



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPLICATION NO. 415 OF 2018

NAIROBI WEST HOSPITAL LIMITED.....APPLICANT

VERSUS

JOSEPH KARIHA1ST RESPONDENT

TEACHERS SERVICE COMMISSION2ND RESPONDENT

RULING

1. Nairobi West Hospital, the applicant herein, took out the motion dated 1st August 2018 in which it sought for the following orders:

- 1. The honourable court be pleased to certify this application as urgent and to be heard on a priority basis with service thereof being dispensed with in the first instance.**
- 2. The honourable court be pleased to order and direct the 1st and 2nd respondents herein jointly and or severally to accept the discharge of G M from the applicant's premises for home based care within fourteen (14) days and or such other period as the honourable court may deem fit and just.**
- 3. ALTERNATIVELY AND WITHOUT PREJUDICE TO THE FOREGOING, the honourable court be pleased to authorize and accordingly order and direct that G M be transferred from the applicant's premises for referral purposes to KENYATTA NATIONAL HOSPITAL and or any other public hospital as the honourable court may deem fit and just.**
- 4. The honourable court be pleased to make and or grant such other and or further order(s) as it may in the interest of justice deem expedient and or necessary.**
- 5. That the cost of this application be provided for.**

2. The aforesaid motion is supported by the affidavit of Michelle Mahaga and the supplementary affidavit of Dr. Andrew Kanyi Gachii. When served, **Joseph Kariha**, the 1st respondent filed a replying and a further affidavit plus a notice of preliminary objection to oppose the motion while **Teacher Service Commission**, the 2nd respondent filed a replying affidavit of Josphine Maundu and grounds of opposition too to resist the motion.

3. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions. One issue which stands out is the preliminary issue raised by both respondents. This court feels obliged to first determine the preliminary objection before determining the motion on its merits.

4. It is the submissions of the respondents that there is no competent suit before this court in which the current motion is premised. It is also the submission of the 1st respondent that the reliefs sought in the application are substantive in nature and as such cannot be granted by way of a miscellaneous application.

5. It is the submission of the plaintiff/applicant that this suit is properly before this court pursuant to the provisions of Section 89 of the Civil Procedure Act. It is argued that the aforesaid provision provides for the institution of suits by way of miscellaneous proceedings. The applicant further stated that this suit falls within the definition of a 'suit' given under Section 2 of the Civil Procedure Act that is to mean

“All civil proceedings commenced in a any manner prescribed.” The applicant contended that the assertion by the respondents that there is no proper suit before this court for determination is unfounded.

6. In response to the respondents’ argument that the reliefs sought in the application are substantive in nature and cannot be granted by the court in a miscellaneous application, the applicant is of the submission that the preliminary objection does not come within the definition given in **Mukira Biscuits Manufacturing Co. Ltd =vs= Westend Distributors Ltd (1969) E.A 696**. The applicant further argued that the facts pleaded are not admitted by the respondents, therefore there is need for the court to consider the matter and ascertain the correct facts. This court was urged to find that this is a matter that can be properly determined by the preliminary objection.

7. Having considered the grounds put forward in support of the preliminary objection and having considered the rival submissions, it is not in dispute that amongst the orders sought in the application, is an order of discharge against the wife of the 1st respondent. In my view this is a substantive order which for all intents and purposes cannot be issued through a miscellaneous application.

8. A perusal of Order 3 rule 1 of the Civil Procedure Rules will reveal that suits may be commenced by way of a **plaint**, a **petition** and or **originating summons** which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed.

9. With respect, I agree with the 1st respondent’s submission that the application raises constitutional issues which relate to the right to life and healthcare which form part of the Social Economic Rights under Articles 26 and 46 of the Constitution of Kenya, 2010. It is apparent from the arguments of the 1st respondent that one of the issues which cannot be determined summarily is whether the order sought is to the best interest of the patient. It has been argued that the grant of the order of discharge is tantamount to condemning the patient to death.

10. In the end, I find the preliminary objection to be meritorious. I have purposely avoided to determine the application on its merits because I do not intend to prejudice the applicant’s right to pursue its rights and have the same substantively determined.

11. Consequently, the preliminary objection is upheld and this suit is ordered struck out. In the circumstances of this case, I think a fair order on costs is to order which I hereby do that each part bears its own costs.

Dated, Signed and Delivered in open court this 14th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent