



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E074 OF 2021**

**REUBEN MUTHANGA MUTHONI**

*(Suing as the administrators and personal representatives of the estate of*

**LUCY MOTHONI THIONGO- Deceased.....APPELLANT**

**VERSUS**

**DR. MATHEWS ODERA AKETCH.....RESPONDENT**

**RULING**

1) This ruling is the outcome of the motion dated 18<sup>th</sup> February 2021 taken out by the appellant/applicant. In the aforesaid motion, the applicant sought for the following orders inter alia:

***i. THAT this application be certified as urgent, service be dispensed with and the same be heard exparte in the first instance.***

***ii. THAT this honourable court be pleased to grant leave to the plaintiff/applicant to appeal this court's order issued on 4<sup>th</sup> February 2021, to the extent that the defendant is at liberty to call an expert witness.***

***iii. THAT the costs of this application be in the cause.***

2) The applicant filed a supporting and a further affidavit both sworn by Prof. Kiama Wangai to buttress the application. The respondent filed grounds of opposition and a replying affidavit sworn by Dominc Njuguna Mbigi to resist the motion.

3) When the motion came up for interpartes hearing, this court directed the application to be disposed of by written submission at the instance of the respondent's advocate. At the time of writing this ruling the appellant/applicant was the only party who had filed his submission.

4) I have considered the grounds stated on the face of the motion dated 18<sup>th</sup> February 2021 and the facts deponed in the rival affidavits. I have further considered the written submissions filed by the appellant.

5) It is the averment of the applicant that on 4<sup>th</sup> February 2020, the respondent was granted leave to call a medical expert witness to testify in support of his case. The appellant being aggrieved, is now before this court seeking for leave to appeal against the order and for enlargement of time to do so.

6) It is argued that at the time of the delivery of the ruling the appellant's advocate failed to seek for leave to appeal against the orders from the lower court because he had not obtained instructions from the client. It is argued that leave to appeal is necessary under the law prior to filing the appeal. The appellant stated that he stands to suffer if the order sought is denied.

7) The respondent opposed the application arguing that if the application is allowed the hearing of the medical negligence case which has been pending before the trial court since 2014 may further delay.

8) It is stated that the appellant/applicant will not suffer any Prejudice, in that, he has the option of calling their own medical expert witness if he is aggrieved. The respondent further pointed out that the appellant filed a similar application before the trial court, hence the instant motion is an abuse of the court process.

9) In response to the later submission, the appellant admitted filing a similar application before the trial court but he stated that he has since then withdrawn the application before the trial court. The appellant attached to the replying affidavit a copy of the notice of withdrawal.

10) It is not disputed that the trial court granted the respondent leave to call for their own medical expert on 4<sup>th</sup> February 2021. It took the appellant/applicant fourteen days to file the instant application. The applicant's advocate's main reason for the delay is that the advocate did not immediately obtain instructions from the client(appellant).

11) The applicant's advocate did not explain what prevented him from obtaining those instructions. Under Order 43 rule 1(3) of the Civil Procedure Rules an applicant is required to seek for such leave in the first instance in the court that made the order sought to be challenged on appeal.

12) The provision further states that the application should be made orally at the time of making the order or within 14 days from the date of the decision being impugned. I find the reason advanced by the applicant to explain the advocate's failure to make the application for leave in the trial court not convincing. The applicant is required to explain the prejudice he would suffer if the order is denied. The applicant failed to offer a plausible explanation on the prejudice he would suffer if the order is refused. In fact, if the order is granted I shudder to state that there will be a considerable delay in concluding the matter therefore the respondent will be more prejudiced than the applicant.

13) With respect, I am persuaded by the submissions made by the respondent that the appellant/applicant still has a chance to summon another medical expert to answer to the medical evidence tendered by the appellant's medical expert.

14) On the basis of the above reasons, I find the appellant's motion to be without merit. The same is dismissed with costs abiding the outcome of the suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF AUGUST, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

..... for the Respondent