



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO. 20 OF 2012

IN THE MATTER OF ARTICLES 22, 23, 165 AND 258 OF THE CONSTITUTION

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES ARTICLES 19, 20, 27, 29 AND 50 OF THE
CONSTITUTION OF KENYA**

AND IN THE MATTER OF THE JUDICATURE ACT, CAP 8 LAWS OF KENYA

AND

IN THE MATTER OF THE INDUSTRIAL COURT ACT, 2011

AND

IN THE MATTER OF INDUSTRIAL CAUSE NO. 538 OF 2011 – NAIROBI

AND

**IN THE MATTER OF COMMITTAL TO CIVIL JAIL OF DR. MARANGU RUCHA AND DR.
WALTER KONYA FOR ALLEGED CONTEMPT OF COURT**

BETWEEN

DR. MARANGU RUCHA.....1ST PETITIONER

DR. WALTER KONYA.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

OFFICER IN CHARGE, INDUSTRIAL AREA PRISON.....2ND RESPONDENT

SISTER BERNADETTE MUTHINA NZIOKI.....3RD RESPONDENT

SISTER TERESIA MUMBE.....4TH RESPONDENT

SISTER ANNE NGARUIYA.....	5TH RESPONDENT
SISTER NICOLETA NGOIRI.....	6TH RESPONDENT
SISTER ASSUMPTA.....	7TH RESPONDENT
SISTER MATILDA KAVIVYA.....	8TH RESPONDENT
SISTER TERESIA MUENI.....	9TH RESPONDENT
SISTER FELISTAS MUTIO.....	10TH RESPONDENT
ST. MARY'S MISSION HOSPITAL.....	INTERESTED PARTY

RULING

Background

1. On 27th April 2012, Mukunya J (as he then was) delivered an Award in Industrial Court Cause No 538 of 2011 in which he ordered reinstatement of the 3rd-10th Respondents herein. The Interested Party, St. Mary's Mission Hospital supported the order for reinstatement. The exact import of the order by Mukunya J is the subject of an intended appeal in the Court of Appeal.
2. As it turned out the 3rd-10th Respondents were not reinstated and they therefore moved the Court seeking committal of the 1st and 2nd Petitioners to civil jail for contempt of court. The 1st and 2nd Petitioners were reported to be Doctors in Charge at St. Mary's Hospital, Elementaita and St. Mary's Hospital, Langata respectively. There is a separate dispute on the ownership of the two Hospitals involving one William Charles Fryda and the Assumption Sisters of Nairobi Registered Trustees which is pending in the High Court at Nakuru.
3. Nzioki wa Makau J heard the contempt of court application and committed the 1st and 2nd Petitioners to civil jail for one month. The Petitioners then filed a Petition in the High Court at Nairobi and Mwilu J (as she then was) granted them temporary reprieve by allowing them to post a Kshs. 1 Million cash bail each pending determination of the Petition. The Petition was transferred to this Court on the basis of jurisdiction and was heard and dismissed by Nduma Nderi J. The Petitioners filed a Notice of Appeal from Justice Nderi's decision on 8th July 2013.
4. Subsequent to the decision by Justice Nderi, the 1st Petitioner Dr. Marangu Rucha was arrested and presented before Justice Nzioki wa Makau on 2nd August 2013. Justice Wa Makau committed Dr. Marangu Rucha to serve the remainder of his jail term.
5. The Petitioners have filed an application for stay in the Court of Appeal, NAI 180 of 2013 (UR 127/2013). This application is fixed for hearing on 14th October 2013. In the meantime, the 1st Petitioner, Dr. Marangu Rucha is serving time at the Industrial Area Prison and the 2nd Petitioner, Dr.

Walter Konya faces arrest and committal.

The Petitioner's Application

6. It is against the foregoing background that the Petitioners have come back to this Court by way of Notice of Motion dated 5th August 2013 under Certificate of Urgency seeking the following orders:

- a. That the application be certified urgent and be heard *ex parte* in the first instance;
- b. That pending the hearing and determination of the application, this Court be pleased to order a stay of execution of the orders made on 31st July 2012, committing the 1st and 2nd Petitioners to civil jail for contempt of court;
- c. That pending the hearing and determination of the application this Court be pleased to order the release of the 1st Petitioner, Dr. Marangu Rucha, from prison custody as ordered on 2nd August 2013;
- d. That Cause Number 538 of 2011 Nairobi be consolidated with Industrial Court Petition Number 20 of 2012 Nairobi for purposes of hearing of this application;
- e. That this Court be pleased to order a stay of execution of the order of committal of the 1st and 2nd Petitioners to civil jail pending the hearing and determination of the intended appeals against the judgments delivered by this Court on 31st July 2012 and 8th July 2013;
- f. That pending the hearing and determination of the intended appeals against the judgments delivered on 31st July 2012 and 8th July 2013, this Court be pleased to order the immediate release of the 1st Petitioner, from prison as ordered on 2nd August 2013;
- g. That the costs of the application be provided for.

7. The matter came before Rika J on 6th August 2013 who certified it urgent and directed that it be heard *inter partes* on 14th August 2013.

The Petitioners' Submissions

8. Mr. Mwangi for the Petitioners submitted that the Award delivered by the Court on 27th April 2012, in Cause No 538 of 2011 remains in force. The Petitioners were however aggrieved by their committal to civil jail for contempt of the orders emanating from the Award.

9. In the aforesaid Award, the Petitioners were ordered not to interfere with the reinstatement of the 3rd-10th Respondents and they had complied. The order to reinstate the 3rd-10th Respondents was not

directed at the Petitioners but to the Interested Party, who had never been taken to task as to why it had failed to comply with the court order. The Petitioners took the view that they were pawns in the ownership dispute pending in the High Court at Nakuru.

10. The 1st Petitioner, Dr. Marangu Rucha had already served 12 days of the sentence imposed by the Court and if he served the entire sentence, the intended appeals would be rendered nugatory. Counsel referred the Court to Articles 50(2) (q) of the Constitution of Kenya, 2010 on the right of appeal for a convicted person and Article 51(1) on the rights and fundamental freedoms of a person held in custody.

11. Mr. Mwangi further submitted that the cash bails already posted on behalf of the Petitioners can be utilised as security to secure their freedom. Counsel told the Court that his clients were ready and willing to attend court whenever required and that the Respondents would not suffer any prejudice if the orders sought were granted.

The Respondents' Reply

12. In opposing the Petitioners' application Mrs. Wambugu for the Respondents submitted that the Petitioners' prayer that Petition No 20 of 2012 be consolidated with Cause No 538 of 2011 was misplaced since both cases had effectively been concluded and there was therefore nothing to consolidate.

13. Counsel further submitted that since the Petitioners had elected to file an application for stay of execution in the Court of Appeal, this Court could not entertain a similar application. In any event, there was nothing to stay in Petition No 20 of 2012 whose order was basically a dismissal of the Petition. With regard to the application for stay of the order in Cause No 538 of 2011 which was issued over a year ago, the Petitioners were guilty of delay.

14. On the issue of the cash bails posted on behalf of the Petitioners, Counsel submitted that since bail had been granted pending determination of Petition No 20 of 2012, there was no bail in force after determination of the said Petition on 8th July 2013.

Interested Party's Reply

15. Mr. Masese for the Interested Party submitted that the application by the Petitioners was an abuse of the court process since a similar application was coming up for hearing in the Court of Appeal on 14th October 2013. Counsel took issue with the procedure adopted by the Petitioners in prosecuting this matter. In his view, the Petitioners' choice to file the original petition in the High Court which has no jurisdiction in labour matters was mischievous.

Ruling by the Court

16. In determining this application, the Court must be guided by the status obtaining at the Court of Appeal as far as the subject matter herein is concerned. The Petitioners have duly filed a Notice of Appeal in this Court. They have in addition filed an application for stay of execution in the Court of Appeal whose prayers are similar to those being sought before this Court. The Court was told that the application in the Court of Appeal comes up for hearing on 14th October 2013.

17. In cases where a matter is pending before the Court of Appeal, the choices available to the trial court are very limited. As held by Nduma Nderi J in the case of **Patrick Njuguna Kariuki Vs Del Monte (K) Limited [2013]eKLR** once an applicant files an application in the Court of Appeal, the jurisdiction of the Industrial Court to deal with the matter is pre-empted. I will therefore not deal with the substance of the Petitioners' application which is pending before the Court of Appeal.

18. However, this Court is called to render substantive justice and cannot therefore ignore the fact that the personal freedoms of the Petitioners are at stake. The 1st Petitioner, Dr. Marangu Rucha has been in custody since 2nd August 2013 and the 2nd Petitioner, Dr. Walter Konya faces arrest and committal. I therefore grant temporary reprieve in the following terms:

- a. The cash bail posted on behalf of the 1st Petitioner, Dr. Marangu Rucha on 3rd August 2012 in the sum of Kshs. 1,000,000 (read one million Kenya Shillings) is hereby reinstated to serve as security to secure the attendance of the said Dr. Marangu Rucha at the Court of Appeal on 14th October 2013 and thereafter as required by the said Court of Appeal.
- b. The said Dr. Marangu Rucha who is held in custody at Industrial Area Prison is hereby set at liberty pending further orders by the Court of Appeal.
- c. The officer in charge of Industrial Area Prison is directed to release the said Dr. Marangu Rucha forthwith.
- d. The cash bail posted on behalf of the 2nd Petitioner, Dr. Walter Konya on 3rd August 2012 in the sum of Kshs. 1,000,000 (read one million Kenya Shillings) is hereby reinstated to serve as security to secure the attendance of the said Dr. Walter Konya at the Court of Appeal on 14th October 2013 and thereafter as required by the said Court of Appeal.
- e. All warrants of arrest issued against the said Dr. Walter Konya on account of the subject matter herein are suspended pending further orders by the Court of Appeal.

19. I make no order for costs.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF AUGUST 2013

LINNET NDOLO

JUDGE

In the presence of:

.....*Petitioner*

.....*Respondent*

.....*Interested Party*