IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A)

CIVIL APPLICATION NO. E308 OF 2020

BETWEEN

DR. DONALD OYATSI.....APPLICANT

AND

THE DISCIPLINARY & ETHICS COMMITTEE....1ST RESPONDENT

THE KENYA MEDICAL PRACTITIONERS &

DENTISTS COUNCIL.....2ND RESPONDENT

AGK suing on behalf of WK (minor).....3RD RESPONDENT

(*Being an application for stay of execution pending the Appeal against*

the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.)

***dated 18th September, 2020 in* Miscellaneous Civil Application No. 42 of 2020)**

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RULING OF THE COURT

The applicant, **Dr. Donald Oyatsi** is a consultant in the field of pediatric neurology within Kenya and the larger East African region. He is among the few specialists in that field in Kenya who treat patients with acute epilepsy and refractory seizures. It on the strength of this the 3rd respondent, **AK,** the mother of the minor, whom we shall refer to as **WK**, sought his expertise to treat her daughter who was diagnosed with developmental delay as a result of brain damage at 7 months of age.

During the course of **WK**'s treatment, the 3rd respondent noticed that her seizures were progressively getting worse in spite of the medication she was on. This led her to seek further treatment for **WK** at the Children's Hospital of Orange County (CHOC) in California in the United States of America. While there, the medication administered to **WK** by the applicant were immediately withdrawn and the seizures stopped. The hospital also recommended a different treatment for **WK** which comprised of less medication than what was earlier prescribed to her by the applicant.

This prompted the 3rd respondent to file a complaint with the 2nd respondent stating that the applicant mismanaged **WK** by overmedicating her, contrary to the appropriate guidelines prescribed which in turn caused her untold trauma and pain. The complaint together with the response from the applicant were tabled before the 1st respondent, and by a ruling delivered on 4th February 2020, it found the applicant culpable of overmedicating **WK** by use of 4 medications concurrently that were deemed not beneficial to her and for failing to comply with its directives at various stages of the inquiry. The 1st respondent then issued orders directing the applicant to enter into mediation with the 3rd respondent with a view of compensation within 90 days of the ruling and additionally to pay a fine of Kshs. 500,000 to the 2nd respondent within 30 days of the ruling.

Aggrieved by the ruling, the applicant filed a Judicial Review Application under **Miscellaneous Application No. 42 of 2020**. Therein he sought an order against the respondents, of certiorari to quash the decision made by the 1st respondent on behalf of the 2nd respondent and an order of prohibition restraining the respondents from taking any action against the applicant based on the said decision. By a judgment delivered on 18th September 2020, Mativo, J found the applicant's case to be unmeritorious and dismissed the application with costs to the

respondents.

It is against that decision the applicant filed a notice of appeal and has now filed the motion seeking the following orders;

> ***2) Pending the hearing and determination of the intended appeal, there be stay of execution of that part or portion of judgment and decree made by the High Court [Mr. Justice Mativo] on 18th September 2020 in High Court Misc. Civil Application No. 42 of 2020 (JR) that is to be executed against the Applicant.***
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> ***3) Pending the hearing and determination of the intended appeal against the judgment or decision made on 18th September 2020 in High Court Misc. Civil Application No. 42 of 2020 (JR), a temporary injunction be granted or issued to restrain the Respondents, their agents or servants from enforcing the decision or Order made on 4th February 2020 against the Applicant in PIC Case No. 3 of 2017 or any part thereof.***
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> ***4) Further, and/or in the alternative, there be stay of execution of the decision or ruling or Order made by the 1st and 2nd Respondents in PIC Case No. 3 of 2017 on 4th February 2020 pending the hearing and determination of the intended appeal against the judgment and decree of High Court Misc. Civil Application No. 42 of 2020 (JR) that effectively upheld the said decision.***

The application is based on 4 grounds on the face of it and is supported by an affidavit sworn by the applicant. He deposed that his intended appeal raises serious and weighty issues that ought to be considered by this Court; that since the 1st respondent's panel did not consist of experts in his field, it was therefore was incompetent to make a proper determination in a matter concerning such a highly specialized field; the recommendation in the ruling, being contrary to the international guidelines as set by the International League Against Epilepsy (ILAE), predisposes patients to harmful medical practices which may lead to death; the 1st respondent did not accord him a fair hearing and likewise disregarded his evidence and submissions; and finally that the High Court erred by upholding the impugned ruling.

The respondents opposed the motion through a replying affidavit sworn by **Michael R. Onyango**, the acting Corporation Secretary of the 2nd respondent. He asserted that since the High Court did not order any party to do or refrain from doing anything, this Court cannot issue stay on the same, save for the order on costs. Additionally, this Court has no jurisdiction to issue an injunctive order pertaining to the ruling of the 1st respondent as the same does not relate directly to the decision of the High Court. He further deposed that injunctive orders cannot be sought in a matter that commenced as a Judicial Review. He opined that the grounds of appeal are not arguable as they are not based on the judgement of the High Court but rather seek to review the decision of the respondents. He prays that the application be dismissed as it is unmeritorious.

The 3rd respondent also opposed the application through a replying affidavit. However, the same rehashed the background of the suit as has already been summarized above, therefore we shall not repeat ourselves. We will only state that she urged the Court to dismiss the application with costs.

Counsel for the parties filed written submissions and digests of authorities, which we have fully considered.

For an application under **Rule 5(2)(b)** to succeed, an applicant must satisfy the Court that first, he has an arguable appeal and secondly, that the appeal, if successful, will be rendered nugatory if its substratum is not preserved. On the issue of arguability, it needs not be one that must necessarily succeed but rather one that raises at least one point that demands an answer from the respondent and is worthy of judicial consideration or interrogation on appeal. The applicant must satisfy both limbs. See **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR**.

In applying these principles to the applicant's prayer 3 on injunction, we find that although the appeal maybe arguable based on the grounds raised, we are not convinced that the same shall be rendered nugatory. The applicant has failed to establish how he will be harmed if the injunction is not granted. In the result, this prayer fails.

Prayers 2 and 4 concern themselves with stay of execution. In prayer number 2, the applicant sought for stay of execution of the judgment of the High Court and in prayer 4, a stay of execution of the decision of the 2nd respondent. The prayers for stay are both hinged on the impugned judgment delivered by the High Court. This issue has been rehashed by this Court time and time again, that a dismissal order cannot be stayed as it cannot be executed nor enforced. Further, it was not a positive order that required the applicant to do or refrain from doing anything hence a stay order cannot be granted as it will be of no use and this Court cannot engage in acts in futility. We reiterate the holding of this Court in the case of **DEVANI AND 4 OTHERS V JOSEPH NGINDARI (CIVIL APPLICATION NO. NAI 136 of 2004** (unreported);

> ***"By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.***
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> ***It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable."***

Invariably, prayers 2 and 4 have no legs to stand on and also fail. For those reasons, this application is devoid of merit and is hereby dismissed in its entirety with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR