellant filed the notice of motion dated November 12, 2021 seeking for orders that:

   (a) Spent

(b) Spent

(c) There be a stay of execution of the ruling and orders made on October 21, 2021 against the appellant in DC No 59 of 2020 by the disciplinary and ethics committee of the KMPDC pending the hearing and determination of the appeal.

(d) The costs of the application be provided for.

3. That application is the subject of this ruling. It was filed pursuant to section 20(9) of the *Medical Practitioners and Dentists Act*, chapter 253 of the Laws of Kenya as well as order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules, 2010* on the basic ground that the appellant had been threatened with closure with effect from November 21, 2021 and yet it has an arguable appeal with overwhelming chances of success. The application was supported by the affidavit of the appellant's director of nursing, Ms Salina Ambitho, sworn on November 12, 2021, in which she reiterated that the appellant was fined Kshs 350,000/= jointly with the 2nd respondent and risked closure unless stay was granted. Ms Ambitho further averred that the appellant would suffer irreparable loss and damage if the orders of the committee were to be enforced before the hearing and determination of its appeal. She believed that the appellant has an arguable appeal with overwhelming chances of success and added that the appellant is ready to comply with any such conditions as may be imposed by the court.

4. In response to the application dated November 12, 2021, the 1st respondent, Naomi Mwihaki Karuga, filed grounds of opposition dated December 1, 2021, contending that:

(a) The application has been brought with unreasonable delay;

(b) The applicant has not established that the intended appeal has reasonable chances of success;

(c) The applicant has not established any substantial loss it stands to suffer should the ruling of the KMPDC and its ethics committee dated October 21, 2021 be executed;

(d) The applicant has not provided any security for the due performance of the ruling of the KMPDC and its committee;

(e) The application is vexatious, frivolous and an abuse of the court process.

5. A few days after the filing of the instant application, the 2nd respondent, Dr Kujoga T Kaguta filed Mombasa High Court Civil Appeal No 223 of 2021 against Naomi Mwihaki Karuga (as 1st respondent), the Mombasa hospital (as 2nd respondent) and Dr Elizabeth Awimbo (as 3rd respondent). He likewise impugned the ruling and orders of KMPDC's disciplinary committee made on October 21, 2021 in DC No 59 of 2020, and prayed that it be set aside. Dr Kaguta also filed a notice of motion dated November 15, 2021 seeking the same orders of stay as the appellant herein, pending the hearing and determination of his appeal. Consequently, and at the instance of the parties, directions were given on February 6, 2022 in HCCA No 223 of 2021 that the two cases be consolidated and that the two applications be canvassed simultaneously by way of written submissions.

6. Accordingly, Mr Omwenga for the appellant filed his written submissions in respect of both applications on March 9, 2022, thereby proposing the following issues for determination:

(a) Whether the court has the jurisdiction to grant stay of execution and determine the appeal;

(b) Whether the appellant has met the threshold for grant of the orders sought by it;

(c) Whether the appellant's application should be allowed.

7. Mr Omwenga relied on section 20(9) of the *Medical Practitioners and Dentists Act* and submitted that it provides for appeal by persons aggrieved by the decision of the KMPDC; and therefore that the court has the requisite jurisdiction to handle the application as well as the appeal. As to whether the appellant has satisfied the conditions for stay, counsel made reference to order 42 rule 6(2) of the *Civil Procedure Rules* and the case of *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365 to support his assertion that the appellant has made out a good case for stay of execution by demonstrating that it was condemned unheard by the disciplinary and ethics committee in contravention of section 20(3) of the *Medical Practitioners and Dentists Act* as well as the principles of natural justice.

8. It was further the submission of Mr Omwenga that the right to a fair hearing is a fundamental right, and therefore its denial amounts to a sufficient cause to warrant stay of execution. He relied on *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR and the *Hon Attorney General v the Law Society of Kenya & Another*, Civil Application No 133 of 2011 as to what amounts to sufficient cause. He added that the appellant has proposed to furnish security in the sum of Kshs 75,000/= being half of the decretal sum awarded by the disciplinary and ethics committee of KMPDC; and that the application was filed without undue delay.

9. On behalf of Dr K T Kaguta (the 2nd respondent herein and the appellant in HCCA No 223 of 2021) Ms Mboce filed her written submissions on March 23, 2022. She started off by stating that the 2nd respondent is a gynaeologist who has built his reputation over a period of 38 years, and that by his application dated November 15, 2021 he seeks to "...protect it from crumbling at the altar of an irregular, unfair and unprocedural process..." Thus, Ms Mboce proposed the following issues for consideration in respect of the two applications:

   (a) Whether the court has jurisdiction to hear and determine the application and the appeal.

   (b) Whether the appellants have met the test for grant of the orders sought.

10. Ms Mboce submitted that the court has the jurisdiction to hear and determine both applications as well as the appeals. She relied on section 20(9) of the *Medical Practitioners and Dentists Act*, and pointed out that since the impugned decision was made under subsection (6) of section 20 of the Act, the appeals are properly before the court. She also pointed out the appeals were filed within the 30 days' period provided for in the aforementioned provision of the law; and therefore were filed without unreasonable delay.

11. As to whether the appellants have met the conditions for stay as stipulated in order 42 rule 6(2) of the *Civil Procedure Rules*, Ms Mboce submitted that substantial loss is a relative term that can only be assessed from the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted. She urged the court to take judicial notice of the fact that the practice of medicine, and specifically gynaecology, is extremely sensitive and any disruption through events such as reputational drain, suspension, withdrawal or cancellation of licence often entails irreparable loss.

12. In addition to the foregoing, Ms Mboce submitted that the 2nd respondent's appeal is arguable as it raises fundamental concerns of procedural and substantive errors, unfairness and impropriety with which the proceedings of the committee were conducted; which in themselves amount to violation of articles 27, 47 and 50 of the *Constitution*. She therefore urged the court to allow the applications and grant stay as prayed.

13. The issue of jurisdiction having been raised by, Naomi Mwihaki Karuga (the 1st respondent) in her grounds of opposition filed in HCCA No 223 of 2021, it is imperative that it be tackled as a preliminary issue. The 1st respondent contended that this court lacks jurisdiction to hear and determine the appeal

as the same was filed in disregard of section 20(9) of the *Medical Practitioners and Dentists Act*; yet that provision is plain that:

> " A person aggrieved by a decision of the council made under subsection (6) may, within thirty days from the date of the decision of the council, appeal to the High Court."

14. In the same vein, subsection (6) provides that:

> " Where after an inquiry, the council determines that a person in guilty, the council may—
>
> a. issue a caution or reprimand in writing;
>
> b. direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;
>
> c. direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;
>
> d. suspend, withdraw or cancel the practicing licence of a medical practitioner or dentist for a period not exceeding twelve months;
>
> e. suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;
>
> f. permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or
>
> g. in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the council deems appropriate in the circumstance."

15. Hence, a decision having been made by the disciplinary and ethics committee of the KMPDC pursuant to section 20(6) of the *Medical Practitioners and Dentists Act*, the appellants were within their rights to appeal to this court; which appeal was evidently filed within the 30 days' window. In the premises, the 1st respondent's objection on jurisdiction is, in my view, entirely misconceived. I therefore have no hesitation in rejecting it, which I hereby do.

16. That said, the only issue for consideration is whether the appellants have made out a good case to warrant the grant of an order of stay pending appeal.

It is now trite that a successful litigant is entitled to the fruits of his litigation; and therefore that, barring sufficient cause, no impediments should be placed in the way of a decree holder who is simply seeking to reap the fruits of his/her Judgment. In *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 this principle was aptly expressed thus:

> " The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

17. The foregoing notwithstanding, order 42 rule 6(1) of the *Civil Procedure Rules*, recognizes that:

> " ... the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."

18. Thus, there is no gainsaying that the court has the discretion to grant stay of execution in appropriate cases, should a justification be made to warrant the exercise of such discretion. And, to guide the exercise of discretion in this regard, order 42 rule 6(2) of the *Civil Procedure Rules*, stipulates that:

(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."

19. In addition to the prerequisites set out in order 42 rule 2 of the *Civil Procedure Rules*, the Court of Appeal explained, in *Butt v Rent Restriction Tribunal* [1982] KLR 417, that:

> " It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way as not to prevent the appeal, if successful from being nugatory...The court will grant stay where special circumstances of the case so require..." (also see Vishram Ravji v Thornton & Turpin, supra),

20. From what can be gleaned from the record, there is no doubt that the two applications were filed without undue delay, noting that they were both filed within the 30 days' period provided for in section 20(9) of the Act and before the expiry of the period given by the KMPDC in the impugned ruling. The appellants have also indicated their readiness to provide such security as the court may order. Accordingly, the only issue to delve into is whether the appellants have shown that they stand to suffer substantial loss unless stay is granted in the manner sought by them. Indeed, in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416, the Court of Appeal held:

> " It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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".

21. Serious allegations have been made in the appellant's grounds of appeal, including violation of the *Constitution* by the KMPDC and its disciplinary and ethics committee. The appellant averred, at paragraph 8 of its supporting affidavit that it is bound to lose substantially should the orders sought not be granted as patients and staff will be highly prejudiced. In the same vein, the 2nd respondent adverted

to the sensitivity of the practice of medicine and averred that the loss he stands to suffer is irremediable. I am, in the circumstances convinced that the appellants have shown that they stand to suffer substantial loss should the decision of the KMPDC be executed before their appeals are heard and determined.

22. In the premises, I find merit in the two applications dated November 12, 2021 and November 15, 2021. The same are hereby allowed and orders granted as hereunder:

    (a) That stay of execution of the ruling and orders made on October 21, 2021 against the appellant in DC No 59 of 2020 by the disciplinary and ethics committee of the KMPDC be and is hereby granted pending the hearing and determination of the consolidated appeals.

    (b) This ruling to apply in like manner to the 2nd respondent's application dated November 15, 2021 in Mombasa HCCA No 223 of 2021.

    (c) That the costs of the two applications be costs in the appeals.

    It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JANUARY, 2023.

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OLGA SEWE

JUDGE