



St. Francis Community Hospital v GCB ((Suing as a Brother and Next Friend of RBK - Patient)) (Civil Appeal E408 of 2022) [2023] KEHC 3859 (KLR) (Civ) (3 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3859 (KLR)

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

CIVIL

CIVIL APPEAL E408 OF 2022

JN MULWA, J

MAY 3, 2023

BETWEEN

ST. FRANCIS COMMUNITY HOSPITAL APPLICANT

AND

GCB RESPONDENT

(SUING AS A BROTHER AND NEXT FRIEND OF RBK - PATIENT)

RULING

1. Before the court is a Notice of Motion Application dated 20th June 2022 brought under Article 48 and 50 of the *Constitution* of Kenya, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*; and, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. The Applicant seeks the following Orders:
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to stay the execution of the Ruling and all consequential Orders issued on 10th June 2022 by Hon. H. M. Nyaga (CM) in CMCC No. E1066 of 2022 – *GCB (Suing as a brother and next friend of RBK (Patient)) v St. Francis Community Hospital*, pending the hearing and determination of the Appeal.
 4. That the costs of this application be provided for.
2. The application is based on the grounds set out on its face as well as the Supporting and Further Affidavits of Geoffrey Ngisa, an Administrator of the Applicant Hospital.
3. The Respondent responded through a Replying Affidavit sworn on 15th July 2022.



4. The court has considered the parties respective affidavits in support of and in opposition of the application as well as their respective written submissions. The only issue is whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.
5. The conditions necessary for the grant of stay of execution pending appeal are laid out in Order 42 Rule 6(1) & (2) of the [Civil Procedure Rules](#) which provides that:

“6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, 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.
- (2) No order for stay of execution shall be made under sub-rule (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.”

6. From the above provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate: that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and, must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
7. It the impugned Ruling of 10th June 2022, the lower court ordered the Applicant to immediately surrender and/ or release to the Respondent a certified copy of the original unfiltered medical file of the Respondent’s brother, pending the hearing and determination of the suit in the lower court. The Applicant does not dispute the Respondent’s averment that his brother walked into its facility for a left upper limb surgery and has been lying unconscious therein since the same was conducted on 23rd September 2021. Further, the Respondent does not deny that it is in possession of said medical file but claims that the documents therein are highly sensitive, highly classified and highly confidential/ privileged and thus cannot be released to the Respondent as he had no locus standi to file the suit in the trial court.



8. As regards substantial loss, the Applicant in its written submissions contends that if it hands over the patient's original file to the Respondent, it may not be able to recover from the Respondent the accruing medical bill which stood at Kshs. 3,595,585/- as at the time of filing its submissions, should the appeal succeed. The end result in the Applicant's view is that its appeal would be rendered nugatory if that was to happen.
9. On the other hand, the Respondent avers that the Applicant has not demonstrated the substantial loss it will suffer in the absence of the stay order sought. He avers that the Patient is in critical condition and his health keeps deteriorating every day as evidenced by the annexed current photograph marked "GCB-10". The Respondent is wary that the Applicant seems to be only interested on how its huge medical fees will be settled to the detriment of the patient health and the right to life. To prove this, the Respondent has annexed a letter dated 6th July 2022 (annexture GCB-12) from the Applicant's advocates stating that the Applicant is willing to release the original medical records/file on condition that the patient is immediately and simultaneously removed from their facility.
10. Substantial loss is the cornerstone of any application for stay of execution. An applicant must establish what he stands to lose in case the stay sought is not granted and the Appeal happens to succeed. In the case of *James Wangalwa & Another v Agnes Naliaka* [2012] eKLR, Gikonyo J stated that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail..."
11. In *Mukuma v Abuoga* (1988) KLR 645, the Court of Appeal stated that:

"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."
12. In the instant case, it is the court's considered view that the Applicant has not demonstrated the substantial loss it stands to suffer in the absence of a stay of execution order. The Applicant's contention that it may not be able to recover the accrued medical bill from the Respondent in case it releases the medical file as ordered does not arise as it has admitted that the patient is still in its facility and under its care. In any event, accrued medical bills are civil debts which can lawfully be recovered through civil proceedings.
13. As regards the second limb, there is no doubt that the application was filed without undue delay. The Ruling was delivered on 10th June 2022 and the application was filed 10 days later on 20th June 2022.
14. On the third limb, it is evident that the subject ruling does not involve a money decree and thus the Applicant may not be required to deposit security. However, the Applicant has not given an undertaking to meet any condition(s) that the court may impose as pre-requisite for the grant of stay pending appeal. This condition has therefore not been satisfied as well.
15. For the foregoing, the court finds that the Applicant's application dated 20th June 2022 lacks merit. The same is hereby dismissed with costs to the Respondent.



Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY, 2023.

JANET MULWA

JUDGE.

