



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 224 OF 2010**

**WILLIAM CHARLES FRYDA.....PLAINTIFF**

**VERSUS**

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES...1<sup>ST</sup> DEFENDANT**

**ST. MARY’S MISSION HOSPITAL .....2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH NAKURU ELC NO. 238 OF 2012**

**REGINA PACIS UNIVERSITY COLLEGE (THROUGH THE BOARD OF**

**TRUSTEES).....1<sup>ST</sup> PLAINTIFF**

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WILLIAM CHARLES FRYDA .....DEFENDANT**

**RULING**

*(Application for stay pending appeal; principles to be considered; applicant having filed suit seeking orders that various properties registered in name of the 1st respondent be declared to be held in trust for him; applicant and 1st respondent having together founded a hospital through donor funds; judgment holding that the title to the properties purchased and the management of the hospitals be with the respondents; applicant aggrieved by the said judgment and filing an appeal; notice of appeal filed by a firm which was not on record; notice of appeal incompetent and cannot be the foundation of an application for stay pending appeal; even on merits, no substantial loss that applicant will suffer by handing over the hospitals or giving effect to the judgment; application dismissed)*

1. The application before me is that dated 29 September 2017 and filed on 2 October 2017 by the law firm of M/s Mindo & Company Advocates on behalf of the plaintiff. It is an application brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, and Sections 1, 1A, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The principal order sought is an order of stay of execution of the judgment herein pending appeal to the Court of Appeal. The application is opposed and before I go to the gist of it, it is only fair that I give a little background to the suit and the judgment, which was delivered on 28 September 2017.

2. The simplified facts of the case are that applicant herein commenced suit on 8 September 2010 registered as Nakuru High Court Civil Suit No. 224 of 2010 against the Assumption Sisters of Nairobi Registered Trustees (ASN) , a congregation and order of Catholic Sisters, and St. Mary's Mission Hospital, a company limited by guarantee, inter alia seeking orders that various parcels of land registered in the name of ASN are held in trust on behalf of the applicant. These properties are LR Nos. 27228 and 227229 situated in Langata in Nairobi; LR No. 9361/10 situated in Elementaita in Nakuru; and LR No. Kiine/Rukanga/2846 situated in Sagana. On the properties in Langata and Elementaita are developed hospitals easily identified as St. Mary's Mission Hospitals. While the applicant was prosecuting his suit against ASN and St. Mary's Mission Hospital, a second suit was filed in Nairobi, being Nairobi High Court Civil Suit No. 9 of 2011, by Regina Pacis University College and ASN against the applicant, vide which the two plaintiffs sought orders inter alia that the applicant be permanently restrained from the land parcel LR No. 27229 where the University had been allowed to set up a campus by ASN through the instrument of a trust deed. The two cases were combined and heard before me. Pending the hearing of the cases, an order of injunction had been issued in favour of the applicant which meant that the applicant was the person in control and management of the two hospitals in Langata and Elementaita.

3. It emerged from the evidence presented before me that ASN and the applicant approached various donors to establish a hospital to cater for the poor in society. It is through the donation of these persons that the land in Langata and Sagana were purchased. The land in Elementaita was however donated by an individual. I found that the hospitals built in Langata and Elementaita were also built by donor funds who contributed towards the development of the hospitals. I found that the company, St. Mary's Mission Hospital was set up in order to have the properties transferred to the said company and for the said company to manage the hospitals in the form of a charitable trust for purposes of providing medical services to the poor. I found that the properties were not held in trust on behalf of Dr. Fryda, the applicant herein. On the management of the hospitals, I held that the same ought to be with the company and directed the applicant to hand over the hospitals to the respondents. I also held that the company was free to operate the hospitals through a hospital manual that it was free to adopt. I further directed the applicant to submit to an audit of the hospital accounts.

4. On 2 October 2017 a Notice of Appeal was filed by the law firm of M/s Mwangi E.G & Company Advocates, said to be on behalf of the applicant, giving notice of intention to appeal against the whole of the said judgment.

5. In this application, the applicant has averred that despite the judgment directing that there be a smooth transition, it is claimed that ASN, the 1st respondent, invaded the hospital in Nairobi and started throwing its weight around and that staff members were only saved by the administrator insisting that he needs to see a decree of the court. It is averred that others were on their way to invade the Elementaita hospital but turned back after they were told they need a decree. He has stated that he has a genuine apprehension that the 1st respondent will invade the two institutions and that the 1st respondent has the intention of disrupting the smooth running and operations of the hospitals. He has stated that the hospitals cater for in-patients and out-patients and see approximately 29,000 patients every month; that they also cater and educate 140 destitute children; that they have formed a collaborative training for higher education for some doctors with the University of Cape Town, South Africa which will be destroyed; and that they also sponsor 43 staff members for higher education. He has deposed that he has thus sought a stay pending appeal so that the smooth running of the hospitals is maintained while he pursues his appeal. He has also asked that I consider public interest.

6. The application is opposed by the respondents through a Replying Affidavit sworn by Sister Bernadette Munyao, the Superior General of ASN. She has deposed that the applicant has not demonstrated that he will suffer any irreparable loss and has not offered any security for the due performance of the decree. She has further deposed that after the delivery of the judgment, she made attempts to reach the applicant by making calls but her calls were not picked. On 29 September 2017, she visited the hospital in Langata and met the hospital administrator, one Mr. Stephen Nyaga, and they held a meeting. Mr. Nyaga promised to call them on Monday, 2 October 2017 for another meeting but he did not call them. She then called him and he promised a meeting on 4 October 2017 but they were served with interim orders of stay before that day could reach. She has refuted any insinuation of a forceful takeover as alleged by the applicant.

She has also denied that ASN wish to disrupt the operations of the hospitals.

7. Regina Pacis University filed a preliminary objection inter alia that the purported Notice of Appeal dated 29 September 2017 and the letter requesting for proceedings, dated 2 October 2017, have been filed by a firm of Advocates not on record, and therefore fatally defective. It is also pointed out that the judgment has directory reliefs which are self executing, and if complied with in good faith, there will be no disruption of services and no loss to the applicant.

8. On 11 October 2017, a consent was filed through which the law firm of M/s Mindo & Company Advocates and M/s Ogolla H.J. Okeke, gave consent to the law firm of M/s Mwangi E.G& Company Advocates to come on record for the applicant.

9. I invited counsel to file written submissions and also make oral submissions, all of which I have taken account of.

10. The application before me is an application for stay pending appeal and the provisions of Order 42 Rule 6 apply. It provides as follows :-

**6. Stay in case of appeal [Order 42, rule 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 subrule (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.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.*

11. It will be seen from the above, especially Rule 2, that to succeed in an application for stay pending appeal, the applicant needs to establish three things, being :-

*(i) That the application has been made without unreasonable delay.*

(ii) that the applicant stands to suffer irreparable loss if the stay is not granted.

(iii) That the applicant is ready to offer security for the performance of the decree.

12. Before I embark on whether the applicant has established a case for stay pending appeal, let me first deal with the preliminary issue raised, that the Notice of Appeal filed herein is incompetent as it has been filed by a firm of advocates who were not on record at the time the same was filed. At issue are the provisions of Order 9 of the Civil Procedure Rules, 2010, which deals with recognized agents and Advocates of parties, and specifically Order 9 Rule 9 which deals with change of advocate after judgment. The said provision is drawn as follows :-

**9. Change to be effected by order of court or consent of parties [Order 9, rule 9.]**

*When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—*

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

13. It will be seen from the above, that where there has been judgment in a matter, a change of advocate ought not to be effected without there being an order of the court pursuant to an application, or alternatively, there be a consent filed between the outgoing advocate and the proposed incoming advocate. Where there has been judgment, the incoming advocate can only take over a matter after going through this process. It goes without saying that before the incoming advocate is deemed to have taken over the matter, it is the outgoing advocate who is in charge of the proceedings, until the change of advocate is effected in the manner provided.

14. In our case, the Notice of Appeal was lodged on 2 October 2017 by M/s E.G Mwangi & Company Advocates. The consent allowing the said firm to come on record was executed on 9 October 2017 and filed on 11 October 2011. I do note that this application for stay pending appeal was filed by the law firm of M/s Mindo & Company Advocates on 2 October 2017. Now, it cannot be that the law firm of M/s E.G Mwangi & Company Advocates were on record on 2 October 2017 as they could only have properly come on record after 11 October 2017 when the consent for the said firm to come on record was filed. I wonder on what basis the said firm lodged a Notice of Appeal on 2 October 2017 when they were not on record.

15. In her submissions, Mrs. Mwangi, learned counsel for the applicant, inter alia argued that Order 9 Rule 9 only applies in cases of execution of the decree. I regret that that cannot be the correct interpretation of Order 9 Rule 9. The drafting of it is clear that a new advocate, coming into the suit after judgment, can only properly do so after filing an application and an order issued allowing it, or by consent of the outgoing advocate. There is indeed no mention of any execution process in the said Order 9 Rule 9.

16. In my view, the Notice of Appeal filed on 2 October 2017 was filed by a stranger to the proceedings and the same is incompetent. Being incompetent, I am not persuaded that I have a competent Notice of Appeal in this case which can support a full appeal before the Court of Appeal. Without there being a valid Notice of Appeal, one cannot then be entitled to a stay pending appeal, for the simple reason that you can only have a stay pending appeal if you have an appeal, and you cannot have an appeal if you do not have a competent Notice of Appeal.

17. For the reason that the applicant does not have a competent Notice of Appeal, his application for stay pending appeal automatically fails and the same must be dismissed.

18. But just in case I am wrong on the above, I will consider the merits of the application. As I have mentioned before, an applicant is supposed to demonstrate three things, that is, that he has filed his application without unreasonable delay; that he stands to suffer substantial loss; and that he is ready to offer security for the due performance of the decree.

19. I have no problem with the issue of delay, as the application was filed just a few days after the judgment. However, I am not persuaded that the applicant stands to suffer any loss in the event that the decree is executed. In other words, I do not see how his appeal will be rendered nugatory if the decree is executed. It should be remembered that in his suit, the applicant had sought orders that it be declared that the suit properties are held in trust for him. He failed in seeking that prayer. In my judgment, I ordered ASN to transfer the properties to the name of the company St. Mary's Mission Hospital, for the company to hold these properties in the form of a charitable trust. Now, what loss will the applicant suffer if the properties are transferred to the company? It is not as if the properties are currently in the name of the applicant; the same are currently in the name of ASN and are to be transferred to the company. The properties are not going to be dealt with or go anywhere. If the applicant succeeds on appeal, the properties will simply be transferred to him. The other prayers that I issued were for the applicant to give accounts and submit to an audit of the accounts covering the duration of time that he has been running the hospitals. Of course there is no loss to be suffered by submitting to an audit.

20. It was submitted by Mrs. Mwangi, that the judgment left the applicant at the mercy of the 1st respondent. True, that probably would be the effect of the judgment, but again, I wonder what substantive loss the applicant stands to suffer by ceding the management of the hospitals to ASN through the company. In my judgment, I found that the understanding between the parties and the donors was that the applicant will serve as the first medical director, although of course upon the company taking over the hospitals, that may change. Even if this occurs, I do not see what substantial loss the applicant will suffer. The applicant is a medical doctor and assuming that the 1st respondent through the company does not find a place for him, he can surely make a living by simply practicing his profession. There is in fact a high demand for doctors in Kenya and the applicant cannot argue that he will be unable to earn a living if his tenure as medical director at the St. Mary's Mission Hospitals is terminated. He can still be able to utilize his skills to earn a living while he pursues the appeal. Of course if he feels that the hospitals are so dear to him, and he really needs to continue being involved, he can opt to cooperate with the respondents, so that he is retained as the medical director while he pursues his appeal. His appeal certainly cannot be rendered nugatory by handing over the management of the hospitals to the respondents.

21. The other arguments raised are that there will be disruption of medical and other services. I am not persuaded that there will be any of such. If the applicant applies his mind to have the judgment executed in good faith, the services currently running in the hospitals will not be disrupted. If he hands over all the services in good faith, I do not see how any of the programmes implemented in the hospitals will be disrupted and indeed the 1st respondent has deposed that they have no intention of disrupting any of the programmes. I held that he continues to serve as the medical director until such time that the respondents feel that this needs to change, and given that position, I am sure that he can guide the respondents on the services and programmes that are ongoing in the hospital for purposes of continuity.

22. The applicant attempted to claim that there was an "invasion" or "attempted invasion" of the hospitals by the 1st respondent, but I have seen nothing of the sort, not that there was anything barring the respondents from a takeover, because they have a judgment in their favour. It was also urged that the respondents came "throwing their weight around" which I have not seen, but again, who would blame a successful litigant from "throwing his weight" around? There would indeed be nothing odd or wrong in that, for a successful litigant is always eager to effect the judgment. From the material tendered before me, I have seen that the 1st respondent made polite overtures through letters and a meeting that they had with the administrator of the hospital at Langata, so that there can be a smooth transition to the new regime. The 1st respondent's counsel also wrote letters to the applicant's erstwhile advocates, but all her letters were ignored. I am not persuaded that there was any "invasion" as claimed. But all this is conjecture; as I have said, the respondents have judgment in their favour and one would expect a move to give effect to the judgment. What is important is that I am not persuaded that the applicant stands to suffer any irreparable loss if the decree is executed. His appeal if successful will not be rendered nugatory

by the execution of the decree.

23. On the issue of security, it was said that the applicant is willing to deposit costs as security. I am afraid that in the circumstances of this case, that cannot be termed as security. I made no orders as to costs and therefore there are no costs to be deposited as security. In essence, there is nothing offered by the applicant which can constitute good security to back up a stay pending appeal, in the event that I was persuaded that there would be substantial loss, which of course I am not so persuaded.

24. It follows that even if I am to consider the merits of the application, the application would still fail.

25. For the above reasons, I find no merit in this application and the same is hereby dismissed.

26. Just as I made no orders as to costs in respect of the judgment, I make no orders as to costs in respect of this application.

27. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of October 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

Mrs E.G. Mwangi for the applicant.

Ms. Ogange holding brief for Mrs. W.G. Wambugu and Mr. C.N Kihara for the respondents.

Court Assistant: Carlton Toroitich.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**