



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU, M'INOTI, J.J.A.)

CIVIL APPEAL (APPLICATION) NO.485 OF 2019

BETWEEN

PHARMACY AND POISONS BOARD.....APPLICANT

AND

WAMBUA MAITHYA.....1ST RESPONDENT

PHARMACEUTICAL SOCIETY OF KENYA.....2ND RESPONDENT

DR. PIUS WANJALA.....3RD RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. 529 OF 2019

DR. KAMAMIA WA MURICHU.....APPLICANT

AND

WAMBUA MAITHYA.....1ST RESPONDENT

PHARMACY AND POISONS BOARD.....2ND RESPONDENT

PHARMACEUTICAL SOCIETY OF KENYA.....3RD RESPONDENT

DR. PIUS WANJALA.....4TH RESPONDENT

(Being an application for stay of execution of the Order emanating from the

Judgment and Rulings of the High Court of Kenya at Machakos (Odunga, J.)

delivered on 26th September, 2019

in

H.C. Const. Pet. No. 2 of 2019.)

RULING OF THE COURT

1. This consolidated ruling is in respect of two applications, Nos.485 and 529 of 2019 that emanate from the judgment of **Odunga, J.** delivered on 26th September, 2019 in **Petition No.2 of 2019** at Machakos.

2. In **Civil Application No. 485 of 2019, Pharmacy and Poisons Board**, (the 1st applicant), seeks stay of execution of the decree emanating from the aforesaid judgment pending hearing and determination of an intended appeal.
3. In **Civil Application No. 529 of 2019, Dr. Kamamia Wa Murichu**, (the 2nd applicant), is also seeking a similar order as the 1st applicant.
4. In the Petition that gave rise to the impugned judgment, the Petitioner, **Wambua Maithya**, sought, among other reliefs, a declaration that the qualifications requirements for the position of Chief Executive officer ('CEO') of the Pharmacy and Poisons Board ('PPB') placed in the advertisement of 25th January, 2019 were unconstitutional, null and void.
5. The said advertisement required applicants to have at least 5 years' experience in Senior Management of the Board or in a similar organization. The petitioner also sought an order of *certiorari* to quash the said requirements.
6. In the impugned advertisements, PPB listed the following "must meet" mandatory requirements: -

"i. Must be a Kenyan Citizen;

ii. Be a holder of a Pharmacy degree and relevant Master's degree from a recognized University;

iii. Be registered to practice pharmacy in Kenya, belonging to the professional body of registered pharmacists and holder of a current practicing license;

iv. Have knowledge, skills and experience of not less than 15 years of pharmacy practice, with at least 5 years served in a senior management or leadership position at the Board or in a similar organization;

v. Have a Strategic Leadership Development Programme and Corporate Governance Certification from a recognized institution;

vi. Have a thorough understanding of the local and international trends in the regulation of pharmacy profession, medical products and health technologies;

vii. The Applications to be forwarded to the Chairman of the Pharmacy and Poisons Board at the Pharmacy and Poisons Board Premises located at Lenana Road Nairobi."

7. The petitioner contended, *inter alia*, that the stipulated requirements were not provided for by **section 5** of the **Pharmacy and Poisons Act** and were meant to favour the Acting Registrar, to the detriment of other potential applicants. Further, the petitioner argued, the recruitment process ought to have complied with **Article 73(2)(a)** and **232** of the **Constitution of Kenya, 2010**.

8. In the impugned judgment, the learned judge held, *inter alia*:

"...the prescriptions by the Board were so onerous as to permit only a few persons to apply for the vacant position."

The learned judge concluded that the process of recruitment of the CEO of the PPB failed to meet the constitutional and statutory requirements and granted the order of *certiorari* as sought.

9. Being aggrieved by the said judgment, the applicants filed notices of appeal against the judgment.

10. The applicants contended that the intended appeal is arguable and unless the Court grants the order of stay of execution as sought, the intended appeals shall be rendered nugatory. These are the twin principles that this Court applies in an application brought under **rule 5(2)(b)** of the **Court of Appeal Rules**. See **Stanley Kang'ethe Kinyanjui vs Tonny Ketter & 5 others [2013] eKLR**.

11. On the arguability aspect, **Mr. Amoko**, who led **Mr. Mulenya** and **Mr. Gumbo** for the 1st applicant, submitted that the intended appeal challenges the jurisdiction of the High Court to adjudicate the dispute that was before it. He contended that the dispute related to the question of recruitment, which is a preserve of Employment and Labour Relations Court and therefore the High Court acted in excess of its jurisdiction.

12. Another arguable issue is whether the High Court usurped the broad jurisdiction conferred upon the PPB to recruit the CEO by the Act. It was upto the PPB to determine the most appropriate criteria, Mr. Amoko submitted.

13. **Mr. Omiti**, learned counsel for the applicant in Civil Application No. 529 of 2019, highlighted some of the arguable issues as far as the 2nd applicant's appeal is concerned. The first one relates to the place of an interested party in a Constitutional Petition. Counsel stated that the PPB filed certain interlocutory applications but the learned judge declined to determine them, holding that the PPB, being an interested party, was not a substantive party. Counsel argued that an interested party is like all other parties in a matter and can file any relevant application.

14. Mr. Omiti further submitted that the PPB had filed a complaint against the learned judge before the Judicial Service Commission. The PPB wanted the judge to recuse himself from the matter because it believed he could not be impartial in the circumstances. The learned judge directed that he would determine the issue of his recusal in the judgment.

