



**Onyancha v College of Surgeons of East Central and Southern Africa (COSECSA) & 11 others
(Constitutional Petition E015 of 2023) [2023] KEHC 22009 (KLR) (4 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CONSTITUTIONAL PETITION E015 OF 2023**

SM MOHOCHI, J

SEPTEMBER 4, 2023

**IN THE MATTER OF ALLEGED ILLEGAL AND IRREGULAR
SUSPENSION OF DR. ABEL ONYANCHA APIMA FROM COSECSA
SURGERY TRAINING PROGRAMME AND MCS COSECSA
EXAMINATION**

AND

**IN THE MATTER OF SECTION 9 OF THE FAIR ADMINISTRATION
ACTION ACT NUMBER 4 OF 2015**

AND

**IN THE MATTER OF RULE 4,10,11, 13 OF THE CONSTITUTION OF
KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL FREEDOMS) HIGH COURT PRACTICE AND
PROCEDURE RULES 2013**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3,10,
19, 20,23 28,41,43,47,50, 159,165,258 AND 259 OF THE CONSTITUTION
OF KENYA 2010**

BETWEEN

DR. APIMA ABEL ONYANCHA PETITIONER

AND

**COLLEGE OF SURGEONS OF EAST CENTRAL AND SOUTHERN AFRICA
(COSECSA) 1ST RESPONDENT**



DR. PETER ODUOR	2 ND RESPONDENT
DR. SAMUEL WANJARA WACHERA	3 RD RESPONDENT
DR. SITIMA ORUKO MICHEAL	4 TH RESPONDENT
DR. GITHIRI CHRISTINE	5 TH RESPONDENT
DR ONDARI NYARIBARI JOSHUA	6 TH RESPONDENT
MUCHERU ELISHA	7 TH RESPONDENT
DR. MATHENGE NDUHIU	8 TH RESPONDENT
DR. KAREN MBAABU	9 TH RESPONDENT
NAKURU TEACHING AND REFERRAL HOSPITAL	10 TH RESPONDENT
NAKURU COUNTY GOVERNMENT	11 TH RESPONDENT
COUNTY ATTORNEY	12 TH RESPONDENT

RULING

1. Dr Apima Abel Onyancha- the applicant/petitioner, was on the July 10, 2023 suspended for three (3) months from the 1st respondent’s program *vide* a letter HRAC/PGH/Nku/Dis/Vol.1/2023/3 signed by the 2nd respondent.
2. It is this suspension following a disciplinary committee hearing, that has given rise to a lengthy constitutional petition as filed, plus an interlocutory application for injunctive reliefs, to suspend and stay the effect of the suspension and thus enable the petitioner undertake his examination commencing on the September 6, 2023.
3. Before me is a notice of motion dated July 13, 2023, filed pursuant to articles 1, 2, 3, 10, 22, 23, 47,159, 161,258 & 259 of the Constitution of Kenya, sections 1A & 3A of the Civil Procedure Act cap 21, section 9 of the Fair Administrative Action Act, 2015 and all other enabling inherent powers of the court and provisions of the law) seeking the following seven (7) prayers;
 - i. That the application be certified as urgent and service be dispensed with in the first instance and be heard ex parte.....spent
 - ii. That considering the likelihood of the petitioner wasting/missing a whole year and its implications, the extreme urgency of this application and in consideration of rules of natural justice an interim order be issued and hereby temporal suspending/staying the suspension of the petitioner from COSECSA programme as contained in any document and/or in a with reference dated letter 2023 July HRAC/PGH/NKU/DISP/VOL.1/2023 pending determination of this application inter parties and thereafter pending the hearing and determination of this petition or such orders of the court may issue.
 - iii. That, pending the hearing, determination and final disposal of this application, a temporary order of injunction be and is hereby issued suspending/staying the suspension of the petitioner from COSECSA programme as contained in any document and/or in a letter dated July 10, 2023 with reference No HRAC/PGH/NKU/DISP/VOL.1/2023/3 or such orders of the court may issue SPENT



- iv. That pending the hearing, determination and final disposal of this petition, an order of injunction be and is hereby issued suspending/staying the suspension of the petitioner from COSECESA programme as contained in any document and/or in a letter dated July 10, 2023 with reference no.HRAC/PGH/NKU/DISP/VOL.1/2023/3 or such orders of the court may issue
 - v. That pending the hearing, determination and final disposal of this application and petition, a temporary order of injunction be issued prohibiting the respondents either by themselves, their agents and/or any other person(s) whatsoever from acting and/or giving effect to any document or the suspension letter dated July 10, 2023, with reference HRAAC/PGH/NKU/DISP/VOL. 1/2023/3 purporting to suspend the petitioner from COSECESA programme.
 - vi. That in the alternative to the above the court be pleased to order that the MCS COSECESA examinations taking place on September 9, 2023 or any other date in this 2023 cohort be put on hold until this application and petition are heard and determined.
 - vii. Anyother order of modification of his prayers as the honorable court may deem fit to grant for purposes of attaining justice for the petitioner.
 - viii. Cost in the cause.
4. The applicant/petitioner’s application is based on forty-three (43) grounds which to me would not constitute solid grounds but rather assertions. The court summarizes his grounds as follows;
- a. That he has been illegally, irregularly against all rules of natural justice been suspended from his COSECESA surgery training program un-procedurally and unheard.
 - b. That his suspension comes two months to him sitting an examination starting on the September 6, 2023.
 - c. That his fair administrative rights were not observed prior to and leading to the impugned suspension and that unless the court intervenes the applicant is at risk of losing, one (1) year and two (2) months of his study.
5. The matter came up under certificate of urgency dated the July 13, 2023 and the court directed and ordered on the July 17, 2023 as follows;
- i. Temporary conservatory order of stay was issued, restraining the respondent’s, their agents, servants, employees and assigns whatsoever from implementing or otherwise effecting the suspension of the petitioner as is contained in the letter dated July 10, 2023, referenced HRAC/PGH/NKU/DISP/VOL.1/2023 pending hearing and determination of this application;
 - ii. The applicant/petitioner was to serve the application, upon the respondents within the three (3) days from the date of the order and not later than July 20, 2023; while the respondent was to file a written response to the application, within seven (7) days of service upon them of the application, not later than July 27, 2023;
 - iii. The applicant/petitioner was to file and serve his written submissions (maximum 5 pages, within seven (7) days of service upon them of the respondents written response and not later than August 3, 2023;



- iv. The respondents were to file their written submissions (maximum 5 pages), within seven (7) days of service upon them of the applicant written submission and not later than August 3, 2023.
6. By the time of this ruling, the applicant/petitioner had not filed his written submissions in support of his case, the court has notwithstanding the absence of written submissions by the applicant, considered the application. The court has equally considered the replying affidavit by Dr Peter Oduor the 2nd respondent dated July 27, 2023, the written submissions filed by the 1st, 2nd, 5th, 8th and 9th respondents, filed on their behalf by Githui Advocates LLP on August 7, 2023, and the written submissions dated August 11, 2023 filed by the County Attorney on behalf of the 3rd, 4th, 6th, 7th, 10th, 11th and 12th respondents.
7. The application is opposed by the 1st, 2nd, 5th, 8th and 9th respondents arguing that the petition and application is premature for not exhausting all other available remedies, that the application is fatal incompetent for seeking reliefs not provided for in law, that the 1st respondent enjoys diplomatic immunity (a preliminary objection) and that the application seeks injunctive reliefs rather than conservatory orders thereby rendering the entire motion incompetent.
8. The application is also opposed by the 3rd, 4th, 6th, 7th, 10th, 11th and 12th respondents who contend that the application is bereft of merit for failing to meet and satisfy the old age test as established in the *Giella v Cassman Brown* case that the petitioner has not demonstrated to the court a *prima facie* case with probability of success; and that if the orders sought are declined he shall suffer irreparable injury that cannot adequately be compensated by an award of damages;
9. The onus was upon the applicant/petitioner to first meet the threshold set in *Giella v Cassman Brown case*, that is the three sequential requirements of first establishing a *prima facie* case with a probability of success; secondly, showing that damages would not be an adequate remedy; and, thirdly, demonstrating that the balance of convenience tilts in his favour. Thereafter, he had to go further and meet the further threshold set in the *Munya* decision by showing that the public interest element was also in his favour.

Determination

10. I will deal with the application as well as the preliminary objection together, the invocation of section 9 of the *Privileges and Immunity Act* by the 1st respondent on a matter clearly over its role of administration of examination and accreditation of training facilities cannot pass, I am unpersuaded that the 1st respondent a creature of a treaty, would in its core operation be ventilated from any civil action. In fact as a human rights court, the fact that the applicant/petitioner and the 1st respondent are in a contractual relation would negate such an assertion.
11. The applicant/petitioner is entitled to the enforcement of his fundamental rights where a breach is alleged to have occurred or is continuing and that the 1st respondent is in an active and direct partnership with public bodies in the 10th and 11th respondents that are subject to the *constitution* and the law so without belaboring the 1st respondent is properly enjoined and cannot invoke diplomatic immunity under these circumstances the purpose of the immunities conferred is not intended to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions.
12. This court finds and concurs with the respondents as submitted that the only issue for determination in this application is whether an injunction can issue in the manner prayed for.
13. To begin with, the matters herein are based on alleged violation of the constitutional rights of the petitioner under article 40(2) of the *Constitution*. The law is clear that one cannot seek injunctive



relief through an application, if the relief is not part of what is sought in the petition. In matters to do with constitutional petitions, what is normally sought are in the nature of conservatory orders. This is because in constitutional petitions, the Civil Procedure Rules do not apply. Even the threshold required in injunctive orders under the Civil Procedure is not what is required in constitutional petitions.

14. Injunction is an equitable remedy derived from common law and the same cannot be sought for or obtained in a constitutional petition. I am however unpersuaded that just by seeking misplaced reliefs the motion ought to be dismissed and that I believe the court may grant appropriate reliefs which would include conservatory orders and structural interdicts even where they have not been expressly sought.

15. In civil application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR, a two bench of the Supreme Court judges stated as follows on conservatory orders:

“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 stay 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 applicant’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”.

16. In the case of Centre for Rights Education and Awareness (CREW) & 7 others v Attorney General [2011] eKLR, Justice Musinga (as he then was) stated as follows: -

“At this stage a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with likelihood of success and that unless the court grants the conservatory order there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution”.

17. It is in light of the above decisions that I will seek to determine whether the petitioner deserves any conservatory orders. The petitioner was expected to demonstrate that he has a *prima facie* case with probability of success. A look at the petitioner’s petition shows that he is basically seeking judicial review orders seeking to quash the decision of the disciplinary committee, he contests the legality of the suspension, argues he was not notified before the decision was delivered and that the same is irrational and illegal.

18. Upon considering the application and supporting affidavit by the applicant/petitioner a *prima facie* case is laid out on the legality and constitutionality of the suspension and if the same would constitute an infringement of any of his fundamental rights, which issue shall be answered in the determination of the petition.

19. The applicant/petitioner has not in any way demonstrated the eminent danger of prejudice he shall suffer if the conservatory order is not issued in fact the impugned disciplinary process, no rules of procedure were showcased and that constitutional guarantees would demand of the same.

20. The reliefs and remedies being sought in the application would appear reliefs available in judicial review procedure which in this instance are unavailable.



21. The ninety (90) days suspension does not appear inordinate and would have been best challenged in a judicial review application
22. The applicant/petitioner has not in any way demonstrated that that damages would not be an adequate remedy; and, that the balance of convenience tilts in his favour. In the circumstances, I therefore find that the petitioner's application lacks merit. The same is hereby dismissed with parties to bear their own cost.
23. The issue of joinder or misjoinder of any of the respondent to be addressed in the hearing and determination of the substantive petition.
24. The interlocutory orders dated July 17, 2023, are hereby vacated, the petitioner is directed to set down the petition for a mention for direction of its hearing and disposal.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 4TH SEPTEMBER 2023.

Mohochi S.M

JUDGE

