



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. E433 OF 2020**

**DR PHILIP KIPKIRUI TONUI.....APPLICANT**

**VERSUS**

**MEDICAL PRACTITIONERS AND DENTISTS COUNCIL.....1<sup>ST</sup> RESPONDENT**

**GEORGE OMWOMO OOKO**

**(On behalf of the Estate of late PAMELA AUMA OOKO –deceased).....2<sup>ND</sup> RESPONDENT**

**RULING**

The application dated 16<sup>th</sup> October 2020 seeks the following orders:

- 1. THAT this Honourable Court be pleased to enlarge time to file an appeal against the ruling delivered by the 1<sup>st</sup> Respondent on 16<sup>th</sup> March, 2020 in Preliminary Inquiry Committee Case No. 40 of 2018.**
- 2. That costs of this application be provided for.**

The application is supported by the affidavit of the applicant sworn on 16<sup>th</sup> October 2020 and two further affidavits sworn on 8<sup>th</sup> December and 21<sup>st</sup> December 2020 respectively. The 1<sup>st</sup> respondent filed a replying affidavit sworn on by Michael R. Onyango on 2<sup>nd</sup> December, 2020. The second respondent filed a replying affidavit sworn on 8<sup>th</sup> December, 2020. The application was determined by way of written submissions.

Counsel for the applicant submits that the 1<sup>st</sup> respondent delivered a ruling on 16<sup>th</sup> March 2020 and a copy thereof was forwarded to the applicant upon demand on 17<sup>th</sup> March, 2020. The 1<sup>st</sup> respondent found that the applicant was negligent yet it had no jurisdiction to make a finding on negligence as this is the province of the court. The applicant was not able to file the appeal within the required time of 30 days since he got to know about the decision on 17<sup>th</sup> of March 2020. A copy of the decision was supplied via e-mail and soon thereafter Covid-19 struck and it became difficult to instruct an advocate to file the appeal which has high chances of success. The delay in filing the application is not inordinate. Although parties have been filing matters online, the system had and still has problems of access. No prejudice will be suffered by the respondents.

The applicant further avers that he is not aware of a civil suit between him and the 1<sup>st</sup> respondent pending before the Eldoret Chief Magistrate's Court as he has not been served with the summons. The plaint before the Eldoret Court does not mention the complaint handled by the 1<sup>st</sup> respondent namely **preliminary complaint case No. 40 of 2018** and therefore the Eldoret suit could not have been the reason as to why the current application was filed. The Eldoret Civil suit deals with the issue of negligence while the current application relates to the issue of infamous conduct on the part of the applicant. The applicant contends that he was denied the right to be heard by the first respondent.

Counsel for the first respondent opposed the application and submitted that the same has been filed after a period of seven (7) months. The inordinate delay has not been explained. The intended appeal is also not arguable. Section 29(9) of the Medical Practitioners and Dentists Act provides for a 30 days appeal period to the High Court by any party aggrieved by the decision of the Medical Council. The justification of the delay on the Covid 19 pandemic is untenable as the court registry has been accessible and parties have been filing their matters electronically since April, 2020.

It is submitted that the 2<sup>nd</sup> respondent lodged a complaint with the medical council on 4<sup>th</sup> July, 2018. On behalf of the estate of the late

**Pamela Ooko.** The investigations revealed that the application was culpable and a ruling was delivered on 16<sup>th</sup> March, 2020 and was received by the applicant on 17<sup>th</sup> March 2020. The applicant has failed to explain the delay of seven months satisfactorily and has further failed to explain how he was unable to instruct an advocate. Counsel relies on the case of **COUNTY EXECUTIVE OF KISUMU –VS- COUNTY GOVERNMENT OF KISUMU & 8 OTHERS (2017) eKLR** where the Supreme Court held:-

**“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:**

**“the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**

**5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**

**6. Whether the application has been brought without undue delay;**

**and**

**7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

Counsel for the first respondent further contend that the applicant has no arguable appeal. The main issue being raised in the intended appeal is that the 1<sup>st</sup> respondent lacked jurisdiction to deal with issues of negligence and that the patient was also seen by other doctors who misdiagnosed her. It is submitted that the Medical Council has the mandate of dealing with complaints involving professional misconduct, malpractice or breach of standards. The applicant was found culpable of negligence in the case of the patient. Therefore, the medical council acted within its jurisdiction.

The second respondent also opposed the application. Counsel for the 2<sup>nd</sup> respondent maintain that advocates were declared essential service providers by the court in April, 2020 in **Constitutional Petition Number 120 of 2020**. The reasons for the delay are neither good nor sufficient. Counsel referred to the case of **NANDI TEA ESTATES LTD. –V- GEORGE OCHIENG ODUONGO (2015) eKLR** where a delay of 20 days was held to be inordinate.

There is no dispute that the decision of the medical council was made on 16<sup>th</sup> March, 2020. There is further no dispute that the applicant was made aware of the decision by the following day on 17<sup>th</sup> March, 2020. The applicant admits that the decision was sent to him on e-mail on 17<sup>th</sup> March, 2020. It is therefore established that no fault on the issue of service of the decision can be attributed to the 1<sup>st</sup> respondent. The first respondent promptly released the decision. The applicant is a medical Doctor and is aware that even under the Medical practitioners and Dentist Act, he had thirty (30) days to lodge an appeal to the High Court against the decision of the Medical Council.

The Supreme Court in the case of **SALAT –VS- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS (2014) KLR** set the principles to be considered in an application by the court when exercising its discretion to extend time for filing an appeal. These are:-

**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 for extension of time has the burden of laying a basis to the satisfaction of the court;**

**3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;**

**4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**

**5. Whether there would be any prejudice suffered by the respondents if the extension was granted;**

**6. Whether the application had been brought without undue delay; and;**

**7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.**

The court is being asked to exercise its discretion and extend time so as to allow the applicant lodge his appeal out of time. The applicant has

a duty to explain the reason for the delay to the satisfaction of the court. The ruling of the Medical Counsel which is the subject of the intended appeal was delivered on 16<sup>th</sup> March, 2020. The current application was filed in mid-October, 2020. This is a period of exactly seven months after the delivery of the ruling. The explanation advanced is that the Covid-19 pandemic made it difficult for the applicant to file the appeal. In my view, this explanation is not sufficient. The applicant is a medical doctor who was aware of the consequences of the ruling. Waiting for seven months to take action cannot be justified by the Covid-19 pandemic. Nothing stopped the applicant from consulting an advocate soon after the delivery of the ruling. The contention that the applicant was condemned unheard cannot justify the long delay of seven months. The applicant's reasons for the delay fall short of convincing the court to exercise its discretion in his favour. The other reason that the registry has been operating online and that at times it is difficult to access the registry is equally unconvincing. Advocates have been operating online and cases have been fully heard virtually. There is no evidence that the applicant tried to file an application on-line but could not. I do find that the operations of the court have always been accessible and the applicant cannot hide behind the court's online system in the pretext that it prevented him from taking action.

The 2<sup>nd</sup> respondent filed a civil suit before the Eldoret Chief Magistrate's Court seeking damages arising from the applicant's alleged negligence. The plaint is dated 6<sup>th</sup> October, 2020. The applicant will be able to defend the suit and enjoin all other doctors or parties he considers to have been culpable. It is not all lost to the applicant. Further, the ruling of the medical council can be contracted by the applicant or his witnesses before the Chief Magistrate's Court.

Given the long period it took the applicant to lodge the application and observing that the reasons advanced for the long delay are not convincing, I do find that the application dated 16<sup>th</sup> October, 2020 lacks merit and the same is hereby dismissed with costs.

**DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JUNE, 2021.**

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**S. CHITEMBWE**

**JUDGE**