



Mary Help of the Sick Mission Hospital v Kamau ((Administrator of the Estate of the Late Josephine Wanjiru Irungu)); Karanja & another (Interested Parties) (Miscellaneous Civil Application E403 of 2022) [2023] KEHC 3832 (KLR) (Civ) (3 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3832 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION E403 OF 2022

JN MULWA, J

MAY 3, 2023

BETWEEN

MARY HELP OF THE SICK MISSION HOSPITAL APPLICANT

AND

**PETER THUKU KAMAU RESPONDENT
(ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPHINE WANJIRU
IRUNGU)**

AND

**DR. GEORGE K. KARANJA INTERESTED PARTY
THE KENYA MEDICAL PRACTITIONERS AND DENTISTS
COUNCIL INTERESTED PARTY**

RULING

1. Before the court is a Notice of Motion application dated June 27, 2022 brought under section 20(9) of the *Medical Practitioners and Dentists Act*, (KMPD) Sections 1A, 1B, 3A, 75, 78, 79G of the *Civil Procedure Act*, Order 42 rule, Order 50 rule 5, Order 51 rule 1 of the *Civil Procedure Rules* 2010, article 159(2) (d) of the *Constitution* of Kenya 2010. The Applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That this Honourable Court does direct the Chief Executive Officer of the 2nd Interested Party herein to supply the applicant with a certified copy of the Ruling in PIC Case No. 29 of 2019



dated February 25, 2022, a certified copy of the proceedings and any recordings that led to the delivery of the said Ruling.

4. That this Honourable Court do grant leave to the Applicant to file an appeal out of time, upon being supplied with the documents requested in prayer 3 herein above.
 5. That this honourable court does grant a stay of the Ruling of the 2nd interested party herein in PIC Case No. 29 of 2019 dated February 25, 2022 pending the hearing and determination of the Appeal.
 6. That this honourable court does grant any other orders that it may deem necessary to grant in the circumstances.
2. The Application is premised on the grounds on its face and the Supporting and further affidavits sworn by Esther Wanjiru Thea, the matron of the applicant, on June 27, 2022 and July 27, 2022 respectively.
 3. The respondent responded through a replying affidavit sworn on July 12, 2022.
 4. The court has considered the orders sought in the application, the parties respective affidavits in support and in opposition thereto as well as their written submissions.
 5. The first issue for determination is whether the application is defective and incompetent for want of authority to swear the affidavits in support thereof. The Respondent contends that the application should be struck out as the deponent of the Affidavits Esther Wanjiru Thea has not exhibited any authority or board resolution by the Applicant authorizing her to swear the affidavit on behalf of the Applicant.
 6. The deponent Esther Wanjiru Thea, avers that she is duly authorized to swear the affidavits and has been the Applicant's representative in the subject matter forming the substratum of this suit from the onset. She avers that at the time of carrying out the post-mortem of the Respondent's wife (Josephine Wanjiru Irungu), she was present and she was the liaison person between the Applicant and the 2nd interested party in PIC Case No. 29 of 2019.
 7. Courts have consistently held that it is sufficient for an officer of a company to state in the affidavit has been authorised to swear the affidavit or that he or she has sworn the affidavit as part of the duties assigned to him or her by the subject company without the need to file a separate document of authorization passed by the Board of Directors. See *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR and *Premier Hospital Limited v Meditec Systems Limited & another* [2021] eKLR. It is then up to the person contesting that position to demonstrate by evidence that the deponent was not authorized to swear the affidavit. In the instant case, Esther Wanjiru Thea deposed that she is the matron of Applicant hospital and is conversant with the facts of the matter hence competent to swear the Affidavits. The Respondent did not adduce any evidence to the contrary. The Respondent's contention therefore lacks merit.

Leave to appeal out of time

8. The intended appeal emanates from a decision of the Kenya Medical Practitioners and Dentists (KPMMD) Council dated February 25, 2022. Pursuant to the provisions of section 20(9) of the *Medical Practitioners and Dentists Act*, a person aggrieved by a decision of the Council is required to appeal to the High Court within thirty days from the date of the decision. However, such timelines are never cast on stone and may be extended, at the discretion of the court, if the reason for delay is explained to the satisfaction of the court.



9. The factors to be considered when determining whether or not to extend time to file appeal were set down by the Court of Appeal in the case of *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Application No. 255 of 1997 as:
 - a. The length of the delay;
 - b. The reason for the delay;
 - c. The chances of the appeal succeeding if the application is granted; and
 - d. The degree of prejudice to the respondent if the application is granted.
10. In this case, there is no doubt that the thirty days within which the appeal should have been brought had long elapsed by the time of filing this application. This is because the decision of the KMPD was made on 25th February 2022 and the instant application was filed four months later on 27th June 2022.
11. As for the reason for delay, the applicant explained that upon hearing the respondent's complaint on March 8, 2021, the 2nd interested party directed that the Ruling would be delivered on notice. However the Applicant was never served with any such Notice and only became aware of the decision on May 5, 2022 when it received a letter from the respondent's advocates informing it about the decision. The respondent dismissed the Applicant's claim and contended that all the parties were duly served with the notice vide an email sent to them on March 4, 2022 at around 12:23 pm. The court however notes that the Applicant has ably demonstrated that the said email was sent to the wrong email being info@maryhelfospital.org instead of its official email that had earlier been used to send all communications to the Applicant being info@maryhelfospital.org. The erroneous email address as can be seen on annexure "PTK-2(b)" to the respondent's replying affidavit omitted letter "p" in "hospital". In the premises, the court finds that the delay in filing the appeal was not of its fault, and has satisfactorily been explained.
12. As regards the chances of success of the intended appeal, the court has looked at the draft Memorandum of Appeal annexed to the Applicant's Affidavit (See annexure "KN-10"). Without going into the merits of the matter, this court finds that the grounds therein raise arguable issues. The intended appeal is therefore not a frivolous one.
13. Lastly, having weighed the rival parties cases, the court finds that the Respondent does not stand to suffer any prejudice if leave is granted to the Applicant to appeal out of time. The Applicant will however be prejudiced if denied an opportunity to exercise its legal and constitutional right to appeal particularly where delay was not deliberate and has been satisfactorily explained.
14. For the foregoing, the court finds that the Applicant has made out a case for the grant of leave to appeal out of time.
15. Notably however, the applicant has complained that it wrote three letters dated May 12, 2022, May 23, 2022 and June 6, 2022 to the 2nd interested party requesting for a certified copy of the Ruling and all proceedings that led to the delivery of the said Ruling but the same have elicited no response. Having being granted leave to appeal out of time, it follows that to enable the applicant compile the Record of Appeal, the 2nd interested party will have to supply it with the requested documents. Prayer 3 of the application is therefore merited and granted in terms appearing below.

Stay of execution pending the hearing and determination of the intended appeal.

16. Under Order 42 Rule 6(2) of the *Civil Procedure Rules*, the conditions necessary for the grant of stay of execution are that:



- a. the court must be satisfied that substantial loss may result to the applicant unless the order is made
 - b. the application has been made without unreasonable delay; and
 - c. The applicant must offer such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
17. Substantial loss is the cornerstone of any application for stay of execution. In the case of *James Wangalwa & another v Agnes Naliaka* [2012] eKLR, Gikonyo J stated that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

18. In *Mukuma v Abuoga* (1988) KLR 645, the Court of Appeal stated that:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the instant case, the Applicant avers that if the impugned Ruling is not stayed, the substantial loss it will suffer is that it risks having its licence suspended, withdrawn or cancelled to the detriment of the many patients that it serves on a day to day basis. The court has looked at the orders sought to be stayed which have been reproduced hereunder verbatim:

- i. Mary Help of the Sick Mission Hospital be and is hereby reprimanded for the lapses in care that resulted in the mismanagement of post-partum haemorrhage in Josephine Wanjiru Irungu and her subsequent demise.
- ii. Mary Help of the Sick Mission Hospital be and is hereby directed to develop or adapt standard operating procedures/protocols and job aids for the management of post-partum haemorrhage and other obstetric emergencies at the hospital and submit evidence of this to the Kenya Medical Practitioners and Dentists Council within one month of the date hereof.
- iii. Mary Help of the Sick Mission Hospital do pay a fine of Kshs. 350,000/= to the Kenya Medical Practitioners and Dentist Council within 30 days from the date hereof.
- iv. Mary Help of the Sick Mission Hospital be and is hereby directed to engage the services of a resident Obstetrician and Gynecologist within the next three months from the date hereof, and thereafter submit evidence of this to the Kenya Medical Practitioners and Dentist Council.
- v. Mary Help of the Sick Mission Hospital do initiate mediation with the Estate of the late Josephine Wanjiru Irungu with a view of compensating the latter and thereafter update the Chair of the Kenya Medical Practitioners and Dentists Council within one hundred and twenty (120) days from the date hereof.
- vi. Mary Help of the Sick Mission Hospital be and is hereby directed to ensure that the all the health professionals working in the maternity unit are trained or retrained in Emergency



Obstetric and New-born Care and to submit evidence of this to the Kenya Medical Practitioners and Dentists Council within six months of the date hereof.

- vii. In the event of non-compliance with the directions in the above, Kenya Medical Practitioners and Dentists Council shall be at liberty to suspend, withdraw or cancel the operating licence for Mary Help of the Sick Mission Hospital.
 - viii. Dr. Lambert Niyonizingiye be and is hereby directed to work in a busy maternity for a period of six (6) months under the direct supervision of a qualified Obstetrician and Gynaecologist who will submit monthly progress reports to the KMPD Council.
 - ix. The complaint against the 2nd Respondent, Dr. George K. Karanja, be and is hereby dismissed.
18. Looking at the above orders, the court is not persuaded that their execution will have an irreparable effect on the applicant's operations or render the applicant's intended appeal nugatory. The court agrees with the respondent's contention that these orders are mainly meant to help to protect the wider public interest which the applicant will continue to serve for as long as it remains operational. Further, the applicant has not raised any concerns about the likelihood of not getting refunds in case it pays out the fine ordered to the Council and/or compensates the Applicant upon reaching a settlement. In the premises, the court finds that the Applicant has not demonstrated the substantial loss it stands to suffer.
20. As regards the second limb, there is no doubt that the application was filed without undue delay in the circumstances of the case as determined above.
21. On the third limb, the Applicant avers that it is ready to deposit any such security that the court may order. However, the court notes that save for the sum of Kshs. 350,000/- fine to be paid to the KMPD Council, the rest of the Orders were merely actions that the Applicant is required to take within specific timelines. For that reason, the Applicant would not really be required to deposit security had it demonstrated substantial loss, so long as it gives an undertaking to meet any condition(s) that the court may impose as pre-requisite for the grant of stay pending appeal.

The upshot is that the applicant has not satisfied the court that a stay of execution of the impugned ruling will be necessary pending appeal

Disposition

For the foregoing, the application dated June 26, 2022 partially succeeds in the following terms:

- a. The Applicant is granted leave to appeal out of time against the Ruling of the KMPD Council dated February 25, 2022 in PIC Case No. 29 of 2019.
- b. The 2nd interested party shall supply the applicant with a certified copy of the proceedings and any recordings that led to the delivery of the Ruling dated February 25, 2022 in PIC Case No. 29 of 2019 within 14 days from the date of this Ruling.
- c. The Applicant is directed to file the Memorandum of Appeal and serve within seven days of this Ruling, upon order b above being complied with and the Record of Appeal within 45 days thereafter.
- d. There shall be no stay of execution of the Ruling dated February 25, 2022 in PIC Case No. 29 of 2019.

The costs of this application shall abide the outcome of the intended appeal.

Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY 2023.

JANET MULWA



JUDGE.

