



REPUBLIC OF KENYA



Goko v Shchukin (Deceased) & 2 others (Miscellaneous Civil Application E377 of 2022) [2023] KEHC 18213 (KLR) (Civ) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

MISCELLANEOUS CIVIL APPLICATION E377 OF 2022

CW MEOLI, J

MAY 25, 2023

BETWEEN

WILSON GOKO APPLICANT

AND

THE ESTATE OF DR. VLADIMIR SHCHUKIN (DECEASED) 1ST RESPONDENT

NAIROBI BABIATRIC CENTRE 2ND RESPONDENT

**KENYA MEDICAL PRACTITIONERS AND DENTIST COUNCIL 3RD
RESPONDENT**

RULING

1. For determination is the motion dated June 16, 2022 by Wilson Goko (hereafter the Applicant) seeking leave to file an appeal out of time. The motion is expressed to be brought under Section 20(9) of the *Medical Practitioners and Dentist Act* and Section 1A & 3A of the *Civil Procedure Act* (CPA) *inter alia*. On grounds, among others that, the Applicant being dissatisfied with the decision of the Kenya Medical Practitioners and Dentist Council (hereafter 3rd Respondent) desires to appeal albeit out of time.
2. The motion is supported by the affidavit sworn by the Applicant who deposed that on August 30, 2019 he visited Dr Vladimir Shchukin (Deceased) (hereafter the 1st Respondent) at Nairobi Bariatric Centre (hereafter the 2nd Respondent) seeking professional services for a bariatric surgery. That on October 10, 2019 the 1st Respondent conducted the said surgery and upon his subsequent discharge on October 20, 2019 he developed complications, prompting him to file a complaint with 3rd Respondent. He goes on to depose that the decision of the 3rd Respondent on his complaint was delivered on December 02, 2021 and being aggrieved by the said decision desires to appeal; that however due to the medical



- complications, he has been constantly in and out of hospital since December 2021 in seeking treatment to stabilize his medical condition.
3. He further deposes that as a result he was not in a position, both physically and mentally, to pursue further action on the matter or give instructions to counsel thereby resulting in a delay in filing the appeal within the stipulated time. He asserts that delay in filing the appeal is justifiable and the court ought to exercise its discretion in his favour as the intended appeal raises arguable grounds and is deserving of the court's consideration. In conclusion, he deposes that it is in the interest of justice that the honorable court allows the motion as prayed.
 4. The 1st & 2nd Respondent opposed the motion by way of grounds of opposition dated July 18, 2022. They take issue with the motion on grounds that the same is misconceived, bad in law and an abuse of the court process; that the Applicant lacks the locus standi to lodge the appeal pursuant to Section 20(9) of the Medical Practitioners and Dentist Act; and that the motion lacks merit as this court has not been expressly or impliedly granted jurisdiction to hear and determine the appeal arising out of the decision of the 3rd Respondent.
 5. The 3rd Respondent on its part opposes the motion through the replying affidavit of Michael Onyango dated October 28, 2022, who describes himself as the acting Co-operation Secretary of the 3rd Respondent. He asserts that the Applicant has not shown adequate reasons to warrant him file an appeal out of time. He particularly takes issue with the fact that the Applicant failed to file his appeal within the prescribed duration in accordance with Section 20(9) of the Medical Practitioners and Dentist Act and Section 79G of the *Civil Procedure Act*; and that the Applicant failed to file an application for extension of time upon realizing that he would require additional time to lodge an appeal due to his medical condition.
 6. He further states that the Applicant has failed to demonstrate that he has an arguable appeal with a good chance of success; and that delay in filing the motion and appeal is prolonged and unjustified thus amounts to an abuse of the court process. He goes on to assert that if the motion is allowed, the same will amount to a travesty of justice as it shall cause undue prejudice to the Respondents since the party accused of negligence has since passed on. In summation, he avows that it is in the interest of justice that the motion be dismissed with costs.
 7. The motion was canvassed through written submissions. Counsel for the Applicant in addressing the question of leave, anchored his submissions on the provisions of Section 20(9) of the Medical Practitioners and Dentist Act and Section 79G of the *Civil Procedure Act* to contend that the Applicant has demonstrated a good and sufficient cause as to why he was unable to file his appeal in due course and therefore is deserving of the court's discretion as delay in filing the appeal has been justified.
 8. It was further submitted that the Applicant has an arguable appeal which warrants this court's consideration whereas no prejudice will be occasioned to the Respondents if the motion were to be allowed. Responding the 1st and 2nd Respondent's contention on the Applicant's lack of locus, counsel cited Section 20(9) of the Medical Practitioners and Dentist Act and the decision in *Duncan Kibet v Samnakay Saeed, Aga Khan University Hospital & Another* [2021] eKLR to argue that the Applicant has the requisite standing to appeal against the decision of the 3rd Respondent.
 9. On whether it is mandatory to file an appeal before seeking for extension of time to lodge an appeal, it was submitted that the instant motion is properly before court irrespective of the fact that a memorandum of appeal is yet to be filed, which filing, is only proper after leave has been granted by court. The decisions in *Sylvester Wanje Bomu v Kenya Power & Lighting Co. Ltd* [2018] eKLR, *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* [2018] eKLR and *Nicholas Arap Korir*



Salat v Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR were called to aid in respect of the foregoing.

10. Concerning whether the motion ought to be struck out for failure to properly describe the 1st Respondent it was argued that the Applicant has sought in vain to ascertain the identity of the administrator/executor of the estate of the 1st Respondent which efforts are still ongoing; that there are two other Respondents who are properly joined as parties to the motion and appeal; and that in any event the appeal is primarily as against the decision made by the 3rd Respondent. The court was urged to allow the motion as prayed.
11. Counsel for the 1st and 2nd Respondent have relied on Section 20(9) of the Medical Practitioners and Dentist Act to contend that the Applicant is not “a person” as contemplated in the foregoing provision of statute as he is not a medical practitioner, a dentist or a health institution registered and or regulated by the Act. Therefore, though the dismissal of the complaint may have aggrieved the Applicant, no adverse finding and action has been taken against him. Consequently, the appeal is moot as there is nothing to be determined before the appellate forum.
12. While challenging the competency of the appeal counsel further relied on the Civil Procedure Rules to argue that since 1st Respondent is deceased, failure by the Applicant to sue the Deceased through his duly appointed personal representatives is incurably defective. Counsel went on to submit that an estate is ordinarily sued through the administrators or executors duly appointed by the court for purposes of administration of the estate which included filing and defending suits. In conclusion, counsel challenged this court’s jurisdiction to entertain the substantive appeal on account of the nature and design of dispute in question.
13. Counsel for the 3rd Respondent on his part confined his submissions on the singular issue concerning leave to appeal out of time. While calling to aid the decisions in *Union Insurance Co. of Kenya v Ramzan Abdul Dhanji Civil Application No. 179 of 1998*, Nginyaga Kavole v Mailu Gideon Misc Application No. 401 of 2018, *Aphne Parry v Murray Alexander Carson* [1963] EA 546 and Gerald M’Limbine v Joseph Kangangi [2008] eKLR counsel contended that delay in filing the appeal is inordinate whereas the Applicant has failed to demonstrate sufficient reason for failing to file the appeal within time.
14. Counsel went on to contend that the Applicant failed to file an appeal prior to seeking an extension of time as such the motion is incompetent as presented. In conclusion, it was submitted that the motion has not satisfied the principles laid down to warrant extension of time to file an appeal therefore the same ought to be dismissed with costs. Counsel relied on the decision in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* [2002] 1 EA 65 in respect to the foregoing.
15. The Court has considered the rival affidavit material and submissions in respect of the motion. The 1st and 2nd Respondents have raised a challenge on the competency of the intended appeal, the court’s jurisdiction to entertain the same and the Applicant’s locus standi to institute the intended appeal. It is pertinent to state that at this juncture, the court is not concerned with the actual merits of the substantive appeal beyond what is required under section 79G of the Civil Procedure Rules. What is intended to be challenged going by the draft memorandum of appeal is the decision of the 3rd Respondent delivered December 02, 2021. Section 20(9) of the Medical Practitioners and Dentist Act as read with Section 3(1), 4(1)(j), 4A(1)(b) and 20(6) of the same Act provides that;-

“A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.”



16. I will say no more at this stage on that provision and attendant objections so that if and when an appeal is filed, the Respondents would be at liberty to further pursue their objections as they will deem appropriate. Section 79G of the Civil Procedure Act 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 that 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.”

17. The 3rd Respondent has equally challenged the competency of the motion by arguing that the Applicant failed to file a memorandum of appeal prior to seeking extension of time. It is the court’s reasoned deduction that the words that “an appeal may be admitted out of time” in Section 79G, appear to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed. That said, a successful applicant, in an application of the nature before the court, must demonstrate “good and sufficient cause” for not filing the appeal in time.

18. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that the general matters which this court takes into account in deciding whether to grant an extension time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent of the application is granted.”

19. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

20. In the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] e KLR the Supreme Court enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;



5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

21. It is undisputed that the decision of the 3rd Respondent was delivered on 02.12.2021. The Applicant contends that as a result of the surgery he underwent, he developed medical complications that saw him constantly in and out of hospital as from December 2021 (See Annexure WG-10 WG-11 & WG-12). Therefore, he was not in a position both physically and mentally, to pursue further action on the matter or give instructions to appeal against the decision of the 3rd Respondent thereby resulting in delay in filing the appeal. From the Applicant’s affidavit material, the explanation for delay is his extended medical infirmity.
22. The delay in bringing the present motion is about five (5) months, as reckoned under the provisions of Order 50 Rule 4 of the Civil Procedure Rules, the impugned decision having been delivered on 02.12.2021. In the court’s view the delay herein does not appear inordinate, given the undisputed extenuating circumstances of the Applicant. As earlier noted, Section 79G of the *Civil Procedure Act* obligates an applicant to demonstrate ‘good and sufficient cause’ for the court to exercise its discretion. Besides, the Respondents have not demonstrated undue prejudice to be suffered if leave is granted or that costs would not be reasonable compensation.
23. As regards the merits of the intended appeal, the language employed in *Mutiso v Mwangi* (supra), suggests that the requirement is neither mandatory nor stringently applied in an application of this nature. The draft memorandum of appeal attached to the Applicant’s affidavit appears to raise issues serious enough to require the court’s consideration on appeal or that are prima facie arguable. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal “may not (eventually) succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”
24. Further, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is... crystalized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Othe* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

 - (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”



25. Considering all the foregoing, it is the court's considered opinion that despite the delay involved, given the unique circumstances surrounding matter, the Applicant has tendered sufficient reason warranting the exercise of the court's discretion in his favour, and a peremptory denial of an opportunity to be heard on appeal would amount to an egregious injustice. Accordingly, to facilitate the Applicants' undisputed right of appeal the motion is hereby allowed but the costs are awarded to the Respondents in any event.

The appeal is to be filed within 14 days.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023.

C MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Nyachia h/b for Mr Ngugi

For the 1st & 2nd Respondents: Mr Mwenda

For the 3rd Respondent: Ms. Akinyi h/b for Mrs Kounah

C/A: Carol