15. Another arguable issue that was flagged by Mr. Omiti is the High Court's jurisdiction to determine the matter. He submitted that similar proceedings between the parties on the same issue were before the Employment and Labour Relations Court at Nairobi and the learned judge was aware of that. He should therefore have held that he had no jurisdiction to handle the matter.
16. On the nugatory aspect, Mr. Amoko submitted that the substratum of the appeal challenges the High Court's jurisdiction. The effect of the impugned decision was to nullify the recruitment of the CEO that had been undertaken by the PPB. The CEO would be ousted from office and the position re-advertised, unless the order sought is granted.
17. Mr. Amoko further submitted that by the time the appeal is heard and determined, the current CEO would have no recourse since the office will have been filled, yet the ouster would have been based on a decision from a court without jurisdiction. If the appeal is eventually successful, the 1st applicant would have two CEOs. That would be chaotic, counsel submitted. He added that the current CEO had been in office for about a year by the time the impugned decision was made.
18. That line of submission was adopted by Mr. Omiti for the 2nd applicant.
19. The application was opposed by **Mr. Wambua Maithya**, the 1st respondent in the two applications and **Dr. Pius Wanjala**, the 3rd and 4th respondent in the two applications respectively. The Pharmaceutical Society of Kenya through **Mr. Akusala** did not wish to either support or oppose the applications.
20. **Mr. Masika**, learned counsel for the 1st respondent, submitted that the applicants had failed to satisfy the two limbs as required of them under **rule 5(2)(b)** of this **Court's Rules**.
21. Highlighting the 1st respondent's written submissions, Mr. Masika argued that the PPB had filed before the High Court an application for review of the impugned judgment. That application was yet to be heard and therefore the intended appeal and this application are an abuse of the court process.
22. Counsel further submitted that an order of *certiorari* cannot be stayed in a **rule 5(2)(b)** application. He cited this Court's decision in ***Republic vs Public Procurement Administrative Review Board and 3 Others Ex parte Kenya Electricity Generating Company Ltd [2010] eKLR***.
23. Regarding the nugatory aspect, Mr. Masika submitted that the CEO who had been recruited is not a party to these proceedings and therefore the appeal will not be rendered nugatory if the orders sought are not granted. Furthermore, the 3rd respondent had already sought and obtained from the Employment and Labour Relations Court an order of stay prohibiting appointment of Dr. Fred M. Siyoi as the CEO of the PPB. Consequently, even if this Court granted stay of execution of the High Court judgment as sought, the CEO who had been recruited would still be barred from assuming office on account of the aforesaid order.
24. Opposing the application, Dr. Wanjala, who appeared in person, submitted that if the orders sought are not granted, the appeal will not be rendered nugatory. The current CEO will just take leave of absence from the PPB, and being an employee of the Ministry of Health, he will continue to earn his salary from the Ministry. The CEO can participate in subsequent recruitment, if he so desires; Dr. Wanjala submitted. He added that in the event that the intended appeal is successful, the CEO can be compensated for any financial loss that he may have suffered.
25. Regarding arguability of the intended appeal, Dr. Wanjala conceded that the appeal is arguable.
26. In a brief reply, Mr. Amoko told the Court that the application for review that had been filed in the High Court was withdrawn on 4th November, 2019.
27. Regarding the order of stay that was issued by the Employment and Labour Relations Court, Mr. Amoko submitted that the order was not in respect of recruitment of a permanent CEO of the PPB. He therefore urged the Court to grant the orders sought.
28. We have considered the application, the replying affidavits, the submissions by counsel as well as the authorities cited. We have already cited the twin conditions that an applicant must satisfy in an application brought under **rule 5 (2)(b)** of this Court's Rules. Under the first limb, this appeal or intended appeal must be shown to be arguable. An arguable appeal is not one that must necessarily succeed. It is simply one that is deserving of the Court's consideration. It need not be demonstrated that all the proposed grounds of appeal are arguable, even one would suffice. See ***Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others*** (*supra*).
29. The applicants have pointed to us several grounds that they contended are arguable. The 3rd respondent does not contest that the intended appeals are arguable.
30. Despite the 1st respondent's view to the contrary, we are persuaded that the intended appeals are arguable. We need not say more at this juncture.
31. We turn to the second limb, that is, the nugatory aspect of the intended appeal. The applicants argued that the intended appeal will be rendered nugatory if stay is not granted since a legally appointed CEO will have been ousted by a court that is alleged to have acted without jurisdiction; that if the appeal is successful and no stay having been granted, another CEO will have been recruited, thus exposing the PPB to unnecessary litigation.
32. We have considered the arguments advanced by the 1st and 4th respondents. We note that Dr. Fred M. Siyoi, who, in our view, is the person most affected by the impugned judgment showed no interest neither in the High Court proceedings nor in the proceedings before this

Court. It is therefore doubtful whether the applicants herein have *locus* to speak on behalf of Dr. Siyoi.

33. That notwithstanding, we are not persuaded that the intended appeals shall be rendered nugatory unless we grant the orders sought. If the PPB were to conduct a fresh recruitment, we do not think anything bars Dr. Siyoi from participating in it, if he so desires.

34. Secondly, the applicants did not demonstrate that what is sought to be stayed, if allowed to happen is irreversible, or if it is not reversible, whether damages will reasonably compensate the aggrieved party, as this Court held in **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others** (*supra*).

35. Further, the applicants have not sufficiently demonstrated the hardship they are likely to suffer unless this Court grants the orders sought. See **Charles Munyendo Olingo vs Salim Chetechi Makokha & Another [2019] eKLR**.

36. All in all, we are not satisfied that the applicants' intended appeals shall be rendered nugatory unless we grant the orders of stay of execution of the High Court judgment as sought.

37. Consequently, the 1st and 3rd and to the 1st of 2019. we dismiss the two applications with costs to respondent in Civil Application No. 485 of 2019 and 4th respondent in Civil Application No. 529

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

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR