



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL DIVISION**

**MISCELLANEOUS APPLICATION 667 OF 2007**

**DR JAGDISH SONIGRA.....APPLICANT**

**Versus**

**MEDICAL PRACTITIONERS & DENTISTS**

**BOARD & TWO OTHERS.....RESPONDENT**

**RULING**

By the Chamber Summons dated 22<sup>nd</sup> July 2008, the Applicant Dr. Jagdish Sonigra seeks this court's order that the proceedings and hearing of the inquiry under PIC case No. 27 of 2003 pending before the 1<sup>st</sup> Respondent, the Medical Practitioners and Dentists Board, be stayed pending the hearing and determination of the Petitioner's intended appeal from the judgment and order of this court made on 14<sup>th</sup> March 2008 and that costs of the application be costs in the appeal. The application is supported by the affidavit of the applicant. The application is brought pursuant to Section 84(1) (6) the Constitution and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and procedure Rules, 2006.

The main thrust of this application is that the Petitioner was dissatisfied with this court's ruling rendered on 14<sup>th</sup> March 2008 and gave notice of his intention to appeal on 25<sup>th</sup> March 2008 and secondly, that the 2<sup>nd</sup> Respondent has withdrawn the complaint against the Petitioner made by notice to the 1<sup>st</sup> Respondent and dated 23<sup>rd</sup> May 2008 but that the 1<sup>st</sup> Respondent has gone ahead, by its letter of 30<sup>th</sup> May 2008 and received by the Petitioner on 9<sup>th</sup> July 2008, fixed the complaint for hearing on 2<sup>nd</sup> September 2008. The Petitioner urges that he has an arguable case and if stay is not granted, the Petitioner's appeal stands to be rendered nugatory and the Petitioner's rights will be infringed. The Petitioner exhibited the Notice and Memorandum of Appeal dated 25<sup>th</sup> March 2008 and filed in court on the same date, (J S 2) and withdrawal of complaint by Mary Goretti Ng'ang'a (J S 3). The Petitioner relied on **CHRISTOPHER MURUNGARU V KACC HMISC 54/01 AND CA 43/06 AND FARIS V MEDICAL PRACTITIONERS DISCIPLINARY COMMITTEE (1993) NZLR 60** which dealt with what the court should consider in such an application for stay.

The application was opposed and Professor Julius M. Kyambi swore an affidavit as chairman of the 1<sup>st</sup> Respondent. The Respondent urged that the Petitioner has no arguable case since what is under investigation is the conduct of the Petitioner in administering Anaesthesia to the Complainant and that investigation cannot be affected by the death of Dr. Owino who was the dentist; that this Application is meant to delay the conclusion of the matter before the Board and is brought in bad faith and that in any

case the application is premature because Chapter 253 Laws of Kenya allows that Petitioner to come to court by way of Judicial Review or appeal from the decision of the Board and the Petitioner should let the Board go ahead with the enquiry.

As regards withdrawal of the complaint by the 2<sup>nd</sup> Respondent, it is the 1<sup>st</sup> Respondent's case that it is made in bad faith, meant to defeat ends of justice and the 1<sup>st</sup> Respondent questions whether it represents the interests of the 2<sup>nd</sup> Respondent (victim) who is unable to speak for herself and that the Board is meant to protect the Public who includes the 2<sup>nd</sup> Respondent (victim). That despite the withdrawal of complaint by the 2<sup>nd</sup> Respondent the right to investigate the Petitioner by the Board cannot be taken away. It is also urged that the term of the Board ends in 2009 and if the Board is not allowed to continue with the inquiry it will mean the matter awaits determination by another Board. The 1<sup>st</sup> Respondent urged the court to balance the interests of all parties to see who stands suffer most if an order of stay is granted.

I have now considered the application and all the affidavits filed and submissions of all Counsel. After this court rendered its decision on 14<sup>th</sup> March 2008 declining to stop the Board from inquiring into the conduct of the Petitioner, the Petitioner applied for uncertified typed copies of the proceedings and a copy of the judgment by letter dated 25<sup>th</sup> February 2008. On the same date, they filed a notice of appeal and served the Respondent. The Petitioner however did nothing further. He never applied for stay of the proceedings until the Board served the notice dated 30<sup>th</sup> May 2008 giving hearing dates of the inquiry. When judgment of this court was rendered and the court declined to grant the Petitioner's prayers, what was going to follow was that the Board would go ahead to conduct the inquiry. The Petitioner has not given any explanation why no application for stay was made either before this court or in the Court of Appeal soon after the delivery of the judgment in March 2008 only to be made after the issuance of notice of a hearing date. In my considered view the Petitioner has sat on his rights for about 4 months without taking any steps in this case and has not explained to this court why this court should exercise its discretion to grant stay at this stage. The filing of this application was not brought timeously as expected and the timing of this application after a notice of the hearing was served seems to be made in bad faith, meant to delay and to stop the inquiry by the Board into the petitioner's conduct.

No doubt the 2<sup>nd</sup> Respondent has withdrawn her complaint. The complainant who is the victim is impaired and unable to take decisions of her own. The withdrawal of the complaint is made by her mother Mary Ng'ang'a who filed the complaint on the victim's behalf. The question is whether the withdrawal of the complaint adds credence to the Petitioner's case that he has an arguable case. The 2<sup>nd</sup> Respondent opposed the petitioner's motion which the court determined on 14<sup>th</sup> March 2008. This court made a decision dismissing the Petitioner's petition and I do agree with the 1<sup>st</sup> Respondent's contention that the withdrawal of the complaint by the 2<sup>nd</sup> Respondent does not take away the Board's right to conduct an inquiry into the conduct of the Petitioner simply because the Board is there to protect the public interest. The inquiry does not end with the 2<sup>nd</sup> Respondent's case but any other member of public that may be aggrieved. The Applicant will continue to perform his duties as an anaesthetist, it is important that the Board establish whether what happened was an accident, negligence or other cause that may affect other would be patients of the Applicant

The Board has a statutory duty to carry out inquiries into cases as the instant one and keep its professionals in check. This court cannot take away that duty unless for good cause. Under Medical Practitioners & Dentists Act Cap 253 Section 20(6), the Petitioner has a right to challenge the Board's decision by way of appeal to this court if aggrieved. I believe he can also challenge it by way of Judicial Review. The Applicant's rights would not be prejudiced if the Board goes ahead to carry out an inquiry into the Petitioner's conduct because he has other remedies to this court. I have considered the **MURUNGARU CASE** which was relied upon by the Petitioner in which the Court of Appeal stayed the proceedings of the High Court as the result involved penal consequences. The facts of the instant case are different. Besides, balancing the rights for the Petitioner to undergo an enquiry and that of the public I would hold that it is of greater public interest that the inquiry proceeds and this court should not be seen to fetter due process provided by Cap 253 for the Board to conduct inquiries and be in control of its own officers and profession which directly affects the right to life.

As regards the death of Dr. Owino and hence the lack of his evidence, I think it would be premature for this court to stop the enquiry just because one witness is not available. The availability of evidence or the lack of it can only be tested at the inquiry. This is because the inquiry is all about the Petitioner's conduct in administering anaesthesia but not what the late Dr. Owino did. The case of **FARIS (supra)** is not applicable here because the inquiry is not predicated on the evidence of the late Dr. Owino alone.

For all the reasons given in this ruling and especially that the Petitioner did not move with alacrity to seek an order of stay, this court declines to exercise its discretion in his favour and dismiss the Chamber summons dated 22<sup>nd</sup> July 2008 with costs to the 1<sup>st</sup> Respondent.

Dated and delivered this 28<sup>th</sup> day of August 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Gachuhi for petitioner

Mr. Karahu for 1<sup>st</sup> Respondent

Mr. Achache for 2<sup>nd</sup> Respondent

Daniel: Court Clerk