



**Lonyala (Suing on behalf of Stephanie Cheptoo Mutai (Deceased))
v Nyamu & another (Miscellaneous Application E388 of 2023)
[2024] KEHC 2136 (KLR) (Civ) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E388 OF 2023
JN NJAGI, J
FEBRUARY 29, 2024**

BETWEEN

**PHILIP MUTAI LONYALA APPELLANT
SUING ON BEHALF OF STEPHANIE CHEPTOO MUTAI (DECEASED)**

AND

**DR MURIITHI NYAMU 1ST RESPONDENT
MATTER MISERICORDIAE HOSPITAL 2ND RESPONDENT**

RULING

1. The Applicant has filed an application dated June 6, 2023 seeking for leave of the court to file an appeal out of time against the decision of the Kenya Medical Practitioners and Dentists Council (herein the council). The application is based on grounds on the face of the application and supported by the affidavit of Philip Mutai Lonyala sworn on June 6, 2023. The application is opposed by the Respondents.
2. The grounds in support of the application are that the May 4, 2023, the council dismissed the Applicant's complaint that he had presented to the council on behalf of his daughter, Stephanie Cheptoo Mutai (Deceased). That upon dismissal, he applied for copies of proceedings and ruling of the council on the May 11, 2023 but they were not forthcoming. He thereafter on the June 6, 2023 filed the instant application seeking for the orders stated above, by which time the right of appeal had lapsed. He averred that the cause of the delay in filing the appeal was the delay in supplying him with copies of the documents necessary to file the appeal.
3. The application was opposed by the 1st Respondent vide the replying affidavit of his advocate, Stanley Nduati. The grounds of opposition are that the Applicant applied for copies of the ruling on the May



11, 2023 with a subsequent reminder on May 30, 2023. That there was no follow up until 30th May 2023 which was inordinate delay on the part of the Applicant. Therefore, that the application is an abuse of the process of the court and should be struck out with costs.

Submissions

4. The Applicant stated that the appeal ought to have been filed by June 4, 2023 being 30 days from the date of delivery of the decision by the Council but was filed on 6/6/2020 which was 2 days late. He stated that he had made a follow up of the documents on 12th and 30th May but they were not available. He said that the delay was caused by the fact that he had not been supplied with the said documents. Counsel submitted that the delay was not inordinate.
5. The Applicant submitted that the factors to be considered in such an application are as was set out in *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR, which are: the period of the delay; the reason for the delay; the arguability of the appeal; the degree of prejudice which could be suffered by the Respondent if the extension is not granted; the importance with compliance with the limits to the particular litigation or issue and the effect if any on how the administration of justice or public interest if any is involved.
6. The Applicant submitted that it is not in the interest of justice to lock out a litigant from the seat of justice.
7. The Respondent submitted that the court lacks jurisdiction to hear the appeal and would be acting in vain if the application is allowed.

Analysis and Determination

8. I have considered the grounds in support of the application, the response to the same and the submissions by counsels for the respective parties.
9. Section 20 (9) of the *Medical Practitioners and Dentists Act* Cap 253 provides as follows:

A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.
10. The Section has to be read in conjunction with Section 20(1) of the *Act* that provides that:
 20. Disciplinary proceedings
 - (1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.
11. From the reading of the two sections, it is clear to me that ‘any person’ as referred in section 20(9) of the *Act* includes a person who has made a complaint to the Council. The Applicant herein had made a complaint to the Council. If he was aggrieved by the decision of the Council he has a right of appealing the decision of the Council to the High Court. I therefore find that this court has jurisdiction to entertain the matter.
12. The key enabling provision relied on by the Applicant is Section 79G of the *Civil Procedure Act*, which stipulates that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period



anytime which the lower court may certify as having been requisite for preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal."

13. The successful Applicant must demonstrate "good and sufficient cause for not filing the appeal in time." In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari material with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nairobi 255 of 1997 as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

14. While the discretion of the court is unfettered, an Applicant is obligated to adduce the factual basis for the invocation of the court's discretion in his favor.
15. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

"(T)he underlying principles a court should consider in exercise of such discretion include:

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7."

16. In *Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that:

"It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that "judicial authority



is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.”

17. The Court of Appeal in the above case agreed with the sentiments of the learned Judge of the High Court and I concur that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the Applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”

18. Article 48 of the *Constitution* guarantees every person access to justice, in addition, under Article 50(1) of the *Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
19. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
20. In the instant case, the Applicant filed the request for proceedings 7 days after the delivery of the ruling. He filed the instant application 2 days after the lapse of the statutory period allowed for filing appeals. I find that the Applicant has given sufficient reasons for the delay which is that he was not supplied with the necessary documents to enable him file the appeal. The delay was not inordinate and has fully been explained. This is a proper case for the court to exercise its discretion and grant leave to file the appeal out of time.
21. For the above reasons, the application to file appeal out of time is allowed. The Applicant is granted 30 days within which to file the appeal from the date hereof.

Orders accordingly. Costs to be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH FEBRUARY 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Macharia for Applicant

Ms Pyoka for 1st Respondent

Miss Oganga for 2nd Respondent

Court Assistant – Amina

30 days Right of Appeal.

