



Republic v Kenya Medical Practitioners and Dentists Council; Oasis Doctors Plaza Kisumu Ltd (Exparte Applicant); VM (On behalf of CSM - Minor) (Interested Party) (Miscellaneous Civil Application 171 of 2021) [2023] KEHC 25010 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 25010 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION 171 OF 2021
MS SHARIFE, J
OCTOBER 27, 2023
IN THE MATTER OF KENYA MEDICAL PRACTITIONERS AND
DENTISTS ACT
AND
IN THE MATTER OF KENYA MEDICAL PRACTITIONERS AND
DENTISTS COUNCIL
AND
IN THE MATTER OF AN INQUIRY BY THE DISCIPLINARY AND
ETHICS COMMITTEE
AND
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BY MS. OASIS DOCTORS PLAZA KISUMU PLAZA
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW BY WAY OF CERTIORARI,
MANDAMUS AND PROHIBITION
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010,
ARTICLES 22, 23, 25(C), 28,29,35, 40(1), (2), (3), 48, 50(1),
159(2)(C)(E), 160(1), 165(3)(6)(7)
AND
THE CIVIL PROCEDURE ACT, ORDER 53, CIVIL PROCEDURE



RULES

BETWEEN

REPUBLIC APPLICANT

AND

**KENYA MEDICAL PRACTITIONERS AND DENTISTS
COUNCIL RESPONDENT**

AND

OASIS DOCTORS PLAZA KISUMU LTD EXPARTE APPLICANT

AND

VM (ON BEHALF OF CSM - MINOR) INTERESTED PARTY

RULING

1. By a notice of motion dated March 4, 2022, the *ex-parte* applicant sought;
 - a. An order of judicial review by of *certiorari* do issue in favour of the *ex-parte* applicant, requiring the respondent's decision dated October 21, 2021 and proceedings leading to the said decision, to be brought before this court, and the same be quashed, and annulled, together with all consequential orders, if any made thereon by the respondent pursuant to the said decision.
 - b. That in the event that the respondent or any of its agents or any person acting pursuant to the decision complained of, has already acted on or otherwise implemented the said decision, in any manner, or taken any action thereon pursuant to that decision, then an order of judicial review by way of mandamus be issued in favour of the *ex-parte* applicant, compelling the respondent, its agents or any such person acting pursuant to that decision to restore the status quo as it was before that decision was arrived at or otherwise acted upon.
 - c. That an order of judicial review by way of prohibition be issued in favour of the *ex parte* applicant, restraining the respondent from purporting to hear, review and determine the disciplinary proceedings involving the parties herein in the manner that it was heard, as complained of by the applicant, unless it complies with all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to hear and determine and determine the same after these proceedings.
 - d. That in the event such leave is granted, the court be pleased, while pending the determination of these proceedings, to order it to operate as a stay of enforcement or implementation of the decision of the respondent complained of, and stay any other or further consequential action or any dealings with or transaction being carried out thereon by the respondent, or any person acting under them. In relation to the said decision, in whatsoever manner which may prejudice the applicant's interests.
 - e. Costs of the proceedings by borne by the respondent.
2. The application is premised on the grounds that in the course of his employment, the applicant attended to a patient (minor) with a diagnosis of congenital defect which upon evaluation was



recommended for correctional surgery which was successfully undertaken. However, after the surgery, the patient developed high fever which upon review by one of the applicant's doctors diagnosed as possible acute malaria infection unrelated to the surgical procedure. The patient was managed and released on 18/11/2016 for further management at Avenue hospital Kisumu for ventilator support.

3. The applicant asserts that the second facility indeed confirmed that the patient suffered acute malaria and was not related to any mismanagement and or negligence in the course of the surgery.
4. That the respondent without any evidence of negligence abandoned before and delved into irrelevant consideration of liability of a non-party to the disciplinary proceedings and ultimately found the applicant vicariously liable for misconduct of the alleged non-party to the disciplinary proceedings. That the respondent also delved into non-issues by considering the drugs administered by the anesthetist whose effect or any relationship with the malaria infection.
5. That in arriving at the decision, the respondent arrived at an irrational, unreasonable and disproportionate decision of the alleged misconduct on the part of the anesthetist and the applicant.
6. That the respondent acted ultra vires in that its jurisdiction to hear and determine a purported disciplinary allegation against Michael Okello, the anesthetist, a non-party and a member of a different professional body that is; the clinical officers' council.
7. That the entire disciplinary process and the procedure adopted by the respondent was a sham and unlawful on account that the complaint was against the applicant and one Dr. D. Ongong'a to the exclusion of Michael Okello yet the ultimate decision was against the applicant and Michael Okello who had not been given an opportunity to be heard.
8. That unless the orders sought herein are granted, the applicant stands to suffer substantial loss that cannot be adequately compensated for.
9. Despite service, the respondent and the interested party filed no response. The ex-parte applicant filed its submissions in disposal of the application. The same is on record and have been taken into account.

Analysis and determination.

10. The main issue for determination is whether the applicant is entitled to the orders sought.
11. It is noteworthy that the Respondent opted not to defend this application albeit served.
12. Whereas the case presented before the Disciplinary and Ethics Committee of the Kenya Medical Practitioners & Dentists Council that is PIC Case No. 105 of 2019 was against one Dr. Dedan Ongonga and the applicant herein, the committee made a finding of negligence of a non party, one Michael Okello Ongono, the anaesthetist; that decision was made notwithstanding the fact that the committee had already found that it had no jurisdiction to handle any complaint against the said Michael Okello Ongono as he was a registered clinical Officer duly licensed by the Clinical Officers Council.
13. It is noteworthy that no complaint had been lodged against the said Michael Okello Ongono before the clinical Officers Council and the finding of negligence against him was made by an incompetent forum without notice to Mr. Michael Okello Ongono. The said decision was thus made in total contravention of the rules of natural justice that detects that one person shall not be condemned without a hearing. Further the same is an affront to the constitutional enshrined rights to a fair administrative action and a fair hearing as envisaged under articles 47 and 50(1) of the *Constitution of Kenya* 2010.



14. It is trite law that before vicarious liability can attach to an employer negligence has to first be established against the employee. In this instance the negligence or lack thereof of one Michael Okello Ongono was not an issue for determination before neither the rightful forum nor the wrong one that made the finding of negligence against him.
15. The Respondent's decision was vitiated by illegality due to want of jurisdiction, irrationality as it was in defiance of logic and procedural impropriety given the Respondent's non compliance with the rules of natural justice.
16. In the Uganda case of *Pastoli v Kabale District Local Government Council & others* (2008) E.A 300 – 304 Justice Kasule rendered himself on Judicial Review as follows:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi v Secretary of State for the Housing Department* (1990) AC 876”.

Conclusion:

17. Premised upon the above analysis of this application I am persuaded that the exparte Applicant has made out a case for the grant of the orders sought. I therefore allow the application herein with costs and I make the following orders:
 - i. An order of *certiorari* be and is hereby issued against the proceedings and decision of the respondent in PIC Case No. 105 of 2019: Seneti & Oburu Advocates on behalf of Victor Machera v Dr. Dedan Ongonga & Oasis Doctors Plaza Kisumu Hospital and the same are hereby brought before this court and the same and all consequential orders emanating therefrom are hereby quashed.
 - ii. The respondent is hereby compelled by an order of mandamus to restore the Applicant's *status quo* prevailing ante.
 - iii. An order of prohibition do and is hereby issued against the Respondent prohibiting it from purport to review, hear and determine in disciplinary proceedings against the Applicant in respect of the impugned decision save only when it complies with the law.



DELIVERED, DATED AND SIGNED AT KISUMU THIS 27TH DAY OF OCTOBER 2023.

M. S. SHARIFF

JUDGE

