



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 88 OF 2020

BETWEEN

THE AGA KHAN UNIVERSITY HOSPITAL.....APPLICANT

AND

DR. EDNAH KEMUNTO GISHORE.....RESPONDENT

*(Being an application for stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules,
pending hearing and determination of an intended appeal from the judgment and decree of the*

Employment and Labour Relations Court (Maureen Onyango, J.) dated 21st February, 2020

in

ELRC NO. 105 OF 2019)

RULING OF THE COURT

1. Due to the prevailing circumstances brought about by the COVID 19 epidemic, this application was heard under the current Practice Directions of the Court where the Court deliberated and considered via Skype conference, the application and the written submissions by counsel. The application before us, is by The *Aga Khan University Hospital* (the applicant) seeks an order of stay of execution of the decree issued on 21st February, 2020 by the Employment and Labour Relations Court (ELRC) Onyango, J. In the said judgment which is in favour of *Dr. Ednah Kemunto Gichore* (the respondent), the following orders were issued: -

- “1. A declaration be and is hereby issued that the conduct of the respondent was (sic) a discrimination against the petitioner.***
- 2. An order be and is hereby issued quashing the letter dated 17th June 2019 from the respondent to the extent it purports to cancel the clinical privileges of the petitioner on the 30th June 2019.***
- 3. Costs of the petition to be borne by the respondent.”***

2. Aggrieved by the above orders, the applicant filed a notice of appeal and application under **Rule 5 (2) (b)** of this Court’s Rules seeking an order of stay of the above orders pending the hearing and determination of the appeal. The grounds in support of the application are stated on the body of the application, a draft memorandum of appeal and a supporting affidavit sworn by **Valentino Achungo** on 18th March, 2020. Briefly, the applicant contends that the appeal is arguable, as the learned Judge failed to hold that there was no claim arising out of the contract of employment between the applicant and the respondent, which contract was terminated by the respondent; that the respondent’s claim after she had left the applicant’s employment did not fall within the realm of ELRC and therefore there was no issue which could be determined by the said court and there was no violation of the respondent’s rights.

3. Further, the applicant stated that the applicant did discharge the burden of proof when the employment contract was terminated by the respondent and there was no constitutional violation; that there are two distinct categories of medical staff enjoying clinical privileges i.e those in private practice and those employed by the applicant; two different and independent contracts as a faculty member and as a medical

staff; that clinical privileges are acquired by virtue of employment and therefore cease with employment and finally that the learned Judge failed to consider that the respondent's clinical privileges were granted to her by virtue of employment which ceased upon her resignation as an active medical staff.

4. These grounds were elaborated further by the applicants written submissions emphasizing that even with the narrowest bird's-eyes view of the above summary of the grounds or even the entire fifteen (15) grounds of appeal *ex facie* demonstrate the pending appeal is arguable. Counsel cited many cases on the applicable principles such as the case of **Gabriel Mutova & 2 Others vs. Managing Director Kenya Ports Authority & Another 2016 eKLR** to demonstrate that it is purely labour disputes that can be determined under the Employment Act as well as the Regulations thereto. Also cited was the case of **Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] eKLR** which sets out the standard of test to establish whether a complainant has fashioned a constitutional petition so as to give proper notice to the respondents about the nature of the claims being made and adequately prepare their case. This was to underscore the applicant's argument that the respondent did not establish that there was discrimination.

5. On the nugatory aspect, counsel submitted that the policy of the applicant will be disrupted, and there will be devastating impact on how the faculty runs, as many members may resign and wish to continue enjoying the privileges like the respondent. Since the applicant is transitioning to a full-fledged faculty teaching hospital which requires elimination of private practitioners enjoying clinical privileges, the decree will hamper the elimination and establishment of common standards and expand the category of eligible private practitioners. In this regard counsel cited the case of **Nairobi Hospital vs. Stanley Ominde Khainga [2020] eKLR** where a decision of the ELRC was stayed on the grounds that the reputation of the applicant as a hospital would be destroyed as at the center of the dispute was whether a person had died due to professional negligence while under the care of the respondent. Counsel urged us to allow the application.

5. This application was opposed by the respondent, vide her replying affidavit sworn on 2nd April, 2020 where she gave a blow by blow account of how she joined the applicant in 2006 as a founding resident in the Department of Anesthesia and completed her training in 2012 when she was employed as a full time member of faculty as a Consultant Anesthesiologist. Subsequently, the respondent was on 21st May, 2012 granted clinical privileges. This was renewed on 8th May, 2018 for a period of three (3) years up to 31st May, 2021 but the applicant unilaterally purported to withdraw the clinical privileges, when the respondent resigned which was against the regulations and a violation of the respondent's fundamental rights.

6. Counsel for the respondent also filed written submissions stating that the application does not meet the threshold of granting the orders of stay of execution; that the orders by ELRC are incapable of being executed because the respondent had admission rights running for three (3) years which she has continued to exercise and that issuing orders of stay will greatly prejudice the respondent and curtail her medical practice thereby affecting her livelihood. Counsel urged us to dismiss the application which is frivolous as the orders sought to be stayed are negative orders.

7. We have considered this application against the background of established principles under ***Rule 5 (2) (b)*** of this Court Rules, that for an applicant to succeed he/she must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

8. We now wish to consider this application within the above set out principles. It is common ground that the respondent was employed by the applicant and that she was granted clinical privileges to admit patients with the applicant which was renewed over the time and as at the time she tendered her resignation on 1st April, 2019, the same was valid until 31st May, 2021. We are satisfied, that the application raises several arguable issues among them whether the clinical privilege given to the respondent was tied to her employment and whether the respondent had pleaded a case of constitutional violation of discrimination among others. We also wish to throw caution that not all arguable points have a predilection of success when the appeal is heard and our determination is on a *prima facie* basis

9. On the nugatory aspect, one of the orders issued was declaratory in nature, which is not capable of being executed. See the case of; **Ndungu Kinyanjui vs. Kibichoi Kugeria Services and Another, NAI Civil Application No. 79 of 2007** (unreported) this Court stated that: -

“...that in an application under Rule 5(2) (b) for stay of execution, where the court whose orders is sought to be stayed has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this Court to enforce or to restrain by injunction.”

The other order was to quash a letter dated 17th June, 2019 which purported to cancel the clinical privileges of the respondent. We do not see what is prejudicial about this order, as the respondent had clinical privileges which were valid until 31st May, 2021. The respondent had been admitting patients at the applicant hospital and there were no allegations of professional misconduct or negligence unlike in the case of **Nairobi Hospital vs. Stanley Ominde Khainga** (supra).

Accordingly, we find the applicant has not satisfied the twin principles in granting the orders sought. Therefore, this application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of June, 2020.

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR