



**Republic v Kenya Medical Practitioners and Dentists Council; Matu
(Exparte Applicant) (Judicial Review Application E182 of 2021)
[2023] KEHC 19678 (KLR) (Judicial Review) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19678 (KLR)

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

JUDICIAL REVIEW APPLICATION E182 OF 2021

JM CHIGITI, J

JULY 7, 2023

BETWEEN

REPUBLIC APPLICANT

AND

**KENYA MEDICAL PRACTITIONERS AND DENTISTS
COUNCIL RESPONDENT**

AND

DR. JOSHUA MALITI MATU EXPARTE APPLICANT

RULING

1. The respondent's preliminary objection dated March 18, 2023 is what is before this court for ruling. The preliminary objection is raised in response to the *ex parte* applicant's case and it raises the following grounds;
 - 1) That this suit offends the provisions of order 53 rule 3(1) of the [Civil Procedure Rules, 2010](#) and the court order issued on December 1, 2021.
 - 2) That the applicant failed to file its substantive application by way of notice of motion before this honourable court.
 - 3) That consequently, this suit ought to be struck out with costs to the respondent.



2. The preliminary objection is supported by the written submissions dated May 24, 2023 in which the respondent identifies the following issues for determination;
 - i. Whether the applicant filed a substantive suit?
 - ii. Whether a competent suit exists?
3. The respondent contends that the *ex parte* applicant has failed to comply with practice direction 8 (4) of the Electronic Case Management Practice Directions, 2020 which provides as follows:

“A document will not be considered as filed until the e-filing system generates a notice of electronic filing with a hyperlink to the electronically filed document.”
4. The respondent further submitted that on March 21, 2021, the court could not locate an electronic copy on the e-filing platform nor a physical copy in the court file.
5. The respondent also submits that the electronic filing court record reflects that as at the date of these submissions, there is still no hyperlink to the alleged electronically filed notice of motion application.
6. The respondent submits that the link provided by the e-filing portal has only a 2-page long certificate of urgency dated December 15, 2021 and filed on December 16, 2021 and that no other hyperlink provides access to the notice of motion application dated December 15, 2021.
7. It is also the respondent’s submission that the affidavit of service filed by the applicant’s advocate dated December 17, 2021 only shows service of a hearing notice and the certificate of urgency dated December 15, 2021 but not the notice of motion dated December 15, 2021.
8. The respondent also submits that it is a mandatory provision of the law that a substantive judicial review application ought to be filed by way of notice of motion and as such, the applicant’s failure to file the substantive application by way of notice of motion offends order 53 rule 3(1) of the [Civil Procedure Rules](#). The cases of [Republic v Kabiyet Land Disputes Tribunal & another Ex-parte Mapy Jeptarus Mibei](#) [2014] eKLR and [Wilson Osolo v John Ojiambo Ochola & another](#) [1996] eKLR are cited to support this argument.
9. In conclusion it is submitted that there is no substantive application properly filed before this honourable court, in accordance with order 53 rule 3(1) of the [Civil Procedure Rules](#) and practice direction 8(4) of the Electronic Case Management Practice Directions, 2020.
10. The *ex parte* applicant in response contends that he complied with the terms of the court’s order by filing his notice of motion application, which was filed under a certificate of urgency dated December 15, 2021 via the e-filing portal on the December 16, 2021 at 10:47 am.
11. The application under the e-filing portal is said to have been described as an “application under certificate of urgency”. The *ex parte* applicant is also said to have been charged filing fees of Kshs 2,250.00/= which was paid by the ex-parte applicant’s advocates via m-pesa paybill customer reference number EYNRENPV.
12. The *ex parte* applicant submits that the court will note that although under prayer 5 of the chamber summons application dated November 26, 2021 the ex parte applicant had sought that the order for leave to operate as stay of the sanctions imposed in the respondent’s ruling delivered on October 21, 2021 (the subject of these proceedings), the court did not grant this prayer. Further that the matter thus remained urgent and for that reason, in filing the main notice of motion application, the *ex parte* applicant needed to lodge it under a certificate of urgency.



13. The *ex parte* applicant further contends that it goes without saying that the court could not have assessed court fees of Kshs 2,250/- for a non-existent notice of motion application coupled with a certificate of urgency.
14. It is the *ex parte* applicant's case that on December 18, 2021 the honourable court made a ruling addressing its mind to the certificate of urgency on the notice of motion and that it declined to certify the substantive application as urgent, but noted that the substantive application was correctly filed and directed that the same be served on the respondent within 7 days and their response to be filed within 7 days of service.
15. The *ex parte* applicant submits that a regular court order issued on December 18, 2021 at 11:17hrs is part of this court's proceedings, and which the respondent has either ignored and/or failed to consider it in lodging the preliminary objection dated March 18, 2023.
16. Further that by an affidavit of service sworn on December 17, 2021 by Gabriel Mwanja Nduva who is a process server the respondent was served with the notice of motion application dated December 15, 2021 but the respondent is yet to file a response on the same.
17. The *ex parte* applicant also submits that on November 10, 2022 when the matter came up before the Hon. Anthony Ndungu, the court ordered the applicant to re-serve the order of the court upon the respondent for the last time before ruling was entered and it was after the applicant served the said orders upon it, that the respondent instructed their advocate (Kounah & Company Advocates) who came on record.
18. It is contended that on their first court attendance on November 21, 2022, counsel informed the court that they had just been instructed and sought 7 days to file their response and submissions to the petition. The court allowed their prayers and gave a mention date to confirm the respondents compliance and to fix a ruling date.
19. On January 26, 2023 when the matter came up for compliance and fixing the said ruling date, the respondent's counsel claimed that they had not complied as they intended to settle the matter out of court. This was an ambush, as they had not consulted the *ex parte* applicant on the same. However, court granted them time to attempt settling out of court.
20. Owing to their silence, the *ex parte* applicant's counsel wrote to the respondent's counsel inquiring on the promised terms of settlement but the respondent did not respond, up until the mention date on March 21, 2023 on which date the court was to be informed of the status of the negotiations. On the said date, the respondent further ambushed the applicants by claiming to have filed a preliminary objection.
21. The *ex parte* applicant urges that the substantive application dated December 15, 2021 was filed on time, and that the honourable court took note of the same and gave directions on how the application would be dispensed with and further that had the substantive application not been filed, the honourable court would not have given orders in vain, neither would it order nor approve it as properly filed.
22. The *ex parte* applicant contends that he did not overlook any technicalities and that he filed all the vital documents.
23. This court notes that as seen from the ruling of Ndungu J dated December 18, 2021 that the judge refers to a notice of motion application dated December 15, 2021 and filed under certificate of urgency and also that there is a copy of the disputed notice of motion in this court's record. However, there is



no trace of the notice of motion on the e-filing portal and the respondent also contends having been served with the said motion.

24. The Constitution under article 48 provides for access to justice for all persons including the parties before this court and therefore striking out the suit without giving the parties an opportunity to cure procedural technicalities as envisioned under article 159 of the Constitution would be unbecoming of this court.
25. The court also has a duty under section 1A and 1B of the Civil Procedure Act to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and it is in light of this that I make the following orders;
 - i. That the *ex parte* applicant herein produces before this court the receipt obtained upon filing the notice of motion application dated December 15, 2021 within one (1) day working day from today.
 - ii. That the *ex parte* applicant serves the respondent herein with the notice of motion application dated December 15, 2021 within one (1) working day from today.
 - iii. That the respondent shall file a response to the notice of motion application dated December 15, 2021 within seven (7) days.
 - iv. That the *ex parte* applicant shall file and serve his written submissions within seven (7) days after service of the response.
 - v. That the respondent shall file and serve its written submissions within (7) days of service.
 - vi. That the parties shall appear before this court for highlighting of submissions on September 18, 2023.
 - vii. That failure to comply with the above directions will render the notice of motion application dated December 15, 2021 struck off.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2023

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J. CHIGITI (SC)

JUDGE

