



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.

CIVIL APPLICATION NO. NAI 189 OF 2001

BETWEEN

DAVID MORTON SILVERSTEIN APPLICANT

AND

ATSANGO CHESONI RESPONDENT

(An application for stay of proceedings in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Aganyanya & Rimita JJ) dated 26th April, 2001

in

H.C.C.A. NO. 105 OF 2000)

RULING OF THE COURT

Dr David Morton Silverstein, hereinafter "the applicant", is a registered medical practitioner in Kenya. That being so, he is subject to the disciplinary jurisdiction of the Kenya Medical Practitioners and Dentists Board, "the Board" hereinafter, created under the provisions of **Section 4 of the Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya** . The disciplinary powers of the Board are to be found in **Section 20 of the Act** .

The late Chief Justice Z.R. Chesoni used to be a patient of the applicant and during the last ailment which took his life, the applicant attended to him. The family of Chief Justice Chesoni was not happy with the manner in which the applicant had managed their relative. So Atsango Chesoni, the respondent herein, made a complaint to the Board, obviously on behalf of the family. The respondent is the daughter of the late Chief Justice Chesoni. Her complaints to the Board against the applicant were:

"1.We believe that the medical practitioner, Dr David Silverstein, who was attending to our relative delayed in making a diagnosis of what ailed him, which was later established to be a form of meningitis. 2.We further believe that after diagnosis was made the second line of treatment was prescribed.

3.While our relative was critically ill, the said practitioner went on a weekend vacation.

Furthermore, when our relative was in ICU the said Practitioner still went away on a second

weekend vacation. We believe that he should not have done so under the circumstances."

Upon receipt of these complaints, the Board acted with perfect propriety and did what the Act requires of it, namely that it referred the complaints to the Preliminary Inquiry Committee created under **Rule 3 in Part II of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules** .

That Committee received and reviewed the complaints and determined and reported to the Board that an inquiry ought to be held pursuant to **Section 20 of the Act** . In doing this the Preliminary Inquiry Committee was strictly complying with the provisions of Rule 4 .

Upon receipt of the report of the Preliminary Inquiry Committee, the Board wrote to the respondent on 15th December, 1999, and the Board told the respondent:

"Please note that as a complainant you will be expected to present your complaints to the tribunal."

Thereafter, the Board convened and heard the complaints of the respondent. The Board, after hearing the parties rendered its decision absolving the applicant from any blame with respect to the death of Chief Justice Chesoni.

Section 20 (6) of the Act with which we are dealing provides as follows:

"A person aggrieved by a decision of the Board under the provisions of this section may appeal within thirty days to the High Court and in any such appeal the High Court may annul or vary the decision as it thinks fit."

The respondent to whom the Board itself had referred as "a complainant" was aggrieved by the decision of the Board.

She thought she would qualify as "a person aggrieved" and in purported exercise of the right of appeal in **Section 20 (6)** above, she filed an appeal in the High Court, namely High Court **Civil Appeal No. 105 of 2000**. That appeal is still pending and we must be careful not to make any comments which might be construed as touching upon its merits or demerits.

Before the appeal could be listed for directions, the applicant moved to the High Court, purportedly under **Section 20 (6) of the Act Order 50 rule 1 of the Civil Procedure Rules** and **Sections 3A and 79 (b)** of the Civil Procedure Act , and the only prayer the applicant sought from the High Court was that the respondent's appeal ought to be dismissed **in limine** because:

- "1.The appellant has no locus standi to bring the appeal.
- 2.The appeal is defective and should be dismissed.
- 3.The appeal is an abuse of the process of this Honourabl e Court.
- 4.It is necessary for the ends of justice that the appeal is dismissed."

That application was heard by a bench of the High Court consisting of two Judges, (Aganyanya and Rimita, JJ). They held that the respondent qualified as a person aggrieved and had locus standi to file the appeal. The applicant is in turn aggrieved by the ruling of the High Court and he has filed a notice of appeal and intends to appeal to this Court. In fact an appeal has been lodged. In the meantime, the applicant has come before us pursuant to the provisions of **rule 5 (2) (b) of the rules of this Court** and the substantive order he seeks from us is:

"THAT there be a stay of proceedings in High Court Civil Appeal No 105 of 2000 until after the hearing of the applicant's intended appeal."

The grounds on which the application before us is made are that:

"1.The intended Appeal is arguable.

2.The intended Appeal is not frivolous.

3.That unless there is a stay of the High Court proceedings, then the intended Appeal, if successful, would be rendered nugatory.

4.It is necessary for the ends of justice that there be a stay of proceedings in the High Court."

Grounds one to three in support of the motion before us merely summarise what an applicant for a stay under **rule 5 (2) (b)** of the Court's rules is required to satisfy the Court on before an order for an injunction or an order for stay, as in this case, can be granted to him. It is now trite law that an applicant under **rule 5 (2) (b)** must satisfy the Court that: "(i)his intended appeal is an arguable one or, put another way, the intended appeal is not frivolous; (ii)unless the Court grants an order of stay to him, his intended appeal, if successful, will be rendered nugatory.

An applicant such as the one before us is obliged to prove not only one, but both of these requirements before he can hope to obtain an injunction or an order of stay from the Court.

As regards the first limb of the two requirements, Mr Havelock for the applicant, strenuously argued before us that they will seek to show in their intended appeal that a daughter or any such relative of a deceased party is not "a person aggrieved" within the provisions of **Section 20 (6) of the Medical Practitioners and Dentists Act** . Though such persons may have lost a close relative, argued Mr Havelock, they cannot point out any legal right personal to them which has been breached or infringed and which would qualify them as being "persons aggrieved" . Mr Havelock went so far as to contend that only the medical practitioner or dentist tried before the Board would qualify as "a person aggrieved" and thus have the right of appeal conferred by Section 20 (6) of the Act .

We do not have to decide these points in this application; they will be conclusively determined in the intended appeal. What we have to do in this application is to determine whether the point is an arguable one, that is, that it is not a frivolous one. In doing so, if we were to go simply by what we think an ordinary villager in Korogocho Village would say if he were to be asked: "Is a daughter an aggrieved party where the death of her father is in issue?",

we would have very little difficulty in answering such a question. We would expect the villager to answer without any hesitation:

"Of course a daughter is a person aggrieved where the death of her father is being investigated."

But the law has not always been reasonable in such matters and Mr Havelock tells us that the Act we are dealing with does not permit a daughter or any such close relative the right to appeal under **Section 20 (6)** . We cannot dismiss the arguments of Mr Havelock off-hand, seeing that they are strictly based on the interpretation to be given to the provisions of the Act.

Mr Bumble, the parochial beadle in Charles Dickens' "OLIVER TWIST" was a much harassed, much hen-pecked and a much dominated husband by his wife, Mrs Corney Bumble. As fate would have it, Mrs Bumble in the presence of her hapless husband committed some acts which were criminal under the law of England. When the long arm of the law eventually caught up with them, Mr Bumble, like old Adam before him, blamed it all on his wife. Having made sure that his yoke-mate had left the room, he is recorded as telling his accusers: "It was all Mrs Bumble. She **would** do it". One of Mr Bumble's accusers, Mr Brownlow replies:

"That is no excuse. You were present on the occasion of the destruction of these trinkets and indeed are the more

guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction."

So, here was poor Bumble being told that the law of England as it was then understood, presumed that a man was in control of his wife and if the wife committed a crime in his presence, the man was the more guilty of the two for not preventing the wife from committing the crime. And yet as everybody knew or ought to have known, it was Mrs Bumble who was in control of Mr Bumble and even if Mr Bumble had been inclined to prevent his wife committing the crime, he could not have done it. In amazement at the absurdity of the law, Mr Bumble retorts:

"If the law supposes that, the law is a ass - a idiot.

If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience - by experience" . - See CHARLES DICKENS' "OLIVER TWIST"; Penguin Popular Classics at page 491.

So whatever the ordinary villager in Korogocho Village may say or think, may not necessarily be the true position at law. Perhaps the law did not fall for Mr Bumble's spiteful wish to take unto himself a wife and the law still remains a bachelor to this day. If that be so, then the law would have no daughters, no sons and such like relations and accordingly it would not know of any such persons being aggrieved parties at the death of their father. The applicant may yet come to convince the Court in his intended appeal that the respondent, pursuant to the provisions of the Act governing the operations of the doctors and dentists, is a mere busy body and is not entitled to appeal under that Act. As we have said, we are not prepared to reject that point at this stage as being frivolous; it may well be an arguable point in the intended appeal.

On the second limb regarding whether the applicant's intended appeal would be rendered nugatory if it succeeded and we refused to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must follow the decision of this Court in the case of **KENYA COMMERCIAL BANK LTD VS BENJOH AMALGAMATED LTD & ANOTHER , Civil Application No. NAI 50 of 2001 (29/2001 UR), (Unreported)** . That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:

"... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."

These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.

The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of **rule 5 (2) (b) of the Court's own rules** . But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay.

Before we leave the matter, there is one last point we wish to briefly comment on. This motion first came up for hearing on 5th November, 2001. On that day, we raised with Mr Havelock the issue of whether, under the provisions of the Civil Procedure Act and the Civil Procedure Rules dealing with appeals to the High Court, that court has power to strike out an appeal without hearing it. Mr Havelock did not have an immediate answer to our query and he asked for an adjournment which we granted, to enable him consider the matter. When the hearing resumed before us on 6th February, 2002, Mr Havelock submitted before us, basing himself on the provisions of Section 60 (1) of the Constitution and Sections 3 and 3A of the Civil Procedure Act, that the High Court must of necessity have power to strike out an incompetent appeal. We think that contention must be correct. Section 79 G of the Civil Procedure Act, for example, provides that:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

Under this section if an appeal was filed outside the thirty days allowed and no leave of the High Court was obtained to do so, then of necessity, the High Court must have the power to strike out the appeal as being incompetent without the necessity of going through a hearing on the merits. We did not understand Mr Adere for the respondent to challenge this position. But we think an incompetent appeal ought to be struck out, not dismissed, as Mr Havelock asked the High Court to do in this case. A dismissal implies a hearing on the merits and in the circumstances of the application we have, if it was found that the respondent has not locus standi to bring the appeal, then the merits of the appeal itself would be irrelevant - see for example, *NGONI-MATENGO CO -OPERATIVE MARKETING UNION LTD VS ALIMOHAMED OSMAN [1959] EA 577 at page 580 Letters E to H.*

Finally, we are satisfied that even though the appellant may have an arguable appeal, he has not satisfied us that if we do not grant to him the stay of proceedings, his appeal in this Court will be rendered nugatory. The applicant was bound to satisfy us on both points and having failed to so satisfy on the second requirement, his application for stay must fail.

We order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 1st day of March, 2002.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR