



**MIO (A minor suing through MIO as next friend and guardian) v Vinayak & 2 others
(Civil Case 138 of 2016) [2024] KEHC 215 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 138 OF 2016
CW MEOLI, J
JANUARY 19, 2024**

BETWEEN

**MIO (A MINOR SUING THROUGH MIO AS NEXT FRIEND AND
GUARDIAN) PLAINTIFF**

AND

**DR SUNIL VINAYAK 1ST DEFENDANT
SMILE AFRICA LIMITED 2ND DEFENDANT
DR GEOFFREY MUIRURI KING'ANG'A 3RD DEFENDANT**

RULING

1. For determination is the Notice of Motion brought by Dr. Sunil Vinayak and Smile Africa Limited (hereafter the 1st and 3rd Applicants/ Applicants) dated 2nd December 2020. The substantive prayer sought therein is an order to stay the proceedings in the suit pending hearing and determination of a review application and/or appeal against the decision rendered by Mativo J (as he then was) on 22nd July, 2020 in Judicial Review Misc. Application No. 29 of 2019. The application is expressed to be brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* (CPA) and Order 42, Rule 2 and Order 51 of the *Civil Procedure Rules* (CPR).
2. The Motion is supported by the affidavit of the 1st Applicant, who stated that prior to lodging the present suit, MIO (the Minor) through his guardian and next friend MIO (hereafter the Respondent) filed a complaint on 3rd December, 2015 with the Kenya Medical Practitioners and Dentists Board (the Board) against the 1st Applicant and Dr. Geoffrey Muiruri King'ang'a (hereafter the 2nd Defendant) following which the Board formed the Professional Conduct Committee (PCC) to investigate the said complaint. That consequently, the Board found the 1st Applicant and the 2nd Defendant guilty of professional misconduct vide the ruling delivered on 13th October, 2018.



3. That being aggrieved by the decision, the Applicants herein instituted Judicial Review proceedings at the High Court, namely Judicial Review Misc. Application No. 29 of 2019 seeking various orders against the Board and PCC. The deponent further swears that by way of the judgment rendered on 22nd July, 2020 Mativo J (as he then was) dismissed the Applicants' application. It is the 1st Applicant's averment that both he and the 2nd Applicant thereafter filed a Notice of Appeal in the Court of Appeal dated 28th July, 2020 followed by an application for review of the aforementioned judgment delivered on 22nd July, 2020.
4. According to the 1st Applicant both the appeal and review application raise arguable issues and that unless the stay order sought is granted, the Applicants stand to be gravely prejudiced, rendering the intended appeal and/or review application nugatory. The 1st Applicant added that the Respondent does not stand to be prejudiced in any event.
5. The Motion was opposed by the Respondent, through Grounds of Opposition dated 9th July, 2021 as follows:
 1. "That the 1st and 3rd Defendant/Applicants said application is incompetent, misconceived, mischievous, bad in law and is an abuse of the court process.
 2. That the Defendant/Applicants prayers as sought in the application dated 2nd December 2020 are vexatious, a clear abuse of process, and an unreasonable oppressive effort to delay the expeditious hearing and determination of Civil suit no. 138 OF 2016 M I O (A minor suing through M I Q as next friend and guardian) vs DR. Sunil Vinayak, Dr. Geoffrey Muiruri King'ang'a And Smile Africa Limited.
 3. That there are no sufficient reasons to warrant the orders sought in the application.
 4. That the application herein has not been filed promptly and without undue delay as required in law".
6. The Respondent equally swore a replying affidavit on 26th June, 2023. He defended the decision rendered by the Board as fair and asserted that the Judicial Review Misc. Application No. 29 of 2019 as consolidated with Judicial Review Misc. Application No. 63 of 2019 were properly dismissed by the Judicial Review Court. He further deposed that the review application subsequently filed by the Applicants herein was equally dismissed vide the ruling delivered on 30th November 2021. That the appeal filed by the Applicants to challenge the Judicial Review judgment, namely Civil Appeal No. E162 of 2022, is yet to be finalized. The deponent views the instant Motion as a dilatory tactic intended to frustrate the Respondent and the Minor, the latter who continues to undergo grave suffering and distress arising because of complications resulting from alleged negligence on the part of the defendants in the suit.
7. In rejoinder, the 1st Applicant through his supplementary affidavit sworn on 17th July, 2023 essentially denied the averments made in the replying affidavit to the effect that the Motion is aimed at delaying the suit and averred that the Applicants cannot be faulted for any delays in the progress of the appeal currently in the Court of Appeal.
8. The court directed that parties file written submissions on the Motion. Counsel for the Applicants anchored his submissions on the decisions in Harnam Singh and others v Mistri, Civil Appeal number 43 of 1970 [1971] EA 122 and *Michael Njai v Juan Torres (2015)* eKLR on the principles for consideration by a court in determining an application seeking a stay of proceedings. Counsel submitted that it would be in the interest of justice for the stay order sought to be granted, and that this would further assist in saving judicial time and avoiding multiple concurrent suits over the same



subject matter, relying on the decision in *Matoke v Kenya Commercial Bank Limited* NBI HCC No. 290 of 2002 in that regard.

9. Further citing *Step Up Holdings v Mount Kenya University [2012]* eKLR and *Daniel Walter Rasugu v Johana Nyakwoyo Buti & 2 Others [2008]* eKLR counsel contended that the Applicants have an arguable appeal and have already filed records of appeal in hopes that the appeal in the Court of Appeal will be disposed of at the earliest opportunity. The court was therefore urged to allow the Motion.
10. The Respondent's counsel on his part, relied on the decisions in *George Oraro v Kenya Television Network Nairobi HCCC No. 151 of 1992* and *Jadva Karsan v Harnam Singh Bhogal [1953] 20 (1) EACA 74* to argue that the inherent power of the court to stay proceedings is discretionary in nature. In urging the court to dismiss the Motion, the Respondent's counsel contended that if stay of proceedings is granted, the Minor stands to suffer substantial loss owing to his medical condition, and the Respondent at risk of incurring heavy expenses in respect of the Minor's medical expenses. On those grounds, the Respondent urged the court to dismiss the Motion with costs.
11. In rejoinder, the Applicants through supplementary submissions reiterated earlier submissions and contended inter alia that they have an arguable appeal seeking to challenge the jurisdiction of the PCC. Otherwise, counsel by and large.
12. The 2nd Defendant did not participate in the hearing of the Motion, but indicated through his counsel that he did not oppose the same.
13. The Court has considered the material canvassed in respect of the motion. The power of the court to stay proceedings, is donated by Order 42, Rule 6 (1) of the *Civil Procedure Rules* which states:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court”

14. In the renowned case of *Re Global Tours & Travel Ltd HCWC No. 43 of 2000 (UR) Ringera, J* (as he then was) succinctly set out the applicable considerations in determining an application for stay of proceedings in the following manner:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”(emphasis added).

See also *Christopher Ndolo Mutuku and Anor. v CFC Stanbic Bank Limited* (2015) eKLR; and *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* (2014) e KLR.



15. As held above, the need to avoid the unnecessary duplication of proceedings and prudent use of judicial time would be a paramount consideration in an application of this nature, as would be the question whether the appeal will be rendered nugatory if the subject proceedings are not stayed. As observed by Onyango Otieno, J (as he then was) in *Niazsons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd*. Nairobi HCCC No. 126 of 1999:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay (stay of proceedings) should be granted.”
16. Moreover, the Court of Appeal in the case of *Wachira Waruru & Anor. v Francis Oyatsi* [2002] 2 EA 664 rendered itself thus:

“In an application for stay of proceedings pending appeal where the judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”
17. Upon the court’s study of the record and material presented, it is apparent that while there was a delay of five (5) months between the filing of the instant Motion and the delivery of the impugned judgment, such delay cannot be deemed inordinate or otherwise unreasonable.
18. Concerning the question whether the Applicants have an arguable appeal, that is a matter for the Court of Appeal. While none of the parties availed a copy of the memorandum of appeal, the 1st Applicant annexed copies of the first page titled Record of Appeal to his supplementary affidavit, thereby confirming the filing of the appeals with the Court of Appeal, namely Civil Appeal No. E162 of 2022 and Civil Appeal No. E163 of 2022. It is apparent therefrom that the appeals lie both against both the judgment and review ruling delivered in the Judicial Review Division on 22nd July, 2020 and 16th November, 2021 respectively.
19. The present suit is founded on medical negligence and follows the proceedings conducted before the Board as well as the Judicial Review Court. In the former proceedings, the Applicants were found liable and which finding triggered the appeal currently before the Court of Appeal. It is thus evident that unless the present proceedings are stayed, it is more plausible than not that the objects of the said appeal will likely be defeated, thereby rendering the appeal nugatory. Moreover, it would not constitute proper use of judicial time to allow two concurrent active proceedings in respect of the same subject matter. In any event, the court is of the view that any prejudice likely to be suffered by the Respondent and/or the Minor can be compensated through an award on costs.
20. Considering the foregoing factors as well as the competing interests of the parties, the court is persuaded to exercise its discretion in favour of the Applicants. In the same breath, alive to its duty under the overriding objective, the fact that this matter involves a minor, and noting the fact that the suit was filed in 2016, the Court feels obligated, in the interest of justice, to limit the duration of the stay of proceedings.
21. Consequently, the Notice of Motion dated 2nd December, 2020 is hereby allowed. The court hereby grants an order to the effect that there shall be a limited stay of the proceedings in the present suit (Civil Case No. 138 of 2016) pending hearing and determination of the two appeals before the Court of Appeal. For the avoidance of doubt, the stay order shall remain in force for a period of 9 (nine) months



from today's date. The costs of the motion are awarded to the Plaintiff/Respondent in any event and will be borne by the 1st and 3rd Defendant/Applicants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the 1st and 3rd Defendant/ Applicants: N/A

For the Plaintiff: Ms. Kaguri

For the 2nd Defendant: Ms. Njari

For the Intended Interested Party: Mr. Ouma

C/A: Carol

