



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MUSINGA & OUKO, J.J.A)

CIVIL APPLICATION NO. 66 OF 2014

BETWEEN

MARGARET KWAMBOKA OGEKA 1ST APPLICANT

JANE M. NYAGA 2ND APPLICANT

ANASTACIA MUNEE 3RD APPLICANT

PATRICK MWANIKI 4TH APPLICANT

AND

PERMANENT SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF

MEDICAL SERVICES 2ND RESPONDENT

PERMANENT SECRETARY,

MINISTRY OF HOUSING 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(Being an application under Rule 5 (2) (b) Court of Appeal Rules for a stay of Execution of the Orders of the High Court pending the filing, hearing and determination of an appeal from the Ruling of the Hon. Mr. Justice D. Majanja delivered at the High Court of Kenya, Constitutional and Judicial Review Division, Nairobi on the 31st March 2014

in

PETITION NO. 568 OF 2012)

RULING OF THE COURT

Twelve applicants petitioned the High Court in High Court Petition No. 568 of 2012 alleging that their constitutionally guaranteed rights under **Article 27 (1)** of the Constitution was threatened by eviction notices issued to them by the 1st and 2nd respondents. It would appear that the applicants, who are in occupation of the Mathari Hospital civil servants' quarters by virtue of having been employees of the 1st and 2nd respondents, working in Mathari Hospital, were through a Government directive in September 2010 transferred from the Ministry of Medical Services to various other ministries in a general reshuffle affecting many junior staff in all ministries.

According to Dr. Jackton Azenga Kisivuli's affidavit on behalf of the 1st and 2nd respondents, following the aforesaid directive, the applicants were to vacate their quarters to hospital staff who by their nature of work were required to reside within the hospital premises. In their petition, the applicants argued that they too have equal rights to occupy those quarters; that the State is enjoined by **Article 43 (1) (b)** of the Constitution to cater for their socio-economic rights, including housing; that the eviction notices they were served with were issued in bad faith as they were intended to create room for the 1st and 2nd respondents to allocate the quarters to private non-deserving citizens who are not necessarily civil servants. Consequently they invited the High Court to declare that the intended eviction was unconstitutional and ought be quashed or in the alternative that the respondents be ordered to provide alternative housing to the applicants before effecting the eviction notices.

In the aforesaid affidavit of Dr. Jackton Azenga Kisivuli, the respondents averred that all the Government employees serving Mathari Hospital who were affected by the above mentioned Government directive, save for the applicants, heeded the directive and vacated the quarters they occupied; that like other civil servants, the applicants were entitled to a monthly house allowance and were also at liberty to apply to the 3rd respondent for allocation of alternative quarters; and finally, that it is in the interest of the public, which is served by the hospital that those who reside in the hospital staff quarters be the hospital staff working within the hospital.

The High Court, (Majanja, J.) considered the rival positions of the parties and dismissed the petition stating, *inter alia*, that **section L. 1** of the Code of Regulations (Revised 2006) governing housing to Government employees provides for payment of house allowance based on market rates while those in occupation of Government quarters are required to pay market rent determined by the Ministry responsible for housing. The section also restricts the provision of Government housing only to officers who perform strategic and/or essential functions. Such officers are not entitled to receive house allowance but are instead required to pay market rent for the houses they occupy.

The learned Judge after comparing the foregoing with the provisions of **section 31** of the Employment Act concluded that:-

“...the mandate imposed by the State on every employer fulfills and promotes the right to access. Payment of a sum in the form of housing allowances enables the employee to secure accommodation on the (sic) open market. To that extent therefore, I find that the petitioners' rights under Article 43 (1) (b) have not been violated as alleged by the petitioners. As the petitioners are no longer entitled to remain in the hospital homes, they must now move out to give way to hospital staff...., I direct that the petitioners to vacate the respective houses by 31st July 2013.”

The last part of the above order directing the applicants to vacate the houses in question, although

not sought was nonetheless issued making the order capable of execution hence the application to stay that execution. The judgment was rendered on 31st May, 2013. The applicants made subsequent attempts in the High Court to escape the consequences of the order which attempts included an application for stay of execution, maintenance of *status quo*, review of the judgment and an injunction. In dismissing the said application the learned Judge noted that it was brought ten months after the judgment was delivered and that no sufficient reasons were presented to warrant a review. Undeterred, and even after filing a notice of appeal evincing their intention to challenge that decision in this Court, the applicants stayed put prompting the respondents to move the Court by motion filed on 31st January, 2014 for orders of eviction with the help of the Officer Commanding Muthaiga Police Station.

On 11th February 2014, the High Court extended the time for the applicants to 30th March 2014 to vacate the houses. On 31st March, 2014, the learned Judge made a further order in the following terms:

“In the circumstances the respondents shall be at liberty to evict the petitioners from the staff houses at Mathari Hospital. However, each of the petitioners shall be given a 7 day (sic) written notice to vacate the house voluntarily. In default, the respondents may proceed accordingly.”

This is the decision that is sought to be stayed by four of the original twelve petitioners pending the filing and determination of an appeal. Even though the application was argued *ex parte* after the Attorney General, for the respondents failed to attend court despite service upon his office of the hearing notice, the burden remained on the applicants to satisfy us that the application meets the requirements of **Rule 5 (2) (b)**, which is the basis of the jurisdiction of this Court to grant an order of stay of execution. It provides that:-

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence to or stay execution, but the Court may –

.....

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.(Emphasis supplied)

That jurisdiction is exercisable only when an intending appellant has lodged a valid notice of appeal in terms of **Rule 75**.

There is only one notice of appeal that we have alluded to earlier, filed on 27th March 2014 in respect of the learned Judge’s ruling rendered on 26th March 2014. Likewise, the only draft memorandum of appeal to which learned counsel for the applicants directed us to also only relates to that very same decision of 26th March 2014. There is no notice of appeal in respect of the decision of 31st March 2014. The notice of appeal lodged in respect of the decision rendered on 26th March, 2014 cannot be used as the basis of this application, the two being distinct decisions. This Court, (Omollo, Waki and Nyamu, JJ.A) in **Safaricom Ltd V. Ocean View Beach Hotel Ltd** Civil Application No. 327 of 2009, stated:-

“At the stage of determining an application under Rule 5 (2) (b) there may be no actual appeal already lodged, there nevertheless must be an intention to appeal which is manifested by lodging of a Notice of Appeal. If there is no Notice of Appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or intention to appeal as manifested by lodgment of the Notice of Appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.” (Per Omolo, JA).

It follows that in the absence of a notice of appeal, this Court has no jurisdiction to grant the prayer sought in this application. Consequently, it is hereby dismissed with no orders as to costs.

Dated at Nairobi this 9th day of May 2014.

D.K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR