



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. E067 OF 2020**

**OZA (Minor suing through**

**mother and next friend) ..... 1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**NANA OU..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**ROBERT OUMA.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**= VERSUS =**

**DAVID OLUOCH OLUNYA..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE KENYA HOSPITAL ASSOCIATION**

**T/A THE NAIROBI HOSPITAL..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The Applicants filed a Notice of Motion dated 10th November, 2020 under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Section 20(1) of the Medical Practitioners and Dentists Act, the Medical Practitioners and Dentists (Disciplinary Proceedings) Procedure Rules and all other enabling provisions of the law). The prayers before this court for determination are;

**1. Spent.**

**2. Spent.**

**3. This matter be referred to the Kenya Medical Practitioners and Dentists Council established under The Medical Practitioners and Dentists Act, Cap253 Laws of Kenya for the investigations and determination of the issue of the alleged negligence against the Defendants.**

**4. That pending conclusion and filing in this Court of the outcome of the alleged complaint of professional misconduct or malpractice or any breach of standards on the part of the Defendants under Section 20 (2) of the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya, these proceedings be stayed.**

**5. Any other orders that the court may deem fit to grant in the circumstances of this matter.**

**6. Costs be in the cause.**

The application is supported by the grounds on the face of the application and the supporting affidavit of **David Oluoch Olunya**, the Applicant herein sworn on the 10th November, 2020 and his supplementary affidavit sworn on 9<sup>th</sup> February, 2021. The application is opposed by the Respondent via Grounds of Opposition and a Replying Affidavit of Nana Ouko sworn on 4<sup>th</sup> December, 2020. On 2nd December, 2020 parties consented to having the application canvassed by way of written submissions which were filed on 9th February, 2021 and 9<sup>th</sup> March, 2021 for the Applicant and the Respondents respectively.

The background of this application is that the Respondents/Plaintiffs herein filed a plaint on 20th August, 2020 against the Defendants seeking damages jointly and severally amounting to Kshs. 17,828,245.00 for medical negligence. The 1st Defendant/Applicant then filed the present application seeking to have the matter transferred to the Medical Practitioners and Dentists Council established under the Medical

Practitioners and Dentists Act, Cap 253 for investigation and determination of the alleged medical negligence before this court can make its determination on the damages. The 1st Defendant/Applicant argues that the medical negligence allegations by the Plaintiffs/Respondents raises technical issues that should be subjected to peer review by the Kenya Medical Practitioners and Dentists Council whose authority was established by the court in the case of *David Morton Silverstein V Atsango Chesoni*[2002]eKLR and the case of *JOO & 2 Others V Praxedes P. Mandu Okutoyi & 2 Others* [2018]eKLR where Odunga J. held that:

***“Courts, the world over, have recognized the bodies such as the MPDB are particularly and uniquely well qualified, by virtue of their calling and experience, to determine the issue of responsibility for an incident such as in this case. Reference was made to Evans vs. General Medical Council, where the Board of the Privy Council stressed the importance of the findings of a professional body such as the General Medical Council to a court when considering cases of professional conduct and Atsango Chesoni vs. David Mortons Silverstein.”***

The 1st Defendant/Applicant avers that he is not a member of the Kenya Medical Practitioners and Dentists Council and therefore he is not involved in its decision making. It is his contention that the composition of the Medical Practitioners and Dentists Council is a provided under Section 3 of the Kenya Medical Practitioners and Dentists Board, Cap 253, which comprises of;

***(a) a chairperson who shall be appointed by the President and who shall—***

***(i) be a specialist medical or dental practitioner of good standing; and***

***(ii) have at least ten years' experience, five of which shall be in a managerial position;***

***(b) the Director General for Health or a designated representative;***

***(c) four persons appointed by the Cabinet Secretary, nominated as follows—***

***(i) one person who shall be a representative of universities in Kenya which have the power to grant a qualification which is registerable under this Act;***

***(ii) one person who shall be a representative of the Kenya Medical Association;***

***(iii) one person who shall be a representative of Kenya Dental Association; and***

***(iv) one person who shall be a representative of oral health practitioners;***

***(d) three persons appointed by the Cabinet Secretary, as follows—***

***(i) one person who shall be nominated by Kenya National Commission on Human Rights;***

***(ii) one person who shall be a representative of the private sector in health; and***

***(iii) one person with knowledge and expertise in finance or audit; and***

***(e) the Chief Executive Officer who shall be the Registrar and an ex officio member and also the secretary to the Council.***

It is the 1st Defendant/Applicant's further submission that the Kenya Medical Practitioners and Dental Council has jurisdiction under Section 20 of the Medical Practitioners and Dentists Act to investigate and determine any complaint on professional misconduct, malpractice or any breach of standards by a licensed medical practitioner. While acknowledging the unlimited jurisdiction of the High Court, the 1st Defendant/Applicant contends that to ensure that the dispute before court is handled and determined in the most effective way, this Court should give a chance to specialized bodies to determine issues within their jurisdiction.

The Respondents in their opposition maintain that the suit is against both defendants, one of which, is not a medical practitioners and therefore not subject to the disciplinary process under Section 20 (1) of the Medical Practitioners and Dentists Act. Consequently, it would be an abuse of the court process to stay the plaintiffs/Respondent's case against the 2nd Defendant. The Plaintiffs/Respondents further points out that the allegations before this court does not fall within the disciplinary mandate of the Council under Section 20(1) which is confined to situations where the medical practitioner has committed an offence and secondly where the medical practitioner has been found guilty of an infamous and disgraceful conduct. The Plaintiffs/Respondents have also raised the issue of competence of the Medical Practitioners and Dentists Council in handling a case against the 1st Defendant whom they allege has had a long standing relationship with the Council and its secretariat by offering his services in determining malpractices cases before it. The Plaintiffs/Respondents have similarly referred to the case of *JOO & 2 Others V Praxedes P. Mandu Okutoyi & 2 Others* [2018] eKLR where the Court opined that disciplinary proceedings are quasi-criminal in nature and therefore the standard of proof is not the same as the standard in civil matter.

It is the Plaintiffs/Respondents' assertion that without a complaint, as in this case, the Medical Practitioners and Dentists Council cannot commence disciplinary proceedings. The Plaintiffs/Respondents confirm that they have enough evidence on the defendants' negligence to prove their case and in any event the Plaintiffs would not rely on the outcome of the disciplinary proceedings as evidence in their case, if the same is conducted. It is argued for the Plaintiffs/Respondents that there is no law allowing this court to transfer a matter pending before it to another entity for processing of evidence. That such transfer would only occasion waste of time as the court has to process the same evidence again before making its own determination because the Council does not have jurisdiction to entertain civil claims.

The Plaintiffs/Respondents have also distinguished the present case from the cases of *David Morton Silverstein V Atsango Chesoni*[2002]eKLR and *JOO & 2 Others V Praxedes P. Mandu Okutoyi & 2 Others* [2018]eKLR where the court in that matter was called upon to confirm or vary the decision of the Council where a complaint had been willingly and voluntarily lodged with the Board unlike the present case where no complaint has been lodged nor disciplinary process initiated at the Kenya Medical Practitioners and Dentists Council.

#### **Analysis/Determination:**

The main issues for determination before this court is whether this court should refer this matter to the Kenya Medical Practitioners and Dentists Council for investigation and determination on the alleged medical negligence by the 1st Defendant/Applicant against the Plaintiffs/Respondents. Article 165 (3) (a) gives the High Court unlimited original jurisdiction in criminal and civil matters. Further, under Article 165 (6), the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Therefore, the present suit is properly before this court as the Plaintiffs are seeking general and special damages against the Defendants amounting to Kshs. 17,828,245.00 for alleged medical negligence.

The 1<sup>st</sup> Defendant/Applicant is asking this court to refer the matter to the Kenya Medical Practitioner and Dentist Council established under Section 3 of the Kenya Medical Practitioner and Dentists Act for investigation and determination of the issues of the alleged medical negligence in accordance with that Section. His argument is that the plaint raises very technical issues on medical negligence which would be better investigated and addressed by a specialized body. This proposition has been strongly opposed by the Plaintiffs/Respondents who argue that they have enough evidence to prove their case to the required standards and that the initiating a disciplinary proceedings at the Council would not only be a waste of time but a violation on their right to fair trial as it will mean staying their case against the 2nd Defendant.

The disciplinary proceedings referred to by the 1st Defendant/Plaintiff is provided for under Section 20 of the Medical Practitioners and Dentists Act, Cap 253 which states that:

- (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.***
- (2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.***
- (3) Upon an inquiry held by the Council to determine the complaint made under subsection (2), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative.***
- (4) For purposes of proceedings at any inquiry held under this section, the Council may administer oaths, enforce the attendance of witnesses and production of books and documents.***
- (5) The Council shall regulate its own procedure in disciplinary proceedings.***

Further, Rule 4A (1) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 establishes the Professional Conduct Committee whose functions are to:

- (a) conduct inquiries into the complaints within such counties as the Board may specify and make appropriate recommendations to the Board;***
- (b) ensure that the necessary administrative and evidential arrangements have been met so as to facilitate the Board to effectively undertake an inquiry under rule 6;***
- (c) convene sittings in respective counties to determine complaints;***
- (d) promote arbitration between the parties and refer matters to such arbitrator as the parties may in writing agree.***

Rule 4A (3) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 further provides for the orders/directions that the Professional Conduct Committee are capable of issuing which are subject to the approval of the Council and they include;

- (a) Levy reasonable costs of the proceedings from parties;***
- (b) Order a medical practitioner or dentist to undergo continuous professional development for a maximum of up to fifty points;***
- (c) Suspend licenses for medical institutions for up to six months;***
- (d) Order closure of institutions until compliance with the requirements of the operating licence;***
- (e) Admonish a doctor or dentist or the institution and conclude the case; and***
- (f) Make such further recommendations as the committee deems fit.***

From the above, it is evident that a disciplinary proceeding is initiated once the Medical Practitioners and Dentists Board receive a complaint against a registered or licensed person regarding professional misconduct, malpractice or any breach of standards. The Plaintiffs/Respondents herein have not lodged any complaint with the Medical Practitioners and Dentists Board and they maintain that they have no intention of using any evidence that might emanate from an investigation by the Council Committees. In determination of suits, the Courts are to ensure that disputes are resolved in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Plaintiffs/Respondents moved to this court to seek damages. They have maintained that they have enough evidence to prove their case and have expressed their unwillingness to have the complaint investigated and determined by the Council. The provisions of Section 20 of Cap 253 Laws of Kenya are not mandatory. A complainant has the option of lodging a complaint before the Board and can opt to pursue damages through the court.

This court also takes cognizance of its duty in furthering the overriding objectives under Section 1A and 1B of the Civil Procedure Act which provides that;

***(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—***

***(a) the just determination of the proceedings;***

***(b) the efficient disposal of the business of the Court;***

***(c) the efficient use of the available judicial and administrative resources;***

***(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***

***(e) the use of suitable technology.***

The court acknowledges the important role the professional disciplinary bodies perform in management of disciplinary cases among their members. However, the decision of the Medical Practitioner and dentists Council with regard to the 1<sup>st</sup> Defendant/Respondent is not binding to this court. Unlike Tribunals or Arbitration Proceedings, whose proceedings are regarded as judicial proceedings and whose decision this court can be called upon to adopt its decision and or sit on appeal, the investigation and determination by the Medical Practitioner and Dentists Board can only serve to identify professional misconduct, malpractice or any breach of standards and subsequently make such orders as prescribed under Rule 4A (3) Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979. Therefore, the investigation and determination of the Council would not effectively settle the dispute before this court since the Plaintiffs/Respondents are seeking damages from the Defendants jointly and severally, which orders and directions the Medical Practitioners and Dentists Council cannot issue. It follows then that to transfer the dispute herein to the Medical Practitioners and Dentists Council for investigation will delay its hearing and determination before the court.

The provisions of Cap 253 do not establish a dispute resolution mechanism which awards damages to complainants against members of the medical profession. The mechanism established under the Act and its Rules ultimately leads to sanctions against a member who is found culpable as provided under Rule 4A (3). I am alive to the several authorities to the effect that where there is legislation which provide for a specific mode of settling disputes other than the court, then that mechanism has to be exhausted first before a party approaches the court. In the case of **SPEAKER OF THE NATIONAL ASSEMBLY –V- JAMES NJENGA KARUME (1982) eKLR** the court held *inter-alia*:-

***“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an act of Parliament, that procedure should be strictly followed.”***

Similarly, in the case of **SECRETARY, COUNTY PUBLIC SERVICE BOARD & ANOTHER –V- HULBHAI GEDI ABDILLE (2017) eKLR**, the Court stated: -

***“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum.”***

The question which follows is whether the Medical Practitioners and Dentists Council mechanism has the efficacy to deal with the dispute. It is true that experts will be called before the committee investigating the matter and ultimately make a decision as to whether the 1<sup>st</sup> defendant was negligent or not. The technical evidence adduced before the committee can go a long way to assist the court in reading its decision. However, should the committee find that the 1<sup>st</sup> defendant was negligent, the defendant will be at liberty to contest that verdict by way of appeal to this court. On the other hand, should the committee find that the 1<sup>st</sup> defendant is not culpable, the plaintiff will be free to move to the court and challenge such a verdict. The court would be called upon to evaluate the findings of the committee and in either case reach its finding. All that process will not lead to a finding as to whether damages can be awarded to the plaintiff or not. Even a finding of culpability on the part of the 1<sup>st</sup> defendant by the committee and subsequent confirmation by the court will not result into award of damages. The plaintiff would have to file a fresh suit and rely on the findings of the committee on the issue of culpability. That process in my view is not efficacious and its ultimate role would be to delay the finalization of the plaintiffs' suit. The process of the council will have to be exhausted first case can resume.

The plaintiffs contend that they can prove their case. They are at liberty to call expert evidence to prove the particulars of negligence and irreversible damage as pleaded in the plaint. Equally, the defendants will have the opportunity to tender evidence and call experts to establish that there was no negligence on their part. The court will be able to benefit from the evidence of the expert witnesses and reach an informed

decision. Should either of the parties opt to tender evidence without calling expert witnesses, the court can still reach its own verdict based on the evidence on record. I am satisfied that referring the case to the council as prayed herein is not an efficient and proper way of solving the dispute.

In the circumstance, I do find the application dated 10<sup>th</sup> November, 2020 unmerited and the same is dismissed. Costs shall follow the cause.

**DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021**

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**S. CHITEMBWE**

**JUDGE**