



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 686 OF 2019

DR. FRANK KIBET ENEDERE.....APPELLANT

-VERSUS-

JOHN KENYATTA ONCHIRI..... RESPONDENT

(An appeal from a ruling on an inquiry by the Disciplinary and Ethics Committee of the KENYA Medical Practitioners and Dentists Council (Prof. Alice Mutungi, Chairperson) dated 30th October, 2019 in PIC Case No. 31 of 2014)

RULING

1) Dr. Frank K. Endere, the Appellant /Applicant herein took out the motion dated 5th December 2019 whereof he sought for inter alia, an order for stay of execution of the ruling by the Disciplinary and Ethics Committee of the medical Practitioners and Dentists Council dated 30th October 2019 in **PIC case no 31 of 2014** pending appeal. The motion is supported by the affidavit of the Applicant. When served, John Kenyatta Onchiri, the Respondent herein, filed the replying affidavit he swore to oppose the motion.

2) I have considered the grounds stated on the face of the motion and the facts deposed in the affidavits filed in support and against the application. I have further considered the rival oral submissions of learned counsels appearing in this matter. It is the submission of the Appellant/Applicant that unless the order for stay is granted he would suffer substantial loss in that he will not be in a position to practice as a medical doctor since his license has been suspended for six (6) months with effect from 30th October 2019.

3) The Applicant's main complaint is that he is unable to earn a living hence unable to provide for his family. The Appellant/Applicant also stated that his appeal has overwhelming chances of success. He argued that he will be able to show at the hearing of the appeal that he was not served with a notice with the charges to face before the Medical Practitioners and Dentists Board (now Council), therefore he was not made aware of the charges he was to face. The Appellant further stated that he was ready to abide by any conditions made by this court as a condition for the grant of the order for stay.

4) The Respondent on the other hand strenuously opposed the application for stay stating that the Appellant/Applicant does not deserve to be given the order because he has all along applied delaying tactics to have the matter heard and concluded. The Respondent gave the history of how the matter has dragged on for a long time. It was also pointed out by the Respondent that the Appellant was aware of the charges he was to face before the Medical Practitioners and Dentists Council hence he has no arguable appeal.

5) It is clear from the material placed before this court and from the oral arguments made that the Appellant/Applicant is basically seeking for an order of stay of execution of the decision of the council pending appeal.

6) The history behind this dispute is short and straightforward. The matter arose from the treatment and management of the late Pauline Kasesya Mwinzi by Dr. Frank K. Endere at St. Mary's Mission Hospital- Langata. The Respondent (Complainant) gave detailed brief of the nature of the complaint on the part of the hospital and the doctor which led to the death of the patient before the medical practitioners and Dentists Board (now known as council).

7) The complaint was deliberated by the council under section 20 (6) of the medical Practitioners and Dentists Act as amended by the Health Laws Amendment Act no 5 of 2019.

8) In the end, the council made the following orders inter alia

i) The Appellant be admonished for failing to timely refer the patient to a facility appropriately equipped to manage the complications.

ii) The Appellant's practicing License be suspended for a period of six (6) months.

iii) The Appellant be placed on probation at the Kenyatta National Hospital, Department of obstetrics and Gynaecology under the direct supervision of the head of the aforesaid department for a period of six months.

iv) The Appellant to pay a fine of ksh. 250,000/= to the Kenya Medical Practitioners and Dentists council within 14 days.

v) The Appellant to mediate with the estate of the late Pauline Kasesya Mwinzi on compensation and thereafter submit a report to the chair of the Kenya Medical Practitioners and Dentists Council within 60 days.

9) The Appellant has now preferred this appeal against the aforesaid decision and put forward the following grounds:

i) THAT the Committee erred in law by proceeding with the hearing and then delivered a ruling on a mere complaint without (a) formal charge (s) being formulated contrary to the express provisions of the governing law.

ii) THAT the Committee erred in law by proceeding with the hearing without (a) formal charge(s) being served the Appellant to enable him prepare his defence thereto contrary to the governing law as well as the principles of natural justice.

iii) THAT the committee erred in law by relying upon documents and reports that had never been supplied to the Appellant.

iv) THAT the committee erred in law by Convicting the Appellant of acts that had not been classified as offences under the governing law.

v) THAT the committee erred in law by delivering a legally incompetent ruling.

10) It is apparent from the wording of the orders sought by the Appellant vide the application for stay that the Appellant is seeking for a stay of the entire decision pending appeal. If the order sought is denied, it means the Appellant has to comply with the orders of the council replicated hereinabove.

11) Learned counsels appearing in this appeal have stated that they have been unable to secure the typed proceedings from the council which gave rise to the decision being impugned. It would therefore mean that the appeal may not be ready for hearing soon. The Appeal is likely to be rendered obtuse if the order for stay is not granted.

12) The period the Appellant's practicing license is suspended will have lapsed and before the appeal is heard and determined. The Appellant will also have been admonished and forced to undergo probation before his appeal is heard and determined. I am convinced that in the circumstances he would suffer substantial loss if the order for stay is not granted.

13) It is apparent that the motion for stay was timeously filed hence the motion is competently before this court.

14) The other issue which must be considered is the question touching on security for the due performance of the decree.

15) In instances where the decision being challenged is a monetary decree, the court would order the Appellant to deposit the decretal sum. However, the decision now being challenged is not a monetary decree. It is therefore inappropriate to make an order for a deposit of money. The best the court can do in the circumstances is to grant the order for stay without conditions but for a limited period of time.

16) In the end, I grant the order for stay of execution as sought in the prayer 3 of the motion dated 5/12/2019 last for 90 days. In the circumstances of this matter a fair order on costs is to direct which I hereby do that each party should meet its own costs.

Dated, signed and delivered at Nairobi this 15th of January, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent