



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.114 OF 2018

IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF ARTICLES 22, 23, 27, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SUSPENSION OF ADMITTING RIGHTS OF THE PETITIONER BY THE RESPONDENT, PURSUANT TO FILING OF PETITION NO.335 OF 2018 AT THE HIGH COURT OF KENYA AT NAIROBI

PROF. STANLEY OMINDE KHAINGA.....PETITIONER

- VERSUS -

THE NAIROBI HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 8th November, 2018)

RULING

The petitioner filed the petition on 22.10.2018 through Professor Kiama Wangai & Company Advocates. Together with filing of the petition the petitioner filed an application by way of the notice of motion under Articles 22, 23, 47 and 50 of the Constitution of Kenya 2010, section 3A of the Civil Procedure Act, Cap.21 Laws of Kenya, Order 50 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of law. The substantive prayer is that the Honourable Court is pleased to suspend the two letters from the respondent herein dated 08.10.2018 and 11.10.2018 pending the hearing and determination of the petition herein; and costs of the application and petition be provided for. The application was based on the grounds therein and the supporting affidavit of the petitioners and exhibits thereto. The grounds to support the application are summed up as follows:

1. That pursuant to the petitioner filing petition No. 335 of 2018 in the High Court of Kenya at Nairobi, the respondent has suspended the admitting rights of the petitioner with immediate effect starting 08.10.2018.
2. The said suspension is unmerited, is actuated by malice and spite and is against all the rules of natural justice. The effect of the suspension is to deny the petitioner a right to his livelihood which is highly prejudicial.
3. The dispute relates to the death of a patient one June Mulupi whose father in-law was one John Simba, the chairman of the respondent's Board of Directors. Further, the respondent's head of marketing and customer service is the brother in-law of the said June Mulupi, deceased. It is the petitioner's case that the decision to suspend his admitting rights is therefore laced with bias or conflict of interest and malice.
4. The reasons for suspending the petitioner's admitting rights has no connection with the contract between the petitioner and the respondent herein and in particular, the respondent's criteria on admitting rights is liberal thus, **"The respondent at present maintains an open door policy and all those doctors who wish to apply for membership may do so, provided that the following documentation is complete: registration with the Medical Practitioners and Dentists Board of Kenya (MPDBK); paid up and valid membership with a medical indemnity scheme recognised by the hospital whose values shall be determined from time to time; the application must be accompanied by names of 3 referees from the speciality in which the applicant is licensed to practice; and valid membership of the Kenya Hospital Association (KHA)."**
5. That no investigations have been conducted in relation to the death of the late Jane Mulupi as provided for in the Nairobi Hospital Information Booklet by the Standard Audit and Ethics Committee, and only then can the admitting rights of a doctor be withdrawn if at all.
6. The respondent's conduct breached the petitioner's rights as safeguarded in Articles 27, 41, 47, and 50 of the Constitution of Kenya, 2010.

The evidence is that the respondent is named as the 2nd interested party in the petition No.335 of 2018 in the High Court of Kenya at Nairobi. By the letter dated 08.10.2018 the respondent's Chief Executive Officer (CEO) one Gordon Otiemo Odundo conveyed to the petitioner that the respondent had been served with the court documents in the said petition No.335 of 2018, **Prof. Stanley Khainga and two Others – Versus- Joseph Mulupi and Another**. The letter stated that the petitioner had levelled several allegations against the respondent and accused the hospital of causing the demise of the deceased who had been in the petitioner's care. On several occasions, the letter continued, the petitioner had been invited to meetings where his colleagues had presented the facts relating to the case and none had agreed with the petitioner on the cause of the death as was alleged in that petition – that the petition was the petitioner's machinations to divert attention from the true facts of the case. The letter concluded that the petition pending in the High Court had created a conflict of interest between the petitioner and the hospital. Thus due to the imminent loss of reputation, the hospital's management wished to suspend the petitioner's admitting rights with immediate effect (08.10.2018) until the conclusion of the petition pending in the High Court. The letter directed the petitioner to hand over the patients in his care at the hospital to any other consultant plastic surgeon, in consultation with the Head of Department, Surgery. Further, the letter ended by stating that the management shall decide on the next cause of action after considering the court's decision on the pending petition. Further to that letter, the respondent issued an inter-office memorandum of 11.10.2018 addressed to all wards, theatres, chief security officer and ICT manager informing them that the admitting rights of the petitioner, a Consultant Plastic & Reconstructive Surgeon, had been suspended effective Tuesday 08.10.2018 until further notice. The directives were that no patients were to be admitted and there would be no theatre bookings under the petitioner; security was to de-activate the parking card or vehicle plate number registration identification; and ICT was to de-activate Kranium Reports Access.

The respondent has opposed the application by filing the replying affidavit of Dr. Chris Abeid, the respondent's Medical Director. The replying affidavit was filed on 30.10.2017 through Muthoga Gaturu & Company Advocates. The respondent's grounds of opposition and case are as follows:

1. The applicant applied to use the respondent's facilities as a consultant plastic and reconstructive surgeon. He was interviewed on 17.08.2006 and approved as a Courtesy Staff Member with admitting rights as per the letter dated 22.08.2006.
2. On 06.06.2018 one June Wanza Mulupi (the patient) was referred by doctors from the petitioner's medical facility to the respondent hospital after the patient had undergone breast augmentation and liposuction. Owing to the patient's condition she was immediately recommended for admission at the High Dependency Unit and later transferred to the Intensive Care Unit. The patient was booked for theatre on 07.06.2018 and was wheeled to the theatre at 1635hrs. During the surgery the patient went to asystole and was resuscitated by the ICU team. The surgery continued but the patient re-arrested for the second time and attempts to resuscitate again were unsuccessful so that the patient was pronounced dead.
3. The respondent conducted investigations on the case where the petitioner was invited and he gave his contributions. From the investigations, the petitioner was given a warning letter dated 13.06.2018 for bringing another junior doctor with no respondent's admission rights to review the patient and document in the patient's file and which action was against the respondent's policy.
4. Subsequent to the demise of the patient, the patient's spouse filed with the MPDBK the Preliminary Inquiry Committee Case No. 25 of 2018 against the petitioner and the petitioner's facility known as Surgeoderm Healthcare Limited alleging negligence on the part of the petitioner together with doctors who attended to the patient at the respondent's facility. The petitioner then filed High Court Petition No. 335 of 2018 in which the petitioner made several allegations against the respondent and its staff despite the conferred admission rights.
5. In such circumstances the respondent's case is that there exist a conflict of interest between the petitioner and the respondent so that the petitioner's admission rights were suspended pending the determination of the case at the Board and the High Court Petition No. 335 of 2018. The petitioner could still be reinstated once he is cleared by the MPDBK and there is no malice or bias in the matter.
6. The petitioner was not an employee of the respondent but was a consultant with admitting rights so that the Court lacks jurisdiction in the matter.

The 1st issue for determination is whether the parties are in employment relationship or not.

This court considered the issue in the case of **Stanley Mungai Muchai – versus- National Oil Corporation of Kenya, Industrial Court of Kenya at Nairobi Cause No. 447N of 2009 pages 7 to 9** of the court judgment where it was stated, thus: **“The Industrial Court Act, 2011 in Section 2 defines employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The section also defines employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**

The Employment Act, 2007 in Section 2 defines “Contract of Service” to mean an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of the Act applies.

The court holds that whether the relationship between parties' amounts to a contract of service or contract for service is an issue both of law and fact but largely, one of fact. There is no doubt that a relationship that is a contract of service, unlike one that is a contract for service, will enjoy the statutory protections accorded by the employment legislation. This is more so in view of the definitions of “employee”, “employer” and “contract of service” under the Employment Act, 2007 and the Industrial Court Act, 2011.

A contract of service invariably relates to “dependent” or “subordinate” employment and a contract for service relates to “independent” or “autonomous” employment. Thus, there is a constant line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is no universal formula for

determining existence of a contract of service. *Simon Deakin and Gillian S. Morris, Labour Law, 3rd Edition* pages 146 to 168 have discussed some of the tests used by courts in determining “employment” or “service”. They include the following:

a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. However the formal or personal subordination of a worker as a test for existence of a contract of service may not apply for highly specialized workers such as in the case of the doctors, lawyers, and other professionals.

b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business. However, staff of independent contractors may as well perform entries integral or primarily part of the business when in fact, they are not employees.

c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

Since none of the foregoing tests can resolve the issue decisively on their own, in many cases the issue will be resolved by examining the whole of the various elements which constitute the relationship between the parties; this has been called the multiple test”.

In the present case the Court has applied the multiple-test and the evidence is clear. First the petitioner is designated by the respondent as a courtesy staff member as per the letter dated 22.08.2006 being exhibit CA-1 on the replying affidavit. The use of the word “staff” clearly forms the impression that from the outset, parties are in employer-employee relationship as supported with use of such other words used in such relationship such as “suspension”, “reinstatement”, and “interview”. Second, the respondent has exhibited the Rules and Regulations of the Medical Staff of the Nairobi Hospital. The Rules and Regulations have elaborate provisions about a member of the Medical Staff with appropriate privileges to manage and coordinate a patient’s care, treatment and services. The Admitting Staff Member (such as the petitioner) under clause F thereof, shall be responsible for:

1. The medical care and treatment of the patient in the hospital.
2. Accurately and promptly completing the medical record.
3. Any necessary special instructions.
4. Transmitting reports of the condition of the patient to the referring practitioner and to the family of the patient, as appropriate.

The Rules and regulations have elaborate provisions on the criteria for service delivery, procedures, conduct of admissions, attending to the patient, keeping of patient’s records, consultations on admitted patient, surgical care, discharging the patient, post discharge care, and procedures in event of death of a patient and all of which must be observed by the Admitting Staff Member. Further, the respondent’s Information Booklet for Doctors at 5.1.4.1 on Courtesy Staff (such as the petitioner) states thus, “**Upon joining the Admitting Staff, doctors are categorised as “COURTESY STAFF”. This designation in no way reflects upon their standing in the profession; it solely describes their status in The Nairobi Hospital. The privileges of a Courtesy Staff member are that he or she may admit patients to the Hospital and treat those patients there. The obligations of Courtesy Staff are within the general rules pertaining to all Admitting Staff 1.e. solely towards their patients. Courtesy staff are non-voting members of the Association.**”

The hospital charges are regulated per clause 6.5 and payments per clause 6.4 of the respondent’s Information Booklet for Doctors. It is clear that payments go to the respondent and the respondent sets the amounts to be charged and the respondent will subsequently pay the petitioner out of the revenues collected from the patients by the respondent.

The Court has carefully considered the arrangement between the parties and the highlighted evidence. It is clear that the petitioner as a Courtesy Staff Member with admitting rights conferred by the respondent does not work for himself but under the respondent’s regulatory control. The Court finds that the use of the word “consultant” describes the petitioner’s qualification as “**Consultant Plastic & Reconstructive Surgeon**” but does not describe the relationship between the respondent and the petitioner. The Court returns that the relationship between the petitioner and the respondent is that of employee-employer and the petitioner is clearly paid out of funds paid to or collected by the respondent from the patients within the agreed arrangements. Nowhere has it been said that the petitioner worked for himself and while in the respondent’s service, he used his own facilities accounting for his own losses and profits. Far from that, the respondent employed the petitioner within the framework of conferment of admitting rights with strict regulations and rules prescribing what the petitioner could do or not do, how to administratively discharge the work, and to work using the respondent’s facilities and not the petitioner’s own facilities. The Court finds that applying the multiple-test, the parties satisfied the criteria for a contract of service and not a contract for service as it were. The Court therefore returns that the parties are in employer-employee relationship with a clear contract of service.

The 2nd issue is whether the petitioner has satisfied the criteria to justify the Court’s interference with the respondent’s exercise of human resource function of withdrawing the petitioner’s admitting rights. In such cases seeking to interfere with the employer’s powers, the court

follows its opinion in the ruling in Geoffrey Mworia-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, **“The principles are clear.**

The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

In the present case the only reason why the respondent has suspended the petitioner’s admitting rights is that the petitioner has named the respondent as a party in the High Court Petition No. 335 of 2018. As per the replying affidavit, the respondent says that the withdrawal of the admitting rights amounts to termination of the engagement between the parties, even though temporarily, and only subject to the outcome of the case before the MPDBK and High Court Petition No. 335 of 2018. The Court has considered all the surrounding material and the submission that by mentioning the respondent in the High Court Petition No. 335 of 2018, a conflict of interest has accrued. The respondent has not shown the particulars of the alleged conflict of interest. The Court finds that such conflict of interest has not been established. Instead the Court finds that under section 46 (h) of the Employment Act, 2007 it is an unfair reason for the respondent to permanently or temporarily terminate the petitioner’s employment by way of withdrawing admitting rights on account of the petitioner’s initiation or proposed initiation of a complaint or other legal proceedings against his employer, the respondent, except where the complaint is shown to be irresponsible and without foundation. The Court finds that it has not been shown that it was irresponsible and without foundation for the petitioner to initiate the High Court Petition No. 335 of 2018 and to such extent, the respondent appears to be proceeding in clear contravention of the said section 46(h) of the Act. The Court finds that on the material before the Court, the respondent appears to be proceeding unfairly in a manner to exhibit manifest injustice.

The Court has further considered exhibit CA-3 being the letter dated 06.07.2018 under which the petitioner was warned about breaching the code of conduct flowing from the demise of the patient. In particular the respondent imposed a warning against the petitioner on account of the petitioner allowing a younger doctor to undertake work on the patient at the respondent’s hospital in circumstances whereby the younger doctor had no rights to practice in the hospital. In the Court’s opinion and in absence of any other material before the Court, the issue of the demise of the patient appears to be conclusively settled between the parties through the warning that was imposed thereby rendering the respondent’s powers of disciplinary control over the petitioner, with respect to the case at hand, thereby exhausted – so that the ensuing withdrawal of the admitting rights would be without proper authority or at least, double jeopardy in that regard.

Further the Court has considered the reason for suspending the petitioner’s admitting rights, namely mentioning the respondent in the petition pending at the High Court. The Court finds that such a reason is not fair under section 45 (2) (b) of the Employment Act, 2007 because it has not been shown to relate to the petitioner’s conduct, capacity or compatibility; and was not shown to be based on the respondent’s operational requirement.

The Court has considered clause 5.6.1 of the respondent’s Information Booklet for Doctors on the functions of the Standards Audit & Ethics Committee. The functions, inter alia, include scrutinizing records of every patient who dies at the respondent’s hospital and upon being requested by the chairman of the hospital administration, it investigates complaints of medical nature. Where a complaint is reported and the Committee gets involved as the investigator, the doctor or doctors against whom the complaint is made shall be notified. The further steps in handling the complaint are discussing the Committee’s report with the hospital administration and after which the matter may be reported to the Medical Advisory Committee (MAC) which is a standing committee of the respondent’s Board of Management and is composed of elected and co-opted members. To prevent even slightest suspicion of unprofessionalism, doctors must report to the hospital administration or chairman every case where a complaint may be made and such reports must be made in instances of maternal death, peri-natal death, death on the operating table, or within 24 hours of operation, death possibly caused by drugs prescribed, and any difficulty in one’s patient care or professional colleagues. The Standards Audit & Ethics Committee is the most important instrument of peer review and standard setting for the respondent as per clause 5.6.1 of the respondent’s Information Booklet for Doctors. It is the petitioner’s lamentation that the suspension of his admitting rights by the respondent without involvement of the Standards Audit & Ethics Committee amounted to breach of natural justice. Upon the material on record, the Court returns that the lamentation appears to be valid.

The Court finds that there is no established internal mechanism under which the petitioner could initiate a review or variation of the decision to suspend his admitting rights as earlier conferred by the respondent. In such circumstances the Court returns that the jurisdiction for intervention by the Court became ripe. Thus the principles in the cited case appear to have been satisfied by the applicant.

The Court returns that the applicant has established a prima facie case for Court’s intervention in the matter. Further it has been established that the petitioner will suffer irreparable injury namely serious loss of income and therefore livelihood if the decision to suspend his admitting rights is not stayed. The respondent has confirmed that the admitting rights may anyway be reinstated in due course meaning that the petitioner’s professional competence as a Consultant Plastic & Reconstruction Surgeon has otherwise not been brought to question or doubt. In such circumstances it is the Court’s opinion that public interest and balance of convenience between the parties would favour the Court’s intervention so that the affected patients as may require the petitioner’s services (as accessed through the petitioner’s admitting rights conferred by the respondent) are not unduly disadvantaged.

The Court has also considered the allegations of malice as urged for the petitioner against the respondent on account of some two officials or employees of the respondent being related to the deceased patient. It is clear that the respondent did not specifically deny the existence of the relationship but at the same time, the petitioner did not establish, beyond his mere suspicions, that the persons being related to the patient and in the service of the respondent were involved in arriving at the decision that the admitting rights be suspended. The Court finds that such matter would require deeper inquiry at the full hearing of the petition towards establishing the veracity of the allegations.

In conclusion the application by the notice of motion filed and dated 22.10.2018 is hereby determined with orders:

1. Pending the hearing and determination of the petition, there shall be stay of implementation of the decision suspending the petitioner's admitting rights with the respondent as conveyed in the letter Ref. TNH/ADMIN/CEO/08/10/2018 and dated 08.10.2018 and the inter – office memorandum dated 11.10.2018.

2. The costs of the application to be in the cause.

Signed, dated and delivered in court at **Nairobi** this **Thursday 8th November, 2018.**

BYRAM ONGAYA

JUDGE