Nguti (Suing as the Administrator of the Estate of the Late Ruth Mwende Kithuku) v Gatura & 2 others (Miscellaneous Civil Application E009 of 2023) [2023] KEHC 19970 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

MISCELLANEOUS CIVIL APPLICATION E009 OF 2023

TM MATHEKA, J

JULY 13, 2023

BETWEEN

ISAAC KITHUKU NGUTI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE RUTH MWENDE KITHUKU) .... APPLICANT

AND

DR. WAMBUI JOSEPH GATURA .... 1ST RESPONDENT

MAKINDU SUB-COUNTY HOSPITAL .... 2ND RESPONDENT

COUNTY GOVERNMENT OF MAKUENI .... 3RD RESPONDENT

RULING

1. The applicant Isaac Kithuku Nguti is the father of Ruth Mwende Kithuku (deceased). He filed suit Makindu CMCC 161 of 2018 against the respondents herein on behalf of her estate for negligence. Neither the pleadings nor the proceedings are annexed so I do not know what it is he was seeking in the subordinate court. Be that as it may in that suit a preliminary Objection was raised by the respondents that the learned trial court did not have the jurisdiction to hear and determine that suit because the applicant had filed a matter PIC CASE NO. 38 OF 2019 before the KPMDU which matter had been determined vide a ruling of 18th December 2020 where KMPDC absolved the respondents of any negligence. Consequently, the suit was dismissed. It is that dismissal which has aggrieved the applicant causing him to seek leave of this court to file an appeal out of time.

2. The application is dated 17/02/2023 and is brought under Sections 79G and 95 of the *Civil Procedure Act* and Order 50 Rule 5 of the Civil Procedure Rules. It seeks the following orders;

    a. THAT leave be granted to the applicant to file an appeal out of time with respect to Makindu Civil Case No. 161 of 2018.

b. THAT the annexed memorandum of appeal be deemed as duly filed and served upon payment of the requisite fees.

c. THAT costs of this application be provided for.

3. The application is supported by the grounds on its face and the Applicant's Affidavit sworn on the same day. He depones that the ruling in Makindu Civil Case No. 161 of 2018 was delivered on 21/11/2022 and the time for filing appeal lapsed on 27/01/2023. That he applied for certified copies of proceedings timeously, on 29/11/2022, but they are yet to be supplied.

4. That he was aggrieved by the ruling of the Subordinate Court and is desirous of appealing. That the respondents are unlikely to suffer any prejudice, the delay is not inordinate and the appeal has high chances of success. He has exhibited the grant of letters of Administration, copy of ruling, the letter requesting for the certified copy of the ruling of the subordinate court and copy of the draft memorandum of appeal as IKN 1, 2, 3 and 4 respectively.

   1. The learned magistrate erred in law and in fact in failing to appreciate that the applicant/appellant herein together with his advocate were never involved in the proceedings of Kenya Medical Practitioners and Dentists Council (KMPDU) being PIC CASE No. 38 of 2019.

   2. The learned magistrate erred in law and in fact by failing to appreciate that the applicant/appellant herein was not accorded a fair hearing pursuant to Article 50 of the Kenya 2010 Constitution as he never attended the said hearing and/or proceedings of PIC Case No. 38 of 2019.

   3. The learned magistrate erred in law and in fact by failing to appreciate that the applicant/appellant herein together with his advocate were not notified of any hearing and/or proceedings of PIC Case No. 38 of 2019.

   4. The learned magistrate erred in law and in fact by failing to appreciate that the correspondences and the proceedings of PIC Case No. 38 of 2019 filed in the trial court and annexed a list of documents by the defendants were illegible/unreadable hence could not be admissible as evidence and used in delivering the ruling.

   5. The learned magistrate erred in law and in fact by failing to appreciate that the said determination on 18/12/2020 was delivered during the core of COVID 19 pandemic an at that time the government had banned all meetings hence bewildering how meeting was convoked and a decision arrived during this COVID 19 time being 18/12/2020.

   6. The learned magistrate erred in law and in fact by failing to appreciate that the applicant/appellant herein filed a complaint against KMPDU setting all his addresses and of his advocates but the said KMPDU during its hearing never involved the applicant/appellant and/or his advocates to present his case and be heard on merit.

   7. The learned magistrate erred in law and in fact by failing to appreciate that the applicant/appellant filed his case on 17/07/2018 after delivering a demand letters to the respondents on 3/5/2018 and on 6/7/2018 and after

the KMPDU replied to his letter on 21/6/2018 hence conforming to the time provided under the *Limitation of Actions Act*, Laws of Kenya.

8. The learned magistrate erred in law and in fact by failing to appreciate that after filing of the case all parties had complied with Order 11 of the Civil Procedure rules 2010 and the matter set down for hearing on 10/6/2021 and at that time the respondents had not filed their P.O having complied with order 11 of the Civil Procedure Rules 2010.

9. The learned magistrate erred in law and in fact by failing to appreciate that Judicial review could have been filed by the applicant/appellant herein as he was not involved in the PIC CASE NO. 38 of 2019 hearings/proceedings together with his advocates as the same was conducted clandestinely hence the said decision on 28/11/2011 was ex parte.

10. The learned magistrate erred in law and in fact by failing to appreciate the Judicial Review application could only be filed after 6 months after the delivery of the judgment and which judgment the applicant/appellant was not aware of as he was not involved in the proceedings and the decision delivered on 28/11/2022.

11. The learned magistrate erred in law and in fact by failing to appreciate that the applicant/appellant lost her daughter, a Kenyatta alumna (2nd Class Honors Upper Division) professional teacher, in a torment/grief manner, so emotional in the hands of the respondents hence need to a fair hearing under Article 50 of the 2010 Constitution.

12. The learned magistrate erred in law and in fact by failing to appreciate the circumstance of the case, the submissions filed thereon and that Judicial Review orders could not have been sought after 6 months since the matter arose on 8/7/2017 hence time would lapse for filing the suit on 17/7/2010 one year later.

13. The learned magistrate erred in law and in fact failing to appreciate the cause of action arose on 8/7/2019 even before the decision of the KMPDU and which tribunal the applicant/appellant was not notified and /or involved of.

5. The application was opposed through the replying affidavit of Dr. Wambui Joseph Gatura sworn on 13/03/2023. He depones that the letter exhibited by the plaintiff (IKN 3) does not indicate what he intended to apply for and does not bear the court stamp to prove that it was indeed filed and submitted to court. That an invoice is not proof of payment and the applicant cannot rely on it to prove that he successfully applied and paid for the documents.

6. With respect to paragraphs 1, 2 and 3 of the memorandum of draft memorandum of appeal by deposing that it was the applicant who lodged the complaint to the Kenya Medical Practitioners and Dentist Council (KMPDC) and there is no way he, and his counsel, could have been unaware of the proceedings.

7. In response to paragraph 4 of the draft memorandum of appeal he depones that the documents were legible hence the reliance on them by the court in delivering its ruling.

8. In response to paragraphs 5 and 6, he depones that the applicant was in full knowledge of the proceedings of the complaint and that the allegations do not defeat the fact that there was a ruling from a body established by an Act of Parliament.

9. In response to paragraph 7, he depones that the applicant was at liberty to go for Judicial Review (JR) and withdraw the suit is the Magistrate's court as that has always been the procedure.

10. In response to paragraph 8, he depones that a preliminary objection can be brought any time before judgment of a suit and the court is required by law to down its tools as soon as it realizes that it has no jurisdiction.

11. In response to paragraph 10, he depones that even if the period for JR had lapsed, the applicant had the option to file a petition in the High Court of Kenya and not file a matter in a court without jurisdiction.

12. He depones that the averments in paragraphs 12 and 13 do not defeat the fact that there was a ruling from a competent tribunal and the applicant had an option of filing a Judicial Review or a petition if the time for Judicial Review had lapsed.

13. Consequently, he depones that the application is frivolous, vexatious, a waste of courts time and should be dismissed with costs.

14. In rejoinder, the applicant swore a further affidavit on 22/05/2023 where he depones that the Replying Affidavit contains falsehood lies and misrepresentation calculated and intended to mislead this Honorable Court in not granting the orders as prayed in the application.

15. In response to paragraph 4 of the replying affidavit, he depones that; the ruling was delivered on 28/11/2022 and this application was filed three months later on 17/02/2023. That pursuant to Order 50 rule 2 and 3 of the Civil Procedure Rules, 2010, computation of time excludes Sundays, public holidays and the period between 21st December and 13th January every year. Consequently, he depones, the time of filing of the appeal lapsed on 27/01/2023 and the application for extension of time was filed on 17/02/2023, 12 days later after the time lapsed.

16. In response to paragraph 5,6,7 & 8 of the replying affidavit, he reiterates that he requested for certified copies of ruling and proceedings through a letter dated 29/11/2022 and they have never been supplied. That he paid for the certified proceedings and ruling and was issued with a receipt on 06/02/2023. Copies of the receipts are exhibited as IKN1 a-b.

17. In response to paragraph 9-16 of the replying affidavit, he depones that the issues raised therein should be heard and determined at the hearing of the main appeal hence it's prudent that this matter that this matter be heard to conclusion.

18. He has urged this Honorable Court to intervene and ensure that his deceased daughter enjoys justice as the same was curtailed and condemned unheard pursuant to Article 50 of *the Constitution* Laws of Kenya.

19. The application was canvassed through written submissions.

The Applicant's Submissions

20. The applicant submits that in determining the merits of this application, this court is bound by the Court of Appeal decision in Charles Karanja Kiiru –vs- Charles Githinji Muigwa [2017] eKLR where the Respondent had delayed for 41 days before filing an appeal and the High court enlarged time to enable the respondent file an appeal out of time.

21. He submits that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in Edith Gichungu Koine –vs- Stephen Njagi Thoithi [2014] eKLR. The learned Judge expressed himself as follows;

> "Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others."

22. He submits that as per the guidance of the Court of Appeal, courts have a duty to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

23. He submits that the delay in filing the appeal was occasioned by delay in being furnished with certified copies of ruling and proceedings which are yet to be furnished despite requests. That in any case, the delay was only 12 days. He relies on Kamlesh Mansukhalal Damki Patni –vs- DPP & 3 Others [2015] eKLR where the Court of Appeal articulated that:

> "It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice...."

24. Relying on Articles 48 and 50 of *the Constitution*, he submits that that the ultimate goal and purpose of the justice system is to hear and determine disputes fully and that no person should be locked out.

25. He submits that there is no evidence that the application is an afterthought or showing how the same is intended to abuse court process. He contends that it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Those courts have over time excused parties where such delay is not inordinate and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay. He relies, inter alia, on Belinda Mural & 9 Others –vs- Amos Wainaina [1978] eKLR where the Court of Appeal – Law JA, citing other cases such as Shah H. Bharmal & Brothers Vs Kumar [1961] EA 679, held that:

> "Mistakes of a legal adviser may however amount to 'sufficient cause under the East African Rule."

26. He submits that the discretion of this court to enlarge time for filing of a late appeal is unfettered but it must be exercised judiciously and not capriciously.

27. As to whether this appeal can be validated with leave and be deemed to be duly filed, he submits that the Court of Appeal was faced with a similar situation in Charles Karanja Kuru –vs- Charles Githinji Muigwa; CA 71/2016. The court expressed itself as follows;

> "Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be

admitted as being properly on record once extension of time is granted. Emukule J. in the Gerald M'Limbine Vs Joseph Kangangi [2009] eKLR stated that:

"My understanding of the proviso to Section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court's process under Section 79B."

28. He has also relied on Martha Wambui –vs- Irene Wanjiru Mwangi & Another (Aburili J) which was cited with approval in the case of Charles Karanja Kuru (supra). The court stated:

" In my view, the use of the term "admitted" connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time……" see also APA Insurance Ltd Vs Michael Kinyanjui Muturi."

29. Further, he relied on Mombasa County Government –vs- Kenya Ferry Services & Anor (2019) eKLR, where the Supreme Court held that;

" 25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

"… it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

"… we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;

2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;

4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;"

30. He submits that some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in Thuita Mwangi –vs- Kenya Airways Ltd [2003] eKLR. They include:

i) The period of delay;

ii) The reason for the delay;

iii) The arguability of the appeal;

iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;

v) The importance of compliance with time limits to the particular litigation or issue; and

vi) The effect if any on the administration of justice or public interest if any is involved.

31. He submits that the respondents will not suffer any prejudice if the application is allowed. He contends that he was condemned unheard by the trial magistrate did not consider that he was never involved in the proceedings at the tribunal and that the same were conducted at the core of Covid 19 where physical movements and interactions were restricted.

Submissions by the Respondent

32. The respondents have identified the following as the issues for determination;

1. Whether the applicant's delay is unreasonable

2. Whether the draft memorandum of appeal is hopeless.

33. On issue Whether the applicant's delay is unreasonable they submit that the application was filed more than 2 months later after dismissal of the suit. That a cursory look at the letter exhibited by the applicant shows that it was taken to court for assessment almost a month after it was drafted and there is no evidence to prove that it was paid for and filed in court. Relying on section 79G of the *Civil Procedure Act*, they submit that a party who seeks an extension of time must satisfy court that he has a sufficient cause. That the reason given in the memorandum of appeal for failure to file Judicial Review is that the statutory period had lapsed. This is proof, they contend, that the applicant has been indolent since the beginning of this suit.

34. On whether the draft memorandum of appeal is hopeless they have relied on section 20(9) of the *Medical Practitioners and Dentists Act* for the submission that a right of appeal from a decision of KMPDC lies with the High Court. That the reason for dismissal by the Subordinate Court was because it lacked jurisdiction. It is therefore their contention that lack of jurisdiction cannot be cured by an appeal. They submit that even if this application succeeds, it is very unlikely that the appeal will have the light of day.

35. They submit that any party who is dragged to unnecessary litigation suffers prejudice. That they were absolved of any negligence by KMPDC because what happened to the applicant's daughter was beyond their control. They contend that litigation must come to an end and the applicant ought to have followed statutory procedure instead of dragging them to every court available.

Analysis

36. The issue for determination is whether the application is tenable.

Assuming that the applicant is allowed to appeal against the ruling of the trial court, what this court will be considering in that appeal is whether the trial court was correct is saying that it had no jurisdiction to hear and determine the applicant's suit. The mere fact that court stated so is not necessarily correct and cannot be the reason the deny this application without interrogating the law and facts that she had before her that led to her determination. Section 20 of the *Medical Practitioners and Dentists Act*, Cap 253 Laws of Kenya (the Act) provides the procedure to be followed by any person aggrieved by the professional services of persons registered or licensed under the Act.

37. That then brings in the Doctrine of Exhaustion which Black's Law Dictionary 10th Edition defines as follows –

> " Exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.

38. Is this the same situation in this case? Can it be argued that the applicant was required to exhaust the statutory before filing his suit? Section 20 (9) of the Act provides that;

> " A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court."

39. Section 20 (6) provides the penalties that are available to the Kenya Medical Practitioners and Dentists Disciplinary Council (KMPDC) after finding a person guilty of the offences complained. From the face of it, the Act appears to be silent on the options available to a complainant who is aggrieved by an acquittal decision. It states:

(6) Where after an inquiry, the Council determines that a person is guilty, the Council may—

(a) issue a caution or reprimand in writing;

b. direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;

c. direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;

d. suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;

(e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;

(f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or

(g) in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstances

40. From these provisions it is evident that the person who may feel aggrieved is the person, the medical practitioner/dentist who is found guilty. It follows that it is also that person who has recourse to an appeal in the High Court. The question that begs is what happens to an aggrieved complainant? What reliefs are available for the aggrieved complainant in those law?

41. From what I gather from the materials before me it is doubtful that what was before the subordinate court was an appeal from the KPMDU ruling. The applicant's suit was filed in 2018. The PIC case was filed in 2019. Can it be assumed that the fact that this provision is silent with respect to the reliefs

available to the complainant then it applies mutatis mutandis to the complainant? Is the filing of a suit and the filing of the complaint before the KMPDC mutually exclusive? I think these questions would have been addressed had the learned magistrate applied herself to the provisions of the law she relied on the decline jurisdiction

42. Be that as it may the applicant's grounds of appeal are set on the fact that he was not involved in the proceedings before the KPMDC and was never served. These issues could only have arisen after the delivery of the ruling by the KPMDC and could not have been before the trial court for determination. It is therefore not possible that the learned trial magistrate was being asked to sit on appeal of the KPMDU Ruling. (I must express my frustration as the limited record availed to this court: Not even the pleadings that were available to the applicant that provoked the P.O!)

43. Back to whether the applicant has established sufficient ground for the enlargement of time to file the appeal.

44. The appeal ought to have been filed within 30 days of the Ruling. The Ruling was delivered on 28th November 2022. The letter dated 29th November 2022 requesting for the Ruling does not bear any court stamp and an invoice was issued on 15th December 2022. It is not clear why the request would arrive and an invoice be issued a month later, and if that was so then the applicant ought to have explained the same. Be that as it may I do take judicial notice of the fact that the e filing system does sometimes fail. However, the applicant had the greater duty to follow up on the proceedings.

45. It is deponed by the applicant that a copy of the Ruling was obtained on the 19th December 2022 but there is nothing annexed to support that position. In the further affidavit he indicates that the payment of the invoice was made on 6th February 2023. In addition, the ruling is not certified copy and does not bear the court stamp. Never the less it is not disputed by the respondents.

46. The delay from December 2022 to February 2023 is explained in the following terms. The applicant argues that the delay is 12 days. He has applied that computation of time provided for under Order 50 rule 2 and 3 of the CPR however the applicable provision is Order 50 rule 4 which provides for When time does not run:

> Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:
>
> Provided that this rule shall not apply to any application in respect of a temporary injunction.

47. It would then appear that the delay is not inordinate and is excusable.

48. What prejudice will the respondents suffer? From the circumstances of the case, nothing more than can be compensated by way of costs.

49. It is my view that the justice of this case requires that the issue as to whether the Subordinate court had the jurisdiction to hear the matter before it be determined. I have set out the reasons why.

    i. I therefore allow the application and deem the draft memo of appeal as filed within time.

    ii. The applicant will have 45 days from the date hereof to file and serve the memorandum of appeal.

iii. In default the leave granted will stand withdrawn and the file will be closed for want of prosecution.

iv. The matter mentioned before the Deputy Registrar to confirm compliance

v. No orders as to costs

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH JULY 2023

....

MUMBUA T MATHEKA

JUDGE

Andrew Makundi & Co Advocates: Kiluva

Mwangangi& Associates, Advocates Ms Mboya