

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO. E203 OF 2025

DR. CALVIN NYAKURE.....
APPELLANT

VERSUS

MOSES BARASA MAKOKHA..... 1ST
RESPONDENT

FOUNTAIN HEALTHCARE LIMITED..... 2ND
RESPONDENT

Coram: Before Hon. R. Nyakundi
M/s Wambua Kigamwa & Co. Advocates
M/s S. Mulei Law Advocates

RULING

1. There are two applications before this court. One is dated 30th October, 2025 seeking orders that the Ruling of an application dated 26th September, 2025 be fast tracked. The application dated 26th September, 2025 seeks orders as follows:

- i. Spent.*
- ii. That the Honorable Court be pleased to stay the execution/ implementation of the decision of the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Council dated 25th July 2025 in Disciplinary Case No. 1 of 2022 as communicated by Prof. Stephen Ogendo — Chairperson of the Committee pending the hearing and determination of this application.*
- iii. That the Honorable Court be pleased to stay the execution/ implementation of the decision of the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Council dated 25th July 2025 in Disciplinary Case No. 1 of 2022 as*

communicated by Prof. Stephen Ogendo — Chairperson of the Committee pending the hearing and determination of the appeal.

iv. *That the costs of this application be provided for.*

2. The application is premised on the following grounds;

i. *THAT the appellant is likely to suffer substantial loss.*

ii. *THAT the appeal and the application have been filed without unreasonable delay.*

iii. *THAT the appellant is willing to abide by such requirements as to security.*

3. The application is supported by the annexed affidavit of DR. CALVIN NYAKURE *stating as follows;*

i. *THAT I am the appellant herein hence competent to swear this affidavit.*

ii. *THAT I was the 1st respondent in Disciplinary Case No. 1 of 2022 lodged before the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Council.*

iii. *THAT on the 25th July 2025, the Committee communicated its decision which found the respondents, being myself and the 2nd respondent herein, culpable on the complaint and meted out various sanctions. Annexed hereto is a copy of the decision marked as 'A'.*

iv. *THAT the sanctions as meted out comprise of;*

a. *Dr. Calvin Nyakure is hereby admonished for his professional negligence, particularly his failure to ensure proper and complete documentation of the patient's condition, the procedure performed, and the subsequent postoperative plan, thereby undermining the continuity and safety of care, lack of adequate follow up and insufficient communication with the patient.*

b. *Dr. Calvin Nyakure is hereby directed to pay a fine of Kenya Shillings Four Hundred and Fifty Thousand) within thirty (30) days from the date hereof, in accordance*

with the provisions of the Medical Practitioners and Dentists Act.

- c. Dr. Calvin Nyakure is hereby directed to engage in a mediation process with the complainant, with the objective of reaching a fair and reasonable agreement on compensation for the harm suffered. The outcome of the mediation, including any agreed settlement, shall be documented and submitted in a formal report to the Kenya Medical Practitioners and Dentists Council within One Hundred and Twenty (120) days from the date hereof.*
- d. Dr. Calvin Nyakure is hereby directed to develop and deliver a Continuing Professional Development (CPD) session on the importance of informed consent, proper procedural documentation, post-operative patient communication. Evidence of delivery and participation is to be submitted to the Kenya Medical and Practitioners and Dentists Council within sixty (60) days from the date hereof.*
- e. Fountain Healthcare Limited is hereby directed to enforce and institutionalize the use of a patient safety checklist in all surgical procedures. The Committee finds that had this checklist been properly utilized, the intraoperative incident involving retained drill bits would have been documented and flagged, potentially preventing the continued harm suffered by the Complainant.*
- v. THAT I am aggrieved by the decision and have since preferred an appeal to this court. Annexed hereto is a copy of the Memorandum of Appeal marked as 'B'.*
- vi. THAT I stand to suffer substantial loss unless a stay of execution is issued as the Committee gave 30 days within which the imposed fine of Kes. 450,000/= is to be paid and*

also compelled me to engage in a forced mediation exercise for compensation to the 1st respondent herein.

- vii. THAT the 30-day period lapses today and unless a stay of execution is issued, the Committee may proceed to take irreversible and detrimental measures against me.*
- viii. THAT this application has been made without unreasonable delay as the period within which the appeal is to be preferred is yet to lapse.*
- ix. THAT I am willing to abide by the court's directions on security for the performance of the decision as may be ultimately binding upon me.*
- x. THAT I do pray that this application be allowed.*
- xi. THAT I do make this oath conscientiously believing the afore-deposed particulars to be true to the best of my information, knowledge and belief.*

4. The application is unopposed, as no Response has been filed despite the Respondents' advocates having entered appearance. I shall nonetheless proceed to determine the matter on merit. This was a matter filed under Certificate of urgency during the vacation and upon being served the Respondent Legal counsel was duty bound by law not only to file a notice of appointment under Article 50(2)(G) of the constitution but to file a rejoinder to the Notice of Motion. The practice direction of the High Court and the provisions of the Civil Procedure Rules sets out clear timelines for compliance which do not necessarily require any judicial discretion. As at the time of going to the process of decision making both the CTS and the manual record had no evidence of grounds of opposition or a replying affidavit. I take it therefore the application is unopposed as I delve into the analysis of this interlocutory application pending the intended appeal.

Analysis and determination

5. Stay of Execution is provided for under **order 42 Rule 6** of the Civil Procedure Rules which provides as follows:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

6. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See **Antoine Ndiaye vs. African Virtual University [2015] eKLR**.

7. In **Butt v Rent Restriction Tribunal [1982] KLR 417** at page 419 Madan JA (as he was then) held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from

being nugatory, per Brett, LJ in **Wilson v Church (No 2) 12 Ch D (1879) 454** at p 459. In the same case, Cotton LJ said at p 459:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

8. In determining whether to grant a stay pending appeal, the court navigates a delicate balance. On one hand, the subject matter must be preserved to give effect to the appellant's right of appeal and prevent the appeal from becoming an academic exercise. On the other hand, a party who has prevailed at trial has an equitable interest in reaping the rewards of their success.
9. In **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is

granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss..."

- 10.** Having considered the application, the supporting affidavit, and the applicable legal principles, I now turn to examine whether the appellant has satisfied the statutory requirements under Order 42 Rule 6(2) of the Civil Procedure Rules.
- 11.** The first limb requires the appellant to demonstrate that substantial loss may result unless the stay is granted. The court in **Samvir Trustee Limited** (supra) cautioned against accepting mere assertions of substantial loss, emphasizing the need for empirical or documentary evidence.
- 12.** In the case at bar, the appellant has adduced sufficient evidence of potential substantial loss. The impugned decision imposes a fine of Kes. 450,000/= which was to be paid within thirty days from 25th July 2025. That period has since elapsed. Additionally, the appellant is compelled to engage in a mediation process for compensation to the 1st respondent, the quantum of which remains undetermined. The appellant is further required to develop and deliver a Continuing Professional Development session within sixty days, involving both time and financial resources.
- 13.** Beyond the financial implications, the appellant faces the risk of enforcement action by the Disciplinary and Ethics Committee, which may include further sanctions or adverse notations on his professional record. Such consequences would be irreversible should the appeal succeed. The cumulative effect of these sanctions constitutes substantial loss within the contemplation of Order 42 Rule 6(2)(a).
- 14.** As to the element of unreasonable delay, the decision was communicated on 25th July 2025, and the appeal together with this application were filed within the prescribed timelines. The application dated 26th September 2025 was brought well within the period allowed for filing an appeal. I am satisfied that the appellant has acted with reasonable diligence and has not unduly delayed in seeking the court's intervention.
- 15.** From the comparative law perspective, it is deducible in the same vein that in granting stay within the provisions of Order 42 rule 6 of the Civil

Procedure rules of the condition precedents set out for the court to exercise discretion include substantial loss and to ensure the appeal is not rendered nugatory. The authorities on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd v Baker* where Stoughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay. The authority of **Hammond Suddard Solicitors v Agrichem International Holdings** is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus: “ whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?

16. It is trite law that an appellate jurisdiction is both a creation of the constitution and statute law essentially which must be given effect unless there are compelling reasons for the court not to abide within the provisions of Art. 48 & 50 of the constitution. In analyzing the affidavit evidence I opine that without stay of execution there is a likelihood of the applicant appellant suffering substantial loss or occasioning the appeal to be rendered nugatory.

- 17.** While I am mindful that the 1st respondent, as the successful party before the Committee, has a legitimate expectation to benefit from the decision, I must weigh this against the appellant's right to a meaningful appeal. If the sanctions are immediately enforced, particularly the payment of the fine and the commencement of mediation proceedings, the appeal risks being rendered nugatory should it succeed. The payment of Kes. 450,000/= and the attendant professional consequences are not easily reversible.
- 18.** Conversely, granting a stay pending the appeal's determination will preserve the status quo without causing irreparable prejudice to the respondents. The 1st respondent's rights, if ultimately upheld, can still be vindicated upon the appeal's conclusion. The balance of convenience tilts in favor of granting the stay to ensure the appeal is not reduced to an academic exercise.
- 19.** Having satisfied myself that the appellant has met all three conditions under Order 42 Rule 6(2) of the Civil Procedure Rules, and bearing in mind the overriding objective of facilitating just, expeditious, and proportionate resolution of disputes, I find merit in the application.
- 20.** Accordingly, the application dated 26th September 2025 is allowed as follows:

 - a. That the execution and/or implementation of the decision of the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Council dated 25th July 2025 in Disciplinary Case No. 1 of 2022 is hereby stayed pending the hearing and determination of Civil Appeal No. E203 of 2025.*
 - b. The appeal shall be fast tracked for hearing within thirty (30) days from the date of this ruling.*
 - c. The Appellant do file the record of appeal within 14 days from today's date.*
 - d. The Status Conference be held on 13.11.2025 to confirm compliance on filing of the record of appeal so that directions can be taken.*
 - e. Each party shall bear their own costs of this application*
- 21.** Order accordingly.

DATED AND SIGNED AT ELDORET THIS 30TH DAY OF OCTOBER, 2025

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NYAKUNDI
JUDGE