



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. E370 OF 2020

DR. JOSEPH C. MWANGI.....PLAINTIFF/APPLICANT

-VERSUS-

DR. JYOTEE TRIVEDY.....1ST DEFENDANT/RESPONDENT

LIONS SIGHT FIRST EYE HOSPITAL.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant in this instance lodged the complaint dated 20th May, 2017 with the Medical Practitioners and Dentists Council (“the Council”) and against the 1st and 2nd defendants/respondents, arising out of complications following an eye surgery undertaken by the 1st respondent at the 2nd respondent’s premises. Upon hearing the parties, the Council vide its ruling delivered in August, 2019 found the respondents culpable.
2. The applicant herein has now moved this court by way of the Notice of Motion dated 15th September, 2020 supported by the grounds set out on the body thereof and the facts stated in the affidavit of the applicant, seeking an order of leave to file his plaint out of time and a further order that the plaint be deemed as duly filed upon payment of the requisite court fees.
3. The 1st respondent filed Grounds of Opposition dated 1st October, 2020 and the 2nd respondent put in the replying affidavit sworn by its Director, **Manilal Dodhia** on 1st October, 2020. The applicant a further affidavit he swore on 23rd December, 2020.
4. The Motion was canvassed by way of written submissions.
5. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits supporting and challenging it, the Grounds of Opposition and the contending written submissions and authorities cited.
6. Before touching on the merits of the instant Motion, I wish to address two (2) preliminary issues which arose during the hearing thereof. The first issue which was raised by the 2nd respondent concerns whether the intended suit would properly be before this court in the event that the orders sought in the Motion are granted. The 2nd respondent argues that under the provisions of Section 20(9) of the Medical Practitioners and Dentists Board Act No. 5 of 2019, any person who is aggrieved by the decision of the Council may lodge an appeal with the High Court within 30 days from the date of the decision. The 2nd respondent therefore argues that the applicant ought to have lodged an appeal rather than seek to file a fresh suit with the High Court.
7. Upon perusal of the record and in particular the draft plaint annexed to the Motion, I observed that the applicant is seeking to recover damages arising out of the alleged negligence caused by the respondents. There is nothing to indicate that the applicant is seeking to challenge the decision of the Council/Committee by way of an appeal. I therefore find that the arguments by the 2nd respondent cannot hold water.
8. The second preliminary issue was raised by both respondents and concerns whether the instant Motion offends **Section 4(2) and 27(2)** as read with **Section 28(1)** of the **Limitation of Actions Act Cap. 22 Laws of Kenya**. The respondents contend that the Motion seeks to institute a suit after the lapse of three (3) years and yet he has not satisfied the requirements set out under **Section 27(2)** (supra). In reply, the applicant contends that owing to factors beyond his control, he was unable to bring the suit within the statutory timelines and cites *inter alia*, the case of **Willis Onditi Odhiambo v Gateway Insurance Co Ltd [2014] eKLR** where the Court of Appeal rendered itself thus:

“Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is

found on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort.”

9. Upon considering the nature of circumstances as presented before me and the fact that the parties were previously engaged in proceedings before the Board, I am satisfied that the applicant has reasonably satisfied the requirements of **Section 27(2)** (supra). Concerning **Section 28(1)** (supra) which expresses that an application for leave to institute a suit out of time ought to be made *ex parte*. I am of the view that the applicant has moved this court by way of a Notice of Motion cannot in itself render the application fatally defective. I say so in consideration of the rule of substantive justice. Consequently, the arguments by the respondents in this regard cannot stand.

10. On the merits of the Motion, it is clear that the main order sought is that of leave to file the suit out of time. It is acknowledged that whether or not to grant leave is purely discretionary and which discretion ought to be exercised judiciously. This was the position taken by the court in the case of **Catherine Mwendu v Elijah Mulyingi Musyimi & another [2017] eKLR** quoted in both the applicant's and the 2nd respondent's submissions respectively. The court went on to reason thus:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”

11. Upon perusal of the pleadings and instant Motion, I observed that the applicant did not clearly bring out the issue on when the cause of action arose. Suffice it to say that it is apparent from the facts presented by the parties that the cause of action, which is in the nature of medical negligence, arose sometime in December, 2015. It is therefore evident that the three (3) year statutory timelines for bringing a tortious claim for medical negligence have lapsed and hence there has been a prolonged delay.

12. Concerning the explanation for the delay, I considered the averments by the applicant that following the cause of action (and as earlier mentioned), he lodged a complaint with the Council in July, 2017 and that it was not until August, 2017 that the Council tabled its findings. The applicant also avers that the respondents have since failed to comply with the directives of the Council, whereas the 2nd respondent is of the view that the applicant has thwarted attempts at pursuing mediation as a means of resolving the dispute, which argument is neither here nor there.

13. Upon weighing the rival arguments, I find the reasons given by the applicant for the delay in lodging the suit to be excusable in the circumstances and I am convinced that the delay was occasioned by factors which were beyond his control. That being the case, it would be in the interest of justice to grant the applicant an opportunity to seek reprieve from the courts. In any case, the respondents have not alleged any serious prejudice shall be visited upon them if the applicant is allowed to file his suit out of time.

14. In conclusion therefore, I find merit in the Motion and I will allow it, giving rise to the following orders:

a) Leave is hereby granted to the plaintiff/applicant to file his suit out of time.

b) The plaintiff shall therefore file his plaint within 14 days from this day and shall thereafter serve copies of the same upon the 1st and 2nd defendants/respondents within 14 days of filing.

c) Costs of the Motion shall abide the outcome of the suit.

DATED, SIGNED AND AT NAIROBI THIS DAY OF, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Macharia for appellant

Njoki for 1st respondent

Kagiri for 2nd respondent