



REPUBLIC OF KENYA



Kofuu v Board of Trustees St Marys Mission Hospital Mumias (Miscellaneous Civil Application 168 of 2023) [2025] KEHC 2674 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION 168 OF 2023**

**AC BETT, J
MARCH 5, 2025**

BETWEEN

VELMA AKOLA KOFUU PLAINTIFF

AND

**BOARD OF TRUSTEES ST MARYS MISSION HOSPITAL
MUMIAS DEFENDANT**

RULING

1. The Applicant filed a Notice of Motion dated 12th December 2023. The Motion is brought under Article 159 (2) (d), Section 26, Section 1A,1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules. The prayers before this court for determination are:-
 - (a) Spent
 - b. That this Honorable court be pleased to issue orders enlarging time for filing suit and thus grant leave to the plaintiff to file suit out of time prescribed under the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 - c. That this Honorable court be pleased to issue any other or further orders as it deems fit and just under the circumstances.
 - d. That costs be in the cause
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on 12th December 2023 by the Applicant's counsel.
3. The plaintiff's counsel confirmed that he had drafted and presented the pleadings to the registry for assessment on 18th October 2022 which was within the required time.



4. He stated that the registry forwarded him the payment reference however he forgot to make payment and thus the pleadings remained unfiled.
5. He claimed that he only realized that the plaint had not been filled and paid for after inquiry by the plaintiff and admitted that he was at fault that the suit had not commenced because of his mistake which he held should not be visited on the plaintiff.
6. He opined that his client intended to prosecute the case against the ruling made by the Medical Practitioners & Dentists Council under PIC Case No. 69 of 2019.
7. He claimed that the Plaintiff apprehension is real and that if the orders are not granted he would suffer substantial loss.
8. In response, the Defendant's administrator filed a Replying Affidavit dated 24th January 2024 on behalf of the hospital Board of Trustees.
9. She avers that they had been informed that it was the Plaintiff intent to seek enlargement of time to file their plaint dated 14th October 2022 after the Plaintiff Advocate forgot to make payments hence delay in filing the pleadings.
10. She avers that the courts have the discretion to extend time and the power is discretionary and is to be exercised judiciously if the Applicant had demonstrated that the delay was not inordinate. She avers that the explanation by the Applicant did not meet the threshold for the court to exercise its discretion.
11. She stated that whereas the plaint was dated 18th October 2022 and the application for extension of time filed on 12th December 2023 a year two months, the Applicant did not demonstrate any interest in the case as she failed to follow it up.
12. She asserted that the Applicant had failed to disclose the existence of the Medical Practitioners and Dentists Board Case No. PIC No. 69 of 2019 which was concluded on 7th October 2020 and the claim dismissed.
13. The Respondent posits that the Applicant had an option to appeal against the ruling of the Medical Practitioners and Dentists Board however she opted to file a fresh suit and raised the same issues and grounds that had been determined by the Board hence the suit would be res judicata and the extension of time was a waste of the court's time.
14. They prayed that the application be dismissed with costs.

Applicant's Submissions

15. The Applicant addresses one issue for determination that had been raised by the Respondent being whether the issues raised by the Applicant in the plaint was res judicata.
16. In support of their case, she quotes Section 7 of the *Civil Procedure Act* Cap 21 and the case of JOO & 2 others vs. Praxedes P Maundu Okutoyi (2018) eKLR which in summary stated that the decision made by the Disciplinary Board was in respect to the professional conduct against the Medical Practitioners and or Dentists and their standard of proof in the disciplinary matter was not the same as that in civil cases since it was of quasi criminal nature.
17. She further argues that the issues raised in the Medical Practitioners & Dentists Board was different from what was raised in the plaint. She cites the case of Musankisha Kalala Paulin vs. Director of criminal investigations & 4 others (2022) eKLR where Mrima J cited the case of



John Florence Maritime services Limited & another vs. Cabinet Secretary for Transport and Infrastructure & 3 others (2021) eKLR.

18. She submits that the suit raised different issues from what was decided in the Medical Practitioners and Dentists Board and hence the plea of res judicata cannot stand. Further, that the decisions of the board are not binding on the court and the decision cannot bar them from seeking further remedial claim.

Respondent's Submissions

19. In their submissions, the Respondents argue that the Applicant failed to disclose that she had filed a similar claim with the Medical Practitioners and Dentists Board and hence the claim by the Applicant will not be tenable. They quote Section 20 of the Medical Practitioners and Dentists Council Act Cap 253 which deals with disciplinary proceedings against its members where dissatisfied persons could file complaints against any member in respect of any professional services.
20. They claim that the issue raised by the Applicant/Plaintiff had already been addressed and further relied in the case of Petition No 461 of 2012 Isaac Ngugi vs. Nairobi Hospital and Another (2013) eKLR, Nairobi Petition No. 173 of 2014 Rich Production Ltd vs. Kenya Pipeline Company and Another (2014) eKLR.
21. They aver that the Applicant had approached the Board under Section 20 and a decision was rendered in a ruling dated 7th October 2020 in which the Applicant had 30 days to appeal to the High Court which she failed to do instead opting to file a fresh suit.
22. They finally submit that since the Applicant failed to appeal as provided for under Section 20 (9) of the Medical Practitioners and Dentists Board, the application is unmerited.

Analysis and determination

23. The main issues for determination by this court are;
 - a. Whether the high court has jurisdiction to hear a suit for medical negligence.
 - b. Whether the application for extension of time is valid.
24. On the first ground of whether this court has the jurisdiction to hear the suit, the Applicant opines that they have a right to be heard on merit and further dispute the claim that the suit is res judicata as alluded by the Respondent.
25. It is evident that a disciplinary proceeding are initiated once the Medical Practitioners and Dentists Board receives a complaint against a registered or licensed person regarding professional misconduct, malpractice or any breach of standards. In determination of suits, the Courts are to ensure that disputes are resolved in a fair and public hearing before a court or, if appropriate, another independent and impartial Tribunal or body.
26. The Applicant moved to this court to seek damages. She has maintained that she has sufficient evidence to prove her case and has expressed her unwillingness to have the complaint investigated and determined by the Council. The provisions of Section 20 of Cap 253 Laws of Kenya are not mandatory. A complainant has the option of lodging a complaint before the Board and can opt to pursue damages through the court.



27. Article 22 and Article 23 of *the Constitution* grants the High Court authority to uphold and enforce the Bill of Rights in the following terms:

“(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

28. Further, Article 23 (3) provides that the High Court, in any proceedings brought under Article 22, may ...” grant appropriate relief, including-

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order.

29. Whether in the exercise of its jurisdiction to enforce and protect fundamental rights or to supervise the functioning of inferior tribunal such as the plaintiff, the jurisdiction of the Court cannot be validly disputed. A proper reading of the provisions of Section 20 of the Act shows that it applies to appeals from decisions of the Board made specifically under that Section, not to decisions of the PIC.

30. I therefore find and hold that the Court has jurisdiction to hear and determine the intended suit.

31. As to whether the court should extend time for filing of suit, Section 27 of the *Limitation of Actions Act* provides for extension of limitation period in case of ignorance of material facts in actions for negligence, etc. It reads: -

(1) Section 4(2) does not afford a defence to an action founded on tort where—

- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.



- (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

32. Section 27 provides that section 4(2) does not afford a defence to an action founded on tort as provided in the said section. Section 4(2) provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

33. In the present case, the plaint was to be filed on 14th October 2022. The Applicant’s Counsel admitted that the pleadings were forwarded to the High Court registry for assessment but he did not pay the fee and has now filed an application dated 12th December 2023 which is one (1) year one (1) month later.

34. In considering whether the court can grant this Application, the requirements of Section 27 of the Limitations Act must be fulfilled. See *Mwangi Kanyingi vs. Francis Kariuki Kanyingi & Another* [2008] eKLR. Further it is clear that the grant of extension of time is at the discretion of the court.

35. The court is equally guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice.

36. In *Patel -v- E.A. Handling Services Ltd (1974) EZ 75* and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd CA 38 of 1998* and *Mania -v- Muriuki (1984) KLR 407* the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

37. The Applicant in this case allegedly suffered medical negligence and has filed a civil suit seeking damages for the loss she has suffered. She has a right to be heard on merit in the interest of justice. The counsel admitted that he made a mistake and delayed in filling the plaint on time.

38. In the case *Winnie Wambui Kibinge & 2 Others -v- Match Electricals Limited Civil Case No. 222 of 2010* the Court held that:-

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.”

39. The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009* where it was held that:

“it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

40. In *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR, the Court held that:

“It’s an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 and uphold substantive justice against



technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the Civil Procedure Act obligates the parties to assist the Court in the expeditious disposal of cases.”

41. From a perusal of the court records, it appears that the Applicant was determined to pursue a civil case against the Defendant. However, her Counsel displayed laxity when they failed to pursue the matter expeditiously.
42. I am persuaded that the Applicant would be prejudiced if the court were to lock her out on account of the omissions of her Counsel. This Court must appreciate the challenges that such a person may face after undergoing physical and psychological trauma from the medical procedure.
43. In the interest of justice, this court will allow the Applicant to have her day in court and a chance to be heard in order to prove her claim. She would be prejudiced if she was denied an opportunity to file her suit.
44. In conclusion, the Applicant is to file and serve the pleadings within 30 days from this ruling failure to which the suit shall be dismissed with costs.
45. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Aluku for Plaintiff/Applicant

No appearance for Respondents

Court Assistant: Polycap

