



Vinayak & another v Medical Practitioners & Dentists Board & 3 others (Civil Appeal (Application) E162 of 2022) [2023] KECA 1157 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1157 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E162 OF 2022
S OLE KANTAI, JA
OCTOBER 6, 2023**

BETWEEN

SUNIL VINAYAK 1ST APPELLANT

SUNIL VINAYAK T/A “SMILE AFRICA DENTAL CLINIC” 2ND APPELLANT

AND

MEDICAL PRACTITIONERS & DENTISTS BOARD 1ST RESPONDENT

**PROFESSIONAL CONDUCT COMMITTEE OF THE MEDICAL
PRACTITIONERS AND DENTISTS BOARD 2ND RESPONDENT**

MIO (A MINOR) 3RD RESPONDENT

GEOFFREY MUIRURI KING’ANG’A 4TH RESPONDENT

(An application for extension of time to file and serve a Supplementary Record of Appeal out of time in an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 22nd July, 2020 in JR No. 59 of 2019)

RULING

1. The applicants Dr Sunil Vinayak and Dr Sunil Vinayak trading as “Smile Africa Dental Clinic” has by Motion on notice brought under various provisions of law prayed that I be pleased to grant an extension of time for the applicants to lodge and serve a Supplementary Record of Appeal against the Judgment and decree of the High Court of Kenya at Nairobi (Mativo, J– as he then was) delivered on July 22, 2020 in Milimani JR Miscellaneous Application No 59 of 2019 and that costs of the Motion abide the outcome of the intended appeal. In grounds in support of the Motion and in a supporting affidavit by lawyer Victor Kimani Mungai it is said *inter alia* that the applicants filed Record of Appeal dated March 28, 2022 against the Judgment and decree in the said suit; that the applicants simultaneously filed an appeal against the ruling and order of the High Court (Mativo, J)



of November 16, 2021; that in the Record of Appeal relating to this appeal counsel for the appellant erroneously attached Memorandum of Appeal dated March 28, 2022 relating to the appeal against the ruling and order of the High Court of November 16, 2021 instead of Memorandum of Appeal against the Judgment and decree of the High Court dated July 22, 2020; that the sole reason for the erroneous failure to attach the correct Memorandum of Appeal dated March 28, 2022 is mistake by counsel which mistake was discovered while preparing written submissions; that the applicants wish to exercise their right of appeal and, finally, that the application is made without undue delay.

2. There is a Supplementary Affidavit by the said lawyer who confirms that he noted the omission to include the correct Memorandum of Appeal while preparing written submissions; that the application before me was filed 7 days after the said error was first spotted and he regrets the error.
3. I note that parties were served with a Hearing Notice on September 13, 2023 at 2.56 pm where they were required to file written submissions within limited specified time. I have seen and considered written submissions by the applicants but there are none from the respondents.
4. The factors to consider in an application of this nature are old hat and were well summarized in a ruling by a single Judge which was confirmed by a full bench in the case of *Leo Sila Mutiso v Rose Wangari Mwangi* Civil Application No NAI 255 of 1997. In the case of *Maina Johana Miano v Leah Wanyara Gichohi* [2019] eKLR Koome, JA (as she then was – now Chief Justice) cited the case of *Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 others* [2012] eKLR and said:

“...The principles to guide the court on the exercise of judicial discretion to extend time or to revive a suit are similar and they have been articulated in a long line of authorities. See the case of *Leo Sila Mutiso vs Rose*, CA NAI 255 of 1997 (unreported) ... Besides the principles set out in the case of *Leo* (supra), I am also guided by the provisions of Section 3A and 3B of the Appellate jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal at the end of the day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in Article 159.”

5. The position here is that a Record of Appeal was filed on time. The applicants position is that their lawyer included the wrong Memorandum of Appeal in that Record which happened because of an error on the part of the lawyer. Once the error was discovered the applicants filed the application before me within the week. So there is no delay. I accept the explanation given that the error by the advocates was a genuine one, an inadvertent mistake. I cannot see any prejudice that can be suffered by the respondent if I grant leave. I allow the Motion. Let the applicants file a Supplementary Record of Appeal within fourteen days of today. Costs of the Motion will abide the appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

