



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAL, J.J.A.)

CIVIL APPLICATION NAL. NO. 374 OF 2018

BETWEEN

THE NAIROBI HOSPITAL.....APPLICANT

AND

PROF. STANLEY OMINDE KHAINGARESPONDENT

(Being an application for an order of injunction and stay of proceedings from the ruling of the Employment and Labour Relations Court (Ongaya, J.) delivered on 8th November, 2018 in **ELRC Petition No. 114 of 2018**)

RULING OF THE COURT

It is common ground that the respondent, **Professor Stanley Ominde Khainga** owns or manages a health facility **Surgeoderm Health Care Limited** where a patient, the late **June Wanza Mulupi** was attended to. An operation carried out there did not end up well and the said patient was referred to The Nairobi Hospital, the applicant herein, where she was admitted to the ICU and died. Two pathologists out of three who carried out an autopsy on the body of the deceased reached the conclusion that the death of the deceased occurred out of some negligence on the part of the respondent.

Following those events the applicant by a letter dated 8th October, 2018 suspended the respondent's "admitting rights" with immediate effect for what it said was to save its reputation as a reputable hospital in Kenya and in the region.

The husband of the deceased filed a complaint at the Kenya Medical Practitioners and Dentists Board against the respondent and thereafter the respondent filed a petition at the Employment and Labour Relations Court (ELRC) being **ELRC Petition No. 114 of 2018 Prof. Stanley Ominde Khainga v The Nairobi Hospital**. He also filed another petition in that court being **No. 335 of 2018 Professor Stanley Ominde Khainga & 3 Others v Joseph Mulupi and Others**. There is also another case filed at the High Court being **High Court Judicial Review Miscellaneous**

Application No. 43 of 2019 Professor Stanley Ominde Khainga & 2 Others v Joseph Mulupi, Dr. Reuben Okioma & 13 Others. All those cases are pending in those courts and have not been heard or determined.

The respondent filed an application in ELRC in Petition No. 114 of 2018 praying that the court suspend two letters issued by the applicant where his admitting rights as a Doctor had been suspended. In a ruling delivered by Ongaya, J. on 8th November, 2018 the application was allowed with an order pending that the hearing and determination of the petition, there shall be stay of implementation of the decision suspending the petitioner's admitting rights with the respondent as conveyed in the letter ref. TNH/ADMIN/CEO/08/10/2018 and dated 08.10.2018 and the inter - office memorandum dated 11.10.2018. It is those orders that have provoked the motion before us brought under **rules 5 (2) (b)** and **42** of the rules of this **Court**. We are asked in the main to order an injunction restraining the respondent from exercising admission rights with the applicant pending hearing and determination of the intended appeal and to stay the proceedings in the said Petition No. 114 of 2018.

It is said in the grounds in support of the motion that the applicant has an arguable appeal against the order of that court and that the intended appeal will be rendered nugatory unless an order of injunction is granted. There are 3 affidavits in support of the motion all by **Dr. Christopher Abeid**, a specialist physician and kidney specialist who is a Medical Director of the applicant. It is said that the respondent applied to use the applicant's facilities as a plastic and reconstructive surgeon but that the respondent was not an employee of the applicant but was engaged as a consultant who operated as an independent contractor but not as an employee of the hospital; that the deceased had been referred to the applicant's hospital from the respondent's medical facility and after admission the deceased died; that two pathologists found the respondent negligent in the way that the deceased had been managed; that various suits had been filed by the respondent against

the applicant; that the ELRC had found that the respondent is an employee of the applicant, a finding which the applicant does not agree with; that the respondent had admission rights in other hospitals including Aga Khan University Hospital and was also a member of the teaching staff at the University of Nairobi Department of Surgery. At paragraphs 26, 27 and 28 of the first supporting affidavit Dr. Abeid depones:

“26. I verily believe that owing to the nature of the work of medical consultants, they cannot be classified as employees. The Ruling of the Employment and Labour Relations Court (Justice B. Ongaya) is bound to create chaos and confusion in the medical field where for a long time, consultants have been and continue to practice in various medical facilities as independent contractors.

27. I verily believe that it is not only prudent but also necessary to stay proceedings of Employment and Labour Relations Court so as to first, settle the question of whether consultants are employees or independent contractors.

28. I can confirm that the applicant’s decision to suspend the Respondent’s admission rights was not actuated by malice but was a direct result of the obvious conflict regarding the cause of death of June Mulupi.”

Dr. Abeid in a supporting affidavit sworn on 26th March, 2019 depones that the Medical Practitioners and Dentist Board had since held a hearing where it had been found that the events that led to the death of the deceased started at Surgeoderm Healthcare Limited. Further, that it had been found that the respondent owed the duty of care to the patient and that he had breached that duty of care when he allowed unqualified persons to perform surgery on the patient.

And in yet a further affidavit sworn on 14th August, 2019 the said Dr. Abeid depones that the respondent had since filed **High Court Miscellaneous Cause No. 127 of 2019 Professor Stanley Ominde Khainga v Nairobi Hospital** claiming money from the applicant which is described as professional fees for services rendered from the respondent to the applicant.

There is a replying affidavit of the respondent drawn by Professor Kiama and Company Advocates sworn on 3rd April, 2018. We observe that the same is not elegantly drawn. It merely states the history of the matter and reproduces ruling and orders given by the ELRC and repeats prayers that are made in the motion and prays that the application be dismissed with costs. It does not in fact address the issues raised in the Motion before us.

When the motion came up for hearing before us learned counsel **Mr. John Ohaga** teaming up with his colleague **Mr. Franklin Cheluget** informed us that Civil Appeal No. 108 of 2019 emanating from the ruling subject of this Motion had already been filed and was awaiting case management. He further informed us that the Medical Practitioners and Dentists Board had recommended that the respondent be suspended as a practicing Doctor. He prayed that we grant an injunction against the orders of ELRC which have lifted the letters suspending the respondent’s admission rights at the Nairobi Hospital. According to counsel the Nairobi Hospital is a premier hospital whose reputation required to be protected. Learned counsel submitted that the ELRC had no jurisdiction in the matter filed before it because the respondent is a consultant and not an employee of Nairobi Hospital and provisions of the Employment Act were not applicable. According to counsel if orders are not granted the orders appealed will undermine the reputation of the hospital. He quoted various cases in support of his submissions including **Equity Bank Limited v Westlink MBO Limited [2013] eKLR** and submitted that the end goal of determining such applications for stay is to ensure that the ends of justice are served. He also cited the case of **Okiya Omtatah Okiiti and Another v Anne Waiguru, The Cabinet Secretary, Devolution And Planning And 3 Others [2015] eKLR** where the court outlined the principle that where an order of stay is not granted there is a real and imminent danger; that the appeal will be rendered nugatory if successful; especially for a matter of general importance. Counsel asked that we allow the motion.

Professor Kiama Wangai, learned counsel for the respondent relied on the replying affidavit and submitted that the petition at the ELRC had not been heard and only interim orders had been granted. The respondent had not enforced the orders and had not gone back to Nairobi Hospital to practice. According to counsel we should let the petition at ELRC to be heard and if it was allowed then an appeal can be taken. He thought we should refuse the orders that are prayed for.

The principles that govern the jurisdiction of this Court in applications for stay pending appeal are well settled. For an applicant to succeed he must firstly show that the appeal or intended appeal as the case may be is arguable and once that step is satisfied the applicant must in addition show that absent stay the appeal or intended appeal would be rendered nugatory. This is what this Court said in the case of **Equity Bank Limited** (supra).

“From the foregoing it is clear that rule (5) (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

It was recognized that if the subject matter of the appeal were to dissipate, an appeal would be rendered an academic exercise thus visiting an injustice to an appellant – thus stay should be granted in deserving cases. As we have shown there are 3 matters pending before the ELRC and at the High Court.

In the ruling of Ongaya, J. the judge found that the respondent is an employee of the applicant. It is the case of the applicant that the respondent is a consultant, not an employee. That we find to be an arguable point in the appeal. The position in our law is that one arguable point will suffice and such a point is not one that must succeed.

It is argued on behalf of the applicant that its reputation is at stake because the respondent at whose hands the deceased may have died would destroy its reputation in Kenya and beyond if he was allowed to continue practicing at the Nairobi Hospital. This is a powerful argument and the applicant has satisfied the second limb of the principles we have identified - that the appeal will be rendered nugatory if we do not grant stay. We are satisfied that the motion here is merited and we allow it. There will be stay of execution of the proceedings in ELRC Petition

No. 114 of 2018 pending hearing and determination of Civil Appeal No. 108 of 2019. Costs of this motion will be in that appeal.

Dated and delivered at Nairobi this 24th day of January, 2020.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR