



**Mboya v Pharmacy and Poisons Board & 3 others (Petition
E030 of 2023) [2023] KEELRC 1905 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1905 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E030 OF 2023**

L NDOLO, J

JULY 27, 2023

**IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & (3), 22(1) & (2)(B) & (C),
23(1) & (3), 27, 28, 41(1) & 2(B), 47, 48, 50(1), 73, 75, 159, 162(2)(A), 165(3)(B), 232,
258(1) & (2)(B) & (C) AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF THE PHARMACY AND POISONS
ACT, CHAPTER 244 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES**

AND

**IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES
OF GOVERNANCE UNDER ARTICLE 10, THE PRINCIPLES OF LEADERSHIP
AND INTEGRITY UNDER ARTICLE 73 AND THE VALUES AND PRINCIPLES OF
PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

APOLLO MBOYA PETITIONER

AND

PHARMACY AND POISONS BOARD 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF HEALTH (STATE DEPARTMENT OF
PUBLIC HEALTH & PROFESSIONAL STANDARDS) 2ND RESPONDENT**

FRED MOIN SIYOI 3RD RESPONDENT



RULING

1. By my ruling dated 27th April 2023, I overruled the 1st Respondent's Preliminary Objection challenging the jurisdiction of the Court to hear and determine this matter.
2. The 1st Respondent subsequently filed a Notice of Motion dated 8th May 2023 seeking stay of further proceedings in the matter pending the hearing and determination of Nairobi Civil Appeal No E304 of 2023: Pharmacy and Poisons Board v Apollo Mboya & 3 others.
3. The Motion is supported by an affidavit sworn by the 1st Respondent's Legal Counsel, Kibet Kisorio and is based on the following grounds:
 - a. In a ruling delivered on 27th April 2023 in respect of a Notice of Preliminary Objection by the 1st Respondent, the Court disallowed the Objection and issued further directions on the hearing and disposal of the pending Motion and Petition;
 - b. The Preliminary Objection challenged the jurisdiction of the Court to determine the Petition on account of the absence of an employer-employee relationship between the Petitioner and any of the Respondents, an issue the 1st Respondent contends deprived the Petitioner the locus standi to file the Petition and the Court the jurisdiction to determine the Petition;
 - c. In a judgment delivered by the Court of Appeal in Nakuru Civil Appeal No E136 of 2022: Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others on 14th April 2023, the Court of Appeal affirmed that in the absence of an employment relationship, a petitioner lacks locus standi to bring a petition/claim before the ELRC for redress of fundamental rights and freedoms;
 - d. The 1st Respondent being dissatisfied with the ruling of this Court has since lodged an appeal against the ruling at the Court of Appeal being Nairobi Civil Appeal No E304 of 2023: Pharmacy and Poisons Board v Apollo Mboya & 3 others;
 - e. The pending appeal on the impugned ruling is arguable with high chances of success for among other reasons in the subject Petition, there is no employee-employer relationship between the Petitioner and the 1st Respondent. The 1st Respondent contends that the Court fell into error of law in holding that the Petitioner had locus standi to bring the Petition and that the Court had jurisdiction to determine the Petition;
 - f. Unless the Court stays the proceedings in this matter, during the pendency of the appeal, there is a likelihood that all further proceedings in the matter will be rendered nugatory for want of jurisdiction at the great expense of precious judicial time and resources on the part of the both the Court and the parties;
 - g. This application has been brought timeously and without delay and it is in the interest of justice that the order sought be granted;
 - h. No prejudice will be suffered by the Petitioner/Respondents if the order sought is granted as the question before the Court is a fundamental one going to the root cause of the matter.
4. The Petitioner filed Grounds of Opposition accompanied by a supporting affidavit dated 12th May 2023, stating:



- a. The 1st Respondent has misinterpreted the decision in Nakuru Civil Appeal No E136 of 2022: Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others which is clearly distinguishable from the present case;
 - b. The application is a waste of judicial time since similar grounds were raised in the 1st Respondent's Preliminary Objection dated 27th February 2023 and a ruling delivered on 27th April 2023;
 - c. The order of stay of proceedings sought by the 1st Respondent is intended to benefit the 3rd Respondent from the unconstitutional action of the Principal Secretary, Ministry of Health (State Department for Public Health & Professional Standards), the 2nd Respondent herein;
 - d. This Court issued directions on the filing of responses to the Petitioner's Notice of Motion and Petition all dated 17th February 2023, which the Respondents have ignored and refused to comply with;
 - e. The 1st Respondent has not demonstrated a prima facie case with the possibility of success on appeal;
 - f. In any event, the 1st Respondent ought to have made the application for stay of proceedings to the Appellate Court where it has filed Nairobi Civil Appeal No E304 of 2023: Pharmacy and Poisons Board v Apollo Mboya & 3 others challenging the ruling of this Court delivered on 27th April 2023;
 - g. The application is mischievous, frivolous and otherwise an abuse of the court process, intended to delay the proceedings and determination of the matter.
5. This application asks the Court to stay further proceedings in the Petition. As a rule, stay of proceedings is a serious action to be taken only in exceptional circumstances.
 6. The reason given by the 1st Respondent for its plea is that the decision by this Court in its ruling delivered on 27th April 2023 goes against the judgment by the Court of Appeal in Nakuru Civil Appeal No E136 of 2022: Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others delivered on 14th April 2023.
 7. On his part, the Petitioner submits that Nakuru Civil Appeal No E136 of 2022 is distinguishable from the present Petition. It does not fall on me to determine this question; this is a matter for the Appellate Court. All I am required to do at this stage is to determine whether there are special circumstances to allow for stay of proceedings.
 8. In its submissions in support of the Motion, the 1st Respondent cited the decision in *Turbo Highway Eldoret Ltd v Muniu* [2022] KEHC 10197 (KLR) where Joel Ngugi J (as he then was) relying on *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR restated the principles for grant of stay of proceedings pending an interlocutory appeal as follows:
 - a. First, there must be an appeal pending before a higher court;
 - b. Second, where such stay is sought in the court hearing the case as opposed to the higher court to which the appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in



the court to which an appeal is preferred because such a court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;

- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

9. The 1st Respondent has not bothered to explain why it chose to make its application for stay of proceedings in this Court rather than in the Court of Appeal where its appeal lies.
10. Additionally, no special circumstances have been established as to why the Court should halt the proceedings nor is there evidence that the appeal would be rendered nugatory if the application is not allowed.
11. Consequently, the 1st Respondent's application dated 8th May 2023 is declined with costs in the Petition.
12. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

LINNET NDOLO

JUDGE

Appearance:

Apollo Mboya (The petitioner in person)

Ms. Saina for the 1st respondent

Mr. Kubai and Mr. Malenya for the 3rd respondent

No appearance for the 2nd and 4th respondents

