



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 562 OF 2012**

**BETWEEN**

**MILICENT AWUOR OМУYA alias**

**M A.....1<sup>ST</sup> PETITIONER**

**M AO .....2<sup>ND</sup> PETITIONER**

**AND**

**THE HONOURABLE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**MINISTER FOR LOCAL GOVERNMENT .....2<sup>ND</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI .....3<sup>RD</sup> RESPONDENT**

**MINISTER FOR MEDICAL SERVICES .....4<sup>TH</sup> RESPONDENT**

**PUMWANI MATERNITY HOSPITAL .....5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. On 7<sup>th</sup> December 2012, the petitioners filed the present suit against the respondents alleging violations of several of their constitutional rights guaranteed under the Constitution by the respondents. The violations were alleged to have occurred following the detention of the petitioners at the Pumwani Maternity Hospital, the 5<sup>th</sup> respondent. In its decision dated 7<sup>th</sup> September, 2015, this Court granted orders as follows:

1. *I declare that the detention of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners by the 5<sup>th</sup> respondent was arbitrary and unlawful;*
2. *I declare that the act of arbitrary and unlawful detention in a health care facility is a violation of the constitutional and human rights standards under the Constitution, as well as under international conventions and treaties that Kenya subscribes to;*

3. ***I declare that the Kenyan Government must take the necessary steps to protect all patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations;***
4. ***I declare that the conduct of staff of the 5<sup>th</sup> Respondent against the petitioners before and during their detention constitutes an infringement of the petitioners' fundamental rights and freedoms as set out in Articles 27(4), 28, 29 (a-d, f), 39(1, 3), 43(1[a], 2-3), 45(1), and 53(d) of the Constitution;***
5. ***I direct that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents will develop clear guidelines and procedures for implementing the waiver system in all public hospitals;***
6. ***I direct that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents take the necessary administrative, legislative, and policy measures to eradicate the practice of detaining patients who cannot pay their medical bills.***

2. On the question of damages, this Court made the following orders:

- i. ***To the 1<sup>st</sup> petitioner, the sum of Kshs 1,500,000.00;***
- ii. ***To the 2<sup>nd</sup> petitioner, the sum of Kshs 500,000.00.***

3. I also granted to the petitioners the costs of the petition as well as interest on costs and damages from the date of the judgment until payment in full.

4. The 3<sup>rd</sup> and 5<sup>th</sup> respondents then filed an application brought by way of Notice of Motion dated 3<sup>rd</sup> November, 2015 in which they sought the following orders:

- a. ***This Honourable Court be pleased to order stay of execution of the Judgment and Decree delivered herein on 17<sup>th</sup> September, 2015 pending the hearing and determination of this Application.***
- b. ***This Honourable Court be pleased to order stay of execution of the Judgment and Decree delivered herein on 17<sup>th</sup> September, 2015 pending the hearing and determination of the 3<sup>rd</sup> Respondents intended Appeal.***
- c. ***The costs of this Application be provided for.***

5. The application was based on the grounds that the 3<sup>rd</sup> respondent is dissatisfied with the judgment of the Court, specifically with the orders that it pays damages of Kshs 1, 500, 000 to the 1<sup>st</sup> petitioner and Kshs. 500, 000 to the 2<sup>nd</sup> petitioner, as well as the costs of the suit and interest on costs and damages, and it intended to appeal against the said decision. The 3<sup>rd</sup> respondent stated that it has already filed an appeal to the Court of Appeal through a Notice of Appeal dated 22<sup>nd</sup> September, 2015 which was lodged at the Court's Registry on 24<sup>th</sup> September, 2015.

6. It was its contention that the intended appeal raises crucial issues touching on the law and unless stay of the judgment and decree is ordered, the intended appeal will be rendered nugatory. This was because the decree involves the payment of colossal sums of money to the petitioners which the 3<sup>rd</sup> respondent, should its appeal succeed, may not recover from the petitioners once it was paid as ordered since the petitioners are persons of lesser financial means.

7. The 3<sup>rd</sup> respondent further argued that the application has been brought without unreasonable delay, and it was willing to abide by the directions or orders of the Court with respect to such security for the due performance of the decree as the Court may impose. It was its argument also that it was in the interests of justice, fairness and the overriding objectives of the law that the present application be allowed.

8. Mr. Sifuna Learned Counsel for the applicants submitted, in reliance on the decisions in **Antoine Ndiaye vs African Virtual University, Nairobi Civil Suit No. 422 of 2006** and **John Odongo vs Joyce Irungu Muhatia, Kakamega Civil Appeal No. 46 of 2014**, that they would suffer substantial loss as the petitioners were persons of lesser financial means, while substantial loss occurring to an applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. While conceding that they had not deposited physical security in Court, it was the applicants' submission that they were prepared to do so if required.
9. The petitioners opposed the application and filed an affidavit sworn by the 1<sup>st</sup> petitioner, Millicent Awuor, on 2<sup>nd</sup> December, 2015. Their argument was that nearly three months after the judgement, the 3<sup>rd</sup> and 5<sup>th</sup> respondents had not taken any steps to satisfy the decree but instead have opted to file the present application. In the petitioners' view, the present application had been filed in order to frustrate the judgment that had been entered in their favour.
10. The petitioners further took the view that the applicants had not satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules as they had not demonstrated that they will suffer substantial loss if the stay of execution is not granted. It was their argument that they continue to suffer loss and prejudice as the respondents have failed to satisfy the decree and have instead filed the application nearly three months after the judgment was delivered, so the application had not been brought without undue and unreasonable delay.
11. The petitioners further submit that the 3<sup>rd</sup> and 5<sup>th</sup> respondents have not made any proposal on security that would guarantee their performance of the decree, and such failure should result in dismissal of the application.
12. It was their argument, further, that there is no real threat of execution against the respondents as the process of execution of the decree would only ensue upon the petitioners taxing their costs, a process they alleged has not been finalized. In their view therefore, the present application was merely speculative.
13. The petitioners averred that if the Court allows this application, they will be prejudiced owing to the fact that the cause of action in the present case arose several years back, as early as September 2010. In their view, the 3<sup>rd</sup> and 5<sup>th</sup> respondents, being public institutions, and having been found to have neglected their statutory and public duty, should now do the right thing and satisfy the decree of this Court.
14. It was also the petitioners' contention that the applicants have no arguable appeal with high chances of success. In their view, the grounds of appeal relied on by the applicants constitute mere allegations that cannot stand the rigorous test set for appeal as the applicants are merely attempting to re-litigate matters that were conclusively determined by this Court. They contend further that, the draft memorandum of appeal does not disclose any arguable appeal that would warrant the grant of a stay pending determination of the appeal.
15. In his submissions on their behalf, Learned Counsel Mr. Onyango, informed the Court that the Attorney General and Ministry of Health have not appealed against the judgment and that the petitioners have been informed that these two institutions have taken steps to comply with the judgment.
16. Mr. Onyango submitted that for the respondents to merely state that the petitioners are not persons of sound financial means is not sufficient to deny them the fruits of their judgment when no tangible security has been deposited in Court. They therefore urged the Court to dismiss the application with costs and direct the 3<sup>rd</sup> and 5<sup>th</sup> respondents to honour and satisfy the decree.
17. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents did not participate in the proceedings on the application for stay of execution.

## Determination

18. I note from the application before me that the sole order that the applicants are really dissatisfied with is the order for payment of damages and costs to the petitioners. That being the case, the only issue for consideration is whether to grant orders staying the payment of damages to the petitioners. The argument by the applicants, is that the petitioners, being, as the applicants put it, of lesser financial means, the applicants will suffer substantial loss if they are required to honour the decree in this matter and pay the amounts awarded to the petitioners.

19. Under rule 32 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules)**, an application for stay of execution may be made informally immediately after delivery of the decision, while a formal application is required to be made within 14 days from the date of the decision sought to be appealed from. In this case, the applicants have sought to stay execution by an application lodged on 24<sup>th</sup> November 2015, more than two months after the delivery of the judgment. As the petitioners argue, there was a delay in making the application that puts it outside the period permitted under the Rules. However, in the interests of justice and bearing in mind the requirement in the Constitution for a Court not to be unreasonably restricted by procedural technicalities, I will consider the application on its merits.

20. The applicants have filed their application under **Order 42 Rule 6** of the Civil Procedure Rules which provides that:

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*
3. *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.* (Emphasis added)

21. The applicants have relied on the decision in **Antoine Ndiaye vs African Virtue University (supra)**, in which **Gikonyo J.**, observed as follows with regard to the grant of orders of stay:

*“[13] So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof (sic). Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.”* (Emphasis added)

22.The Court went on to state that:

*“This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See Harlsbury’s Law of England on this subject. In my view, substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment-debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money. ....I say all these things because both parties have rights; the Applicant to his appeal which includes prospects of success; and the Respondent to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient cause to do so.”*

23.The Court concluded that:

*“[14] On the basis of the above, the Applicant has not established that substantial loss will occur unless stay of execution is made. The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of Jason Ngumba [2014] eKLR that:*

*‘...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.*

*But what was stated in the case of Absalom Dova vs Tarbo Transporters [2013] eKLR is relevant, that:*

*“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.*

*How, therefore, will the court balance the rights of parties in the circumstances of this case?*

*[15] Despite my findings above, I reckon that the Applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may ultimately be binding on the Applicant...” (Emphasis added)*

24. On the question of substantial loss, the court in the case of **Bungoma HC Misc Application No 42 of 2011, James Wangalwa and Another vs Agnes Naliaka Cheseto** observed that:

***“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..”***

25. What the decisions set out above illustrate is that the grant or denial of orders of stay pending appeal involves the balancing of competing rights, the right of the applicants to appeal, with the expectation that should they succeed, they will be able to recover the amounts paid. They must, however, show that should the payments required be made, they will suffer substantial loss. On the other hand is the right of the petitioners to enjoy the fruit of their judgment.

26. The applicants are the County Government of Nairobi and a hospital which is managed by the County. They have not shown how the payment of damages amounting to Kshs 2,000,000 awarded to the petitioners, together with costs and interest, can possibly amount to substantial loss for them. They are content with implying that the petitioners are persons of straw, and therefore not likely to be able to refund the amount paid in satisfaction of the decree should the applicants succeed in their appeal.

27. I have before me petitioners whom the Court found to have been subjected to acts that were in violation of their constitutional rights by the respondents, who, as state organs, should be at the forefront in defending their rights. The judgment was in their favour, and although, as was evident from their petition, they are indeed, as the applicants argue, not financially able, they should not be denied the fruits of their judgment. It may, however, be that the applicants will be successful in their appeal against the orders of the Court, in which case they should have some expectation of recovering the amounts paid to the petitioners.

28. Having considered the competing claims in this matter, it is my view that the interests of justice will be served by securing both the interests of the petitioners and the 3<sup>rd</sup> and 5<sup>th</sup> respondents/applicants in the decretal amount. Consequently, my orders are as follows:

- i. ***The order for payment of damages, costs and interests to the petitioners shall be stayed pending the hearing and determination of the applicants’ appeal;***
- ii. ***The order of stay shall be subject to the 3<sup>rd</sup> and 5<sup>th</sup> respondent/applicants depositing the total sum of Kenya Shillings Two Million (Kshs 2,000,000) awarded in damages to the petitioners in a joint interest earning account in the names of the Advocates for the petitioners and the Advocates for the 3<sup>rd</sup> and 5<sup>th</sup> respondents within Thirty (30) days hereof.***
- iii. ***The 3<sup>rd</sup> and 5<sup>th</sup> respondent/applicants shall bear the costs of this application.***

29. It is so ordered.

**Dated, Delivered and Signed at Nairobi this 5<sup>th</sup> day of April 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Onyango instructed by the firm of Judith Auma Okal & Co. Advocates for the petitioners.**

**Mr. Sifuma instructed by the firm of Nyachae & Ashitiva & Co. Advocates for the 3<sup>rd</sup> and 5<sup>th</sup> respondent.**