



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 325 of 2012**

**IN THE MATTER OF AN APPLICATION BY MARURA NURSING HOME FOR ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS.**

**AND**

**IN THE MATTER OF PUBLIC HEALTH ACT CAP 242 LAWS OF KENYA**

**AND**

**IN THE MATTER OF MEDICAL PRACTITIONERS AND DENTIST ACT CAP 253 LAWS OF KENYA**

**VERSUS**

**DISTRICT MEDICAL OFFICER OF HEALTH KIAMBU EAST  
DISTRICT.....RESPONDENT**

**RULING**

On 16<sup>th</sup> August 2012 the ex-parte applicant Marura Nursing Home Ltd (**hereinafter referred to as the Applicant**) filed a chamber summons application dated 15<sup>th</sup> August 2012 seeking leave to commence judicial review proceedings against the Respondent for the following orders :

1. **THAT application be certified as urgent and fit to be heard forthwith**
2. **THAT due to the urgency, service of notice to the registrar, statutory statement and affidavit be dispensed with.**
3. **THAT the applicant be granted leave to apply for an ORDER of CEORTORARI to remove into the High Court and quash the decision of the District Medical Officer of Health kiambu East District to close the applicant's clinic at Kiambu Town.**
4. **THAT the applicant be granted leave to apply for orders of prohibition prohibiting the District Medical officer of health Kiambu East District from interfering with the normal operations of the applicant's clinic at Kiambu town for the current year under license.**
5. **THAT the applicant be granted leave to apply for an ORDER of MANDAMUS compelling the District Medical officer of Health Kiambu East District to open for operation forthwith the applicant's clinic at Kiambu Town.**

6. **THAT the grant of leave do operate as stay of the decision of the District Medical officer of health Kiambu East District from continued closing, interfering with the operations of the applicant's clinic at Kiambu town until the determination of the substantive Notice of Motion or on such terms as the court may order.**

7. **THAT the cost of this application be in the cause.**

The Application was heard before Hon. Achode, J on 16<sup>th</sup> August 2012 who proceeded to grant leave in terms of prayer 3, 4 and 5 but directed that the application be served and heard inter parties on 29<sup>th</sup> August 2012 for orders of stay in terms of prayer 6.

Upon service of the application, the Respondent opposed prayer 6 through a replying affidavit sworn by Catherine Muchemi the Kiambu Deputy District Public Health Officer filed on 30<sup>th</sup> August 2012.

The prayer that leave operates as stay was canvassed before me on 31<sup>st</sup> of August 2012. Learned counsel for the applicant Mr Ojienda advanced the position that the applicant was operating a medical clinic under the trade name of Marura Nursing Home limited which was licensed to operate as Marura Medical Clinic for the year 2012 by the Medical Practitioners and Dentist Board under the Medical Practitioners and Dentist Act. It was the applicant's contention that since the clinic was duly licensed for the year 2012, the decision by the Respondent to order its closure on 7<sup>th</sup> August 2012 was illegal and irregular since the said license had not been revoked and there was no court order directing the said closure.

It was further argued on behalf of the applicant that the Respondent had no power to close down the clinic as the power or mandate to do so was under the law donated to the Medical Practitioners and Dentist Board. The applicant also raised the issue of violation of the rules of natural justice claiming that it had not been served with notice of the intended closure or given an opportunity to be heard before the clinic was closed down by the Respondent. The applicant claimed that the clinic was his source of livelihood and that it would be adversely affected financially if the stay orders were not granted pending hearing and determination of the contemplated judicial review proceedings.

For the above reasons, the applicant urged the court to order that leave granted do operate as stay as prayed.

The Respondent opposed the prayer for leave to operate as stay on grounds that the Applicant was not entitled to such orders as in the Respondent's view, the application was unmerited, bad in law and tainted with misrepresentation of facts, material non-disclosure and was an abuse of the court process. Mr. Kaumba, Learned counsel instructed by the Attorney General for the Respondent submitted that prayer 6 should not be allowed as the applicant had not satisfied the conditions necessary for the grant of stay orders.

According to Mr Kaumba, a stay order is equivalent to an injunction and the principles that guide the court in deciding whether or not to grant an injunction should similarly guide the court when considering an application for stay orders in judicial review proceedings .He submitted that for the court to grant stay orders, an applicant must demonstrate the following:-

- a) That he has a prima facie case
- b) That the balance of convenience tilts in his favour
- c) That If stay orders are not granted, he stands to suffer irreparable loss

It is the respondent's case that the applicant has not demonstrated a prima facie case to warrant grant of the stay orders as evidence in documents annexed to the applicants supporting affidavit particularly annexure marked "SWJ4" revealed that what was closed by the Respondent was a nursing home offering

in patient services and not a medical clinic as licensed by the Medical practitioners and Dentist Board .

It was the Respondent's position that as the applicant was not licensed to run a nursing home offering in patient services, public interest required that stay orders sought herein be denied.

Having considered the rival submissions made by the learned counsels for the parties herein, I find that at this stage the court is only required to consider whether or not leave granted should operate as stay pending determination of the applicant's main motion. It would therefore not be appropriate at this stage to attempt to address the issues raised by the parties concerning the competence or otherwise of the Applicant's suit or the legality or otherwise of the Respondent's impugned decision as in my view doing so would prejudice the hearing of the substantive motion which is yet to be filed . I will therefore strive to limit myself to only those issues which are directly relevant to the application for stay.

The purpose of stay in judicial review proceedings is to suspend the validity and implementation of the impugned decision to avoid the possibility of actions or decisions by public bodies which are suspected to be illegal or irregularly made being implemented to the detriment of parties affected by the said decisions before a final determination is made by the court on the legality or otherwise of the impugned decision after hearing all parties to the dispute in the substantive motion.

That is the reason why in considering applications such as the present one, the court should ensure that the Applicant's substantive motion is not rendered nugatory by the acts or decisions of the Respondent during the pendency of the main application.

I wholly agree with the holding of **Maraga J in Taib A Taib –Vs- Minister for Local Government and 3 Others [2006] eKLR** that where the court is satisfied that the order of stay is efficacious, the court should not hesitate to use its discretion to grant it especially where there is a possibility that if stay orders are not granted, the applicants main application for judicial review may be rendered nugatory.

Having stated the principles upon which stay orders should be granted , I now propose to consider whether the applicant in this case has demonstrated that it is deserving of the stay orders sought in terms of prayer 6.

Given the facts of this case as disclosed in the pleadings filed by the applicant, it is clear that the action the applicant intends to challenge in the contemplated judicial review proceedings is the closure of the Marura Nursing Home which was inspected by a team of health professionals from the ministry of public health and sanitation who made recommendations that the facility be closed. Though the applicant has maintained that it was lawfully operating a medical clinic as authorized in the License issued to it by the Medical Practitioners and Dentist Board but using the trade name of Marura Nursing Home Ltd, it would appear from the inspection report dated 6th August 2012 on the basis of which the closure order was made that the applicant was also running a Nursing Home in the same facility. The fact that the applicant was indeed offering in patient services in the clinic is confirmed by the letter written on behalf of the applicant dated 7th August 2012 addressed to the Respondent referring to the closure on the same day of its in-patient and maternity departments. The letter was annexed to the Respondent's replying affidavit and its authenticity was not disputed by the applicant.

If the court granted the stay orders as sought, the effect of such an order would be to allow the applicant to continue operating the clinic perhaps in the same way it was being operated prior to the date of its closure yet there is prima facie evidence that it was offering in patient services which it was clearly not authorised to do in the license issued to it for the year 2012-**see annexure marked SWJ1**.

The applicant has not shown that it was authorized to operate an in-patient facility and in the circumstances, I am not persuaded that this is a suitable case for the grant of orders of stay as prayed. The better option in my view would be to have both parties fully heard on the main motion to enable the court make a final determination in the matter one way or the other. Consequently, I decline to exercise my discretion to order that leave granted herein operates as stay in terms of prayer 6. The application is therefore dismissed with costs in the cause.

Considering the disclosure that the clinic is the applicants source of livelihood, I direct that once the substantive motion is filed and served, the same be fixed for mention early next term to enable the court give directions aimed at securing the speedy disposal of the matter. It is so ordered.

**DATED** and **SIGNED** by me at Nairobi this **6th** day of **September**, 2012.

**C. W. GITHUA**  
**JUDGE**

**In the presence of:**

.....court clerk

.....for the applicant

.....for the Respondent.