



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: MUSINGA, SICHALE & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. NYR. 120 OF 2017 (UR 8/17)**

**BETWEEN**

**WILLIAM CHARLES FRYDA..... APPLICANT**

**AND**

**ASSUMPTION SISTERS OF NAIROBI**

**REGISTERED TRUSTEES..... 1<sup>ST</sup> RESPONDENT**

**ST. MARY'S MISSION HOSPITAL..... 2<sup>ND</sup> RESPONDENT**

**REGINA PACIS UNIVERSITY**

**COLLEGE (Through the Board of Trustees)... 3<sup>RD</sup> RESPONDENT**

*(An Application for stay of execution from the judgment and/decree of the Environment and Land Court at Nakuru (Munyao, J.) dated 28<sup>th</sup> September, 2017*

*in*

**E. L. C. No. 224 of 2010)**

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**RULING OF THE COURT**

1. On 6<sup>th</sup> November, 2017 the applicant filed an application seeking stay of execution of the judgment delivered by the Environment and Land Court at Nakuru (**Munyao Sila, J.**) on 28<sup>th</sup> September, 2017. The applicant also sought a temporary injunction to restrain the respondents from executing the said judgment and/or decree.

2. The judgment was in respect of two suits that were consolidated, as they raised more or less similar issues of fact and law. The dispute in the two suits is over ownership of four properties. The first two are **L.R. No. 27228** and **L.R. No. 27229**, both situated in Lang'ata area, Nairobi. The third property is **L.R. No. 9361/10** situated in Elementaita, while the fourth property is known as **Kiine/Rukanga/2846** situated in Sagana.

3. In his plaint before the trial court, the applicant, a Medical Doctor and a Catholic Priest, stated that in 1998 he sought for land in Nairobi for purposes of establishing a hospital to cater for the poor; that he purchased the two properties in Lang'ata at a consideration of about Kshs 38 million; that he wanted a body to be registered in whose names the properties would be registered, and consequently he paid for the incorporation of the 2<sup>nd</sup> respondent, **St. Mary's Mission Hospital**.

4. The applicant further stated that because the 2<sup>nd</sup> respondent had not been incorporated when he purchased the two properties in Lang'ata, he agreed with the 1<sup>st</sup> respondent, **Assumption Sisters of Nairobi Registered Trustees**, that they would be registered as the owners of the two parcels of land but as soon as the 2<sup>nd</sup> respondent was registered the trustees would effect transfer of the two properties to the intended hospital; that he commenced development of the two properties with his own funds and subsequently solicited from friends and donors about Kshs 553 million which he spent in developing the two properties.

5. Regarding the Elementaita property, the applicant claimed that he put up a hospital there at a cost of about Kshs 365 million and for about 11 years he was running the two hospitals while awaiting the 1<sup>st</sup> respondent to transfer ownership of the properties. However, in 2009 there was change of leadership of the 1<sup>st</sup> respondent and the new leaders started to claim they owned the two properties at Lang'ata, the one at Elementaita, as well as the one at Sagana, which the applicant had purchased at Kshs 4.8 million.

6. In his amended plaint, the applicant sought the following orders:

***“(a) That a permanent injunction be issued to restrain the defendants by themselves, their servants or agents from entering, remaining or in any other manner interfering with the plaintiff's use and enjoyment of the suit premises.***

***(b) That a declaration be made that the 1<sup>st</sup> defendant (Assumption Sisters) is registered as proprietor of LR Nos. 27228 (original 18590), LR No. 27229 (original LR No. 18590/11), Kiine/Rukanga/2846 and LR No. 9361/10 in trust for the plaintiff.***

***(c) That the trust be terminated by an order of this court and the said lands be transferred to the plaintiff or to his nominee or nominees.***

***(d) The costs of this suit be paid by the 1<sup>st</sup> defendant.***

***(e) The court do make any further orders as to it may seem just.”***

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a defence and counter-claim to the applicant's suit. They denied the applicant's claim and contended, *inter alia*, that the idea of setting up a hospital was as a result of a collaborative meeting between the 1<sup>st</sup> respondent and the Superior General of a Catholic congregation known as Maryknoll Fathers and Brothers from New York, U.S.A; it was agreed that the 1<sup>st</sup> respondent would be the legal owner and would be responsible for the running of the hospital; accordingly the properties were registered in the 1<sup>st</sup> respondent's name.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents conceded that the applicant had been greatly involved in the running of the two hospitals because of the goodwill that previously existed between the 1<sup>st</sup> respondent and the applicant, which had since failed.

9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further pleaded that they had previously authorized the applicant to solicit funds from donors in their name and to receive the same for development of the hospitals but the applicant had abused their trust and had failed to account for some of the funds so collected.

10. In their counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought the following orders:-

***“(a) A permanent injunction to restrain Dr. Fryda or his servants/agents from entering, remaining or in any manner interfering with the suit premises.***

***(b) A permanent injunction to restrain Dr. Fryda or his servants/agents from interfering with the operations of St. Mary's Mission Hospital (the company) and with its hospitals.***

***(c) A permanent injunction to restrain Dr. Fryda or his servants/agents from soliciting for, receiving, collecting, expending, and keeping any funds belonging to St. Mary's Mission Hospital.***

***(d) A permanent injunction to restrain Dr. Fryda or his servants/agents from drawing or dealing with funds held in 6 specified bank accounts of St. Mary's Mission Hospital.***

***(e) A mandatory injunction to compel Dr. Fryda to sign bank forms for change of signatories of the specified bank accounts to at least two directors of St. Mary's Mission Hospital.***

***(f) An order accounts.***

***(g) Costs of the suit.***

***(h) Any other remedy that this Honourable Court may deem fit to award.”***

11. In the second suit, **Nairobi HCCC No. 9 of 2001**, the 3<sup>rd</sup> respondent claimed **Regina Pacis University College** was established on 23<sup>rd</sup> July 2009 with an emphasis on the education of the less privileged women; it was established on amongst other sites, L.R No. 27229 Lang'ata, adjacent to St. Mary's Mission Hospital; and that the applicant had threatened to interfere with the running of the university. The 3<sup>rd</sup> respondent sought the following orders against the applicant:-

***“(a) A permanent injunction against Dr. Fryda from inter alia running and managing the University College.***

***(b) A declaration that the plaintiffs and their constituent institutions and organs are solely entitled to exclusive possession, control and management of the University College situated in LR No. 27229, being Regina Pacis University College.***

***(c) Damages or mesne profits that may be assessed and found fair and just to grant.***

***(d) Costs of the suit and interest thereon until payment in full.”***

12. After a full hearing, the trial court dismissed the 3<sup>rd</sup> respondent's suit. However, in respect of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' suit, the trial court made the following orders:-

***“(i) That the properties LR No. 27228; LR No. 7229; LR No. 9361/10 and Kiine/Rukanga/2846 are not held in trust for Rev. Dr. William Fryda.***

***(ii) That the properties LR. No. 27228; LR. No. 27229; LR No. 9361/10 and Kiine Rukanga/2846 currently registered in the name of Assumption Sisters of Nairobi Registered Trustees be transferred to the company St. Mary's Mission Hospitals being a company limited by guarantee and to be held by the said company under a charitable trust for purposes of developing, maintaining and/or operating a hospital specifically aimed for the poor in society.***

***(iii) That the hospitals located in LR No. 27228 and/or LR No. 27229, and LR No. 9361/10 commonly identified as St. Mary's Mission Hospitals be henceforth under the management of the company St. Mary's Mission Hospitals a company limited by guarantee.***

*(iv) That Regina Pacis University has no claim over land parcel LR No. 27229, or over any of the other land parcels in issue in this suit and the Trust Deed assigning land to the said University is void to the said extent.*

*(v) That the user of the properties LR No. 27228; LR NO. 27229; LR No. 9361/10 and Kiine/Rukanga/2846 other than that of providing health services to the poor or such other auxiliary purposes is null and void and Assumption Sisters of Nairobi are hereby directed to embark on a relocation or discontinuation programme of any such purposes.*

*(vi) That in respect of accounts, Dr. William Fryda to provide details of all accounts forthwith and to surrender the same to St. Mary's Mission Hospital (the company) and if found necessary submit to an audit as directed in this judgment.*

*(vii) That the prayer to have Dr. William Fryda permanently restrained is not granted but the parties to agree on the position of Dr. Fryda within the hospitals given the import of the judgment herein that ownership of the suit properties and management of the hospitals will be with the company St. Mary's Mission Hospital.*

*(viii) There shall be no orders as to costs.”*

13. Being aggrieved by the said orders, the applicant filed a notice of appeal pursuant to which he also filed the Notice of Motion dated 6<sup>th</sup> November, 2017 seeking stay of execution of the said orders as well as an order of injunction to restrain the respondents from executing the orders.

14. The application was argued by **Mr. Muite, Senior Counsel**, who led **Ms. Mwangi**. Mr. Muite restated the twin principles that are considered by this Court in dealing with applications brought under **rule 5(2)(b)** of this **Court's Rules**. The principles require an applicant to satisfy the Court that he has an arguable appeal and secondly, that if the orders sought are not granted the appeal, if successful, shall be rendered nugatory. Senior Counsel cited this Court's decision in **KIRU TEA FACTORY COMPANY LTD VS. KENYA TEA DEVELOPMENT AGENCY HOLDINGS & ANOTHER, (2017) eKLR**.

15. Regarding arguability of the appeal, Senior Counsel referred the Court to the Memorandum of Appeal that had already been filed and served. Among the triable issues that were pointed out to us are that, the learned judge, having found that applicant conceptualized the establishment of the two hospitals, contributed some funds and helped in getting donors to give towards the development of some of the properties in dispute, erred in dismissing the applicant's case; that the learned judge erred in law in ordering a change of ownership of all the properties in dispute and in giving control of the hospitals to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

16. Mr. Muite further submitted that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. In particular, Senior Counsel urged the Court to stay and/or prohibit transfer of the properties and change of management of the hospitals pending hearing and determination of the appeal

17. The applicant's advocate stated that there had been attempted take over of the management of the hospitals by the 1<sup>st</sup> and 2<sup>nd</sup> respondents during the pendency of these proceedings. He pointed out that the applicant's view and vision of running the hospitals was diametrically opposed to that of the 1<sup>st</sup> respondent. Senior Counsel submitted that the applicant's vision and style of management was more in line with the wishes of the donors than that of the respondents.

18. Opposing the application, **Mrs. Wambugu**, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that the applicant has not satisfied the twin principles for grant of the orders sought. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit that was sworn by **Sister Bernadette Munyao**, the Superior General of the 1<sup>st</sup> respondent, and a supplementary one sworn by **Sister Marie Theresa Gachambi**, one of the original Trustees of St. Mary's Mission Hospital.

19. Mrs. Wambugu submitted that the applicant was not deserving of any discretionary order by this Court, having come to the Court with unclean hands, in that he had refused, failed, neglected and/or declined to comply with the orders issued by the trial court. In particular, the applicant had refused to relinquish the management of the hospitals and had also refused to provide details of all the hospital's bank accounts as ordered. He was therefore in contempt of court, counsel submitted.

20. Regarding the trial court's direction that the parties do agree on the position the applicant was going to assume within the hospitals, Mrs. Wambugu told the Court that she had severally written to the applicant's advocates seeking a meeting between the parties and/or their representatives but no response was forthcoming. In view of the non-response from the applicant and refusal to comply with the aforesaid orders, the 1<sup>st</sup> and 2<sup>nd</sup> respondent had to go back to the trial court on 23<sup>rd</sup> November, 2017 to get orders of supervision of eviction of the applicant from the hospitals. Consequently, on 28<sup>th</sup> December, 2017 the management of Lang'ata Hospital was fully taken over by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

21. Counsel added that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had also taken over the management of the Elementaita Hospital but the applicant had funded employees and other workers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to file cases at the Employment and Labour Relations Court, ostensibly to restrain the two respondents from terminating their employment and recruiting new employees, but in reality the objective of the said suits was to frustrate enforcement of the orders issued by the trial court.

22. In view of the foregoing, Mrs. Wambugu submitted that the orders sought to be stayed had already been executed and there was nothing to be stayed. She added that the applicant had, during the pendency of the suit before the trial court, fraudulently transferred one of the properties in dispute, L.R. No. 9361/10 to Medical Mission Charitable Trust Registered Trustees.

23. Lastly, Mrs. Wambugu submitted that the appeal, if successful, would not be rendered nugatory since the properties in dispute shall not be transferred to any 3<sup>rd</sup> party, they shall be dealt with as directed by the trial court. It is only the management of the hospitals that shall change, from the applicant to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. If the appeal were to succeed the management of the hospitals would revert to the applicant.

**24. Mr. C. N. Kihara**, learned counsel for the 3<sup>rd</sup> respondent, supported the submissions by Mrs. Wambugu in urging this Court to dismiss the applicant's application. Counsel highlighted the relevant portions of a replying affidavit sworn by Sister Marie Theresa Gachambi, the Chairperson of the 3<sup>rd</sup> respondent, also a trustee of the 1<sup>st</sup> respondent.

25. The 3<sup>rd</sup> respondent also averred that following the delivery of the impugned judgment, in an attempt to defeat administration of justice and thereby frustrate execution of the judgment, the applicant had instigated, funded and unduly influenced the hospitals' employees to involve themselves in malicious damage of the properties in dispute, and had also blocked and denied the respondents' staff access to the two hospitals.

26. Equally, after the 1<sup>st</sup> and 2<sup>nd</sup> respondents take over and assumption of management of the two hospitals, the applicant had funded the 1<sup>st</sup> and 2<sup>nd</sup> respondents' staff to file suits against their employer in an attempt to shield the applicant from having to comply with the orders issued by the trial court, Mr. Kihara added. In his view, the application had been overtaken by events. Counsel urged the Court to dismiss the application.

27. In a brief rejoinder, Mr. Muite stated that there was no fraudulent transfer of any of the suit properties as alleged; and that the Employment and Labour Relations Court had issued ex-parte orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from terminating the employment of a number of their employees pending inter-partes hearing and determination of their application. In the circumstances, the management of the hospitals should remain in the hands of the applicant until the appeal is heard and determined, Mr. Muite submitted.

28. We have carefully considered the application, the affidavits by all the parties, the submissions by counsel and all the authorities cited. Mr. Muite succinctly restated the twin principles that guide this Court in its consideration of an application for stay of execution or injunction pending appeal under rule 5(2)(b) of this Court's Rules. This Court has severally stated that an arguable appeal is not one that must necessarily succeed, but rather, one that raises an issue or issues deserving consideration by the Court. See **STEPHEN WANYEE ROKI VS. K-REP BANK LIMITED & 2 OTHERS [2015] eKLR**. An applicant is not required to establish a multitude of arguable issues, even a single one would be sufficient, see **AHMED MUSA ISMAEL VS. KUMBA OLE NTAMORUA & 4 OTHERS [2013] eKLR**.

29. In **REPUBLIC VS. KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31**, this Court held that in an application under **rule 5(2)(b)** of the **Court of Appeal Rules** an applicant must satisfy both conditions, that is, demonstrate that the appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

30. Whether or not an appeal will be rendered nugatory depends on whether the orders sought to be stayed, if allowed to happen, are reversible. Further, in **RELIANCE BANK LIMITED VS. NORLAKE INVESTMENTS LTD [2002] I.E.A 227**, this Court held that whether or not an appeal would be rendered nugatory, if successful, would ultimately depend on the peculiar circumstances of each case.

31. Regarding arguability of the appeal, having carefully perused the pleadings that were filed by all the parties before the trial court, the impugned judgment and the Memorandum of Appeal, we do not entertain any doubt that the appeal is arguable. We need not say more at this juncture lest we prejudice one of the parties and embarrass the Bench that shall ultimately hear the appeal.

32. We now turn to consider whether the appeal, if successful, shall be rendered nugatory. The learned judge appreciated the role played by the applicant in acquisition of the suit properties and establishment of the hospitals. But as regards their ownership, the learned judge stated:

***“141. I have elaborated in this judgment that Dr. Fryda ceded ownership of the hospitals to ASN (1<sup>st</sup> respondent) and there appears to have been a mutual understanding that the hospitals would be managed by the company, St. Mary's Mission Hospital. I have spelt out the letters written to donors where Dr. Fryda stated that ownership would be with ASN and that he will be 'the first medical director and Chief of Medical staff.' These are Dr. Fryda's own words and I guess that this was the understanding with the donors. I have absolutely no evidence that there was any agreement or understanding that Dr. Fryda would manage the hospitals apart from playing the role of medical director and Chief of Medical Staff. I do not see how he can assert that he is entitled to full management of the hospitals beyond that scope.”***

33. That being the position, the trial court ordered that the management of the hospitals be granted to St. Mary's Mission Hospitals Limited. The trial court was well aware that prior to delivery of its judgment the hospitals were under the management of the applicant, and in changing their management there would be some interruption of services. This is how the learned judge delivered himself:

***“160. This brings me to an important point; at the moment, the hospitals are under the management of Dr. Fryda. This will now need to change. I direct Dr. Fryda to immediately embark on handing over the hospitals to the company, which handover should take effect immediately. However, let all parties be alive to the fact that there are patients in these hospitals and the handover needs to be least disruptive. Where ASN and the company can retain personnel or service providers, it would be best that this be done, if only to avoid interruptions to the services being offered. I trust that both parties will give their cooperation with regard to this.”***

34. The learned judge was emphatic that given the prevailing circumstances of the case the *“handover should take effect immediately.”* Barely three days upon delivery of the impugned judgment, which was on 28<sup>th</sup> September, 2017, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' advocate wrote to the applicant's advocate and to the Administrator of the hospitals requesting for an urgent meeting in order to agree on the

implementation of the judgment, and particularly to agree on the dynamics of a smooth handover.

35. The applicant was not at all willing to comply with the orders of the trial court and on 2<sup>nd</sup> October, 2017 filed before the same court an application for stay of execution pending appeal. The application was argued inter-partes.

36. In his considered ruling delivered on 31<sup>st</sup> October, 2017, the learned judge found no merit in the application and dismissed it. The court stated, *inter alia*:-

***“.....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.”***

37. We entirely and respectfully agree with the learned judge. Having carefully considered Mr. Muite's submissions, we are not satisfied that the appeal shall be rendered nugatory unless the orders sought are granted. We need not repeat what the learned judge stated as quoted hereinabove. Besides, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have already taken over the management of the hospitals, although in so far as Elementaita Hospital is concerned, the process may not be complete.

38. All in all, we find this application lacking in merit. Consequently, it is dismissed with costs to the respondents. As regards the appeal, we direct that it be set down for hearing on priority basis so that this protracted dispute is brought to a full closure, one way or the other. It is so ordered.

**Dated and delivered at Nyeri, this 21<sup>st</sup> day of February, 2018.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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**