



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 134 OF 2018

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES
19, 20, 28, 29, 31, 35, 46 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

DUNCAN KIBET..... PETITIONER

VERSUS

DR. SAMNAKAY SAEED.....1ST RESPONDENT

AGA KHAN UNIVERSITY HOSPITAL.....2ND RESPONDENT

MEDICAL PRACTITIONERS AND DENTIST COUNCIL.....3RD RESPONDENT

RULING

APPLICATION

1. The 3rd Respondent / Applicant through an application dated 27th November 2019 seek the following orders:-

a. That the Petition dated 9th April 2018 and filed on 10th April 2019 be struck out.

b. That in the alternative to prayer (1) above, the Order issued by the Honourable Court on 16th October, 2018 granting the Petitioner leave to have the matter heard viva voce be varied and/or set aside.

c. That the costs of this application be borne by the Petitioner.

2. The Application is based on the grounds on the face of the application and supported by Supporting Affidavit of Denial Yumbya sworn on 27th November 2019.

THE PETITIONER'S/RESPONDENT RESPONSE

3. The Petitioner/Respondent is opposed to the 3rd Respondent's / Applicant's application and in doing so filed a Replying Affidavit sworn by Duncan Kibet, sworn on 1st March 2020.

BACKGROUND OF THE PETITION

4. On 10th April 2018 the Petitioner filed the instant Petition taking issue with the Respondents for the violation of his rights as follows:-

i. Dr. Smanakay Saeed, a doctor at Aga Khan University Hospital, without securing the consent of the Petitioner invited female medical students in to medical examination room where the Petitioner was being examined while naked. The doctor thereafter encouraged the female students to touch the Petitioner's private parts.

ii. Aga Khan University Hospital failed to take disciplinary action against its doctor, Dr. Samnakay despite the Petitioner's complaint of how the doctor had subjected him to the humiliating and degrading treatment.

iii. The Medical Practitioners and Dentists Council on its part failed to take Action against both the doctor and hospital despite the Petitioner's report of how he was treated and subsequent failure of Aga Kahn to act on his complaint.

5. On 16th October 2018 this Honourable Court ordered that the Petition would be canvassed by way of oral evidence and subsequently parties filed witness statements in the matter. The matter was previously scheduled for hearing on 24th September 2019 but this did not happen at the instance of the 3rd Respondent who indicated that they wanted to have the proceedings continue without the hearing of witnesses. This Honourable Court directed that 3rd Respondent files a formal application within 14 days with the matter scheduled for 19th November 2019 for directions. By 19th November 2019, no application had been filed prompting the Court to direct that the matter shall proceed by way of viva voce evidence on 30th March 2020.

6. The 3rd Respondent filed the instant application on 24th December 2019 seeking the orders as per the application herein above.

7. The Petitioner opposed the application through his replying affidavit sworn on 13th March 2020 citing that the application was part of the scheme of the Respondents to frustrate the hearing of the Petition. He recounted how the Respondents have frustrated the hearing of the Petition. He also averred the dispute resolution mechanism provided for under the Medical Practitioners and Dentists Act was available to medical doctors and hospitals but not patients. He indicated that administrative bodies such as the 3rd Respondent are subject to the supervision by this Honourable Court.

8. The 1st and 2nd Respondents did not file any response nor submission to the application.

ANAYLSIS AND DETERMINATION

9. Upon consideration of the pleadings, and rival submissions the following issues arise for consideration:-

a. Whether Section 20 of the Medical practitioners, and Dentist Act is applicable in the Petition.

b. Whether the application has met the threshold for Court to vary its orders on the Petition being heard by way of viva voce evidence.

A. WHETHER SECTION 20 OF THE MEDICAL PRACTITIONERS, AND DENTIST ACT IS APPLICABLE IN THE PETITION.

10. The 3rd Respondent contend that the genesis of the Petition herein is a complaint lodged by the Petitioner before the Medical Council wherein an inquiry was undertaken and subsequently the Ruling dated 20th April, 2016 was delivered. The provisions of paragraph 20, 24 and 29 as pleaded in the Petition affirm the Petitioner's cause of action and that the Primary issue giving rise to the Petition, as filed herein, is the ruling of 20th April 2016. The provisions of **Section 20(9) of the Medical Practitioners and Dentist Act** provides that a person aggrieved with the decision of the Medical Council has a right to appeal to the High Court within 30 days of the decision.

11. The Applicant urge the provisions of paragraph 20, 24, and 29 of the Petition affirm the Petitioner's cause of action and that the Primary issue giving rise to the Petition.

12. It is Applicant's case that provisions of **Section 20(9) of the Medical Practitioners and Dentist Act** provides that a person aggrieved with the decision of the Medical Council has a right to appeal to the High Court within 30 days of the decision.

13. The Applicant asserts that the Petitioner's case in response to the Application is that **Section 20 of the Act** is in applicable to the case at hand as it applies to health professionals and medical institutions against whom adverse decisions are made. The Petitioner further states that disciplinary proceedings by administrative bodies, including the 3rd Respondent are subject to judicial oversight by the Court.

14. It is noted that **Section 20 of the Act** clearly makes provisions for the procedure of an inquiry or a disciplinary hearings on complaints made against medical practitioners, dentists and medical institutions. It is under this provision and/or pursuant thereto that the Petitioner lodged a complaint to the Medical Council against the Dr. Samnakay and the Aga Khan Hospital, the 1st and 2nd Respondents.

15. It is not disputed in this matter that on 9th October 2014, the firm of Muma & Kanjama Advocates lodged a complaint with the Medical Council on behalf of the Petitioner, (the complaint") against the 1st Respondent, Dr. Samnakay Saeed, and the 2nd Respondent, Aga Khan University Hospital.

16. The Medical Council upon receipt of the said complaint proceeded to write to the 1st Respondent through a letter dated 21st October, 2014, as set out in page 17 of the Petitioner's supporting affidavit, requesting for a comprehensive report and response to the allegations made by the complainant and also requested for statements from all the medical personnel who managed the patient, and any other relevant documents or information. The required information and documents were intended to the Preliminary Inquiry Committee, which was the applicable Committee of the Medical Council to undertake its investigations and inquiry on the complaint.

17. It is further demonstrated that the Medical Council also wrote to the 2nd Respondent through a letters dated 21st October, 2014, as set out in page 17 of the Petitioner's supporting affidavit, requesting for a comprehensive report and response to the allegations made by the complainant and also requested for statements from all the medical personnel who managed the patient, and any other relevant documents or information. The required information and documents were intended to the Preliminary Inquiry Committee, which was the applicable Committee of the Medical Council to undertake its investigations and inquiry on the complaint.

18. The 2nd Respondent made a response to Medical Council's letters through the letter dated 7th July, 2015, and it furnished copies of statements of the medical personnel who were involved in the treatment and management of the patient and also provided copies of the required documents.

19. Upon receipt of the response the Medical Council forwarded the response from the 1st Respondent to the Petitioner's Advocates by way of a letter dated 17th July, 2015 annexing the report and therein requested the Petitioner, through his Advocates, to provide any comments on the said response as set out in the annexed letter at page 23 of the Petitioner's Supporting Affidavit. There was no response from the Petitioner's Advocates to this letter.

20. The PLC, a committee of the 3rd Respondent / Applicant (***now known as the Disciplinary and Ethics Committee following the amendments to the Act***) was established under the Rules for purposes of undertaking inquiries, as stipulated in ***Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules***, herein after referred to as "***The Disciplinary Rules***", reviewed the complaint lodged. The Committee considered all the documents received from the parties on the matter and thereafter made its findings and recommendations as set out in the Ruling of 20th April, 2016. A copy of the Ruling was forwarded to the Petitioner, through his Advocates, and also to all the other parties on 25th April 2016, about two (2) years prior to the filing of the Petition before this Honourable Court, as borne out in the annexed copy marked "JK-2" of the 3rd Respondent's Replying Affidavit.

21. It is noted that the Petitioner has now filed the instant Petition challenging the decision of the Medical Council on grounds or on allegations that the actions of the Respondent are in violation of the Petitioner's Constitutional Rights.

22. There is no dispute from both parties that ***Section 20(9) of the Act*** provides that a person who is aggrieved by a decision of the Medical Council on an inquiry carried out, ***may within 30 days from the date of the decision appeal the High Court.***

23. From the clear reading of the Section herein above, I find that the statutory provision as drawn and from the language used, it applies to any person aggrieved with a decision and this I find, includes the Complainant or a Medical Practitioner, Dentist or Medical Institution, which were parties to the matter under inquiry. In that regard the decision was forwarded to the parties on 25th April 2016 as set out in annexure "JK-2" to the Replying affidavit of Dr. Jackson Kioko.

24. It is clear from the provisions of ***Section 20(9) of the Act***, that a person aggrieved with the decision of the Medical Council has a right to either file an appeal to the High Court or file Judicial Review proceedings seeking orders to quash the decision of the Medical Council. I find the Constitutional Petition herein was filed after 2 years and such filing of a Constitutional Petition after lapse of the (2) years since delivery of the impugned decision is not justified and such a belated action needs a reasonable explanation. I find the Petition is bad in law as any party to the inquiry before the PLC, including her Petitioner herein, had a right to challenge the decision of PLC within a period of 30 days.

25. A review of the Petition, field herein shows that the Petitioner seeks the following reliefs:-

a. A declaration that the 1st and 2nd Respondent violated the Petitioner's rights to dignity, security of the person and privacy.

b. The 3rd Respondent violated the Petitioner's rights to access information and fair administrative action;

c. Seeks the Honourable Court to order for compensation including aggravated damages for infringement of his rights.

26. Looking at Petitioner's Petition against the 3rd Respondent at paragraph 33, is on the manner in which the proceedings leading to the Ruling dated 20th April, 2016 were conducted. The Petitioner's case is that the 3rd Respondent denied him an opportunity to be heard orally, to have a fair and public hearing and make representation and be given a right to review or internally appeal against an administrative action. That is clear as urged the procedure for challenging the action by a Tribunal or an administrative body which ought to be by way of Judicial Review proceedings cannot be by way of a Constitutional Petition.

27. It is further noted that the Petitioner seeks a finding that the 3rd Respondent violated the Petitioner's right to information under ***Article 35 of the Constitution***. However, a review of the documents filed herein shows that the documents requested by the Petitioner were supplied to him even before the filing of the Petition and there is indeed an admission that he was supplied the documents. The Petitioner filed the Notice to Produce the same, which were provided to him and there was no complaint or further request for documents thereafter.

28. Upon perusal of the Petition it is clear that the complaint filed before the Medical Council against the 1st and 2nd Respondents, relates to a claim for alleged unprofessional or unethical conduct in which the Petitioner alleged the 1st Respondent acted in an unprofessional manner

leading to violation of his right to privacy and a feeling of disrespect. Further perusal of the Petition is evident that the Petitioner is dissatisfied by the Ruling dated 20th April 2016 as the Petition herein relates to very same complaint, thus the conduct of the 1st Respondent, a Medical Practitioner and the 2nd Respondent, a medical institution, both of whom are licensed and regulated by the Medical Council in accordance with the provisions of the Medical Practitioner's and Dentist Act.

29. The Petitioner's complaint against the 1st and 2nd Respondents before the Medical Council related to their unprofessional / unethical conduct, in which it is alleged that the Petitioner's rights to privacy and security of the person had been violated. Upon consideration of the Petition, there is no doubt that, the Petition, relates to the same issues and is based on same facts as those which were over the decision of the PLC. In view whereof I find that the instant Petition, as pleaded and field herein, is seeking to appeal the decision of the Medical Council albeit through this Petition.

30. I find by virtue of **Section 20(9) of the Medical Practitioners and Dentists Act**, the Petitioner ought to have lodged an appeal within the prescribed period by statute of 30 days from the date of the decision or file judicial review proceedings if dissatisfied with the procedure followed. There is no dispute that the decision under challenge was released to the Parties on 25th April 2016 and hence the Petition herein was filed 2 years after the delivery of the Ruling.

31. In support of the above proposition reliance is placed in the case **Islam Suleiman Ismail vs. Medical Practitioners & Dentists Board [2019] eKLR** where the aggrieved party instituted a suit by way of a Plaint against the Medical Council, the Court held that where a party is dissatisfied with the decision of a quasi-judicial body, the party has as provided under statute to file an appeal or judicial review proceedings. The Court further held that; -

“The Plaintiff has complained that the rules of natural justice were not complied with by the Committee. In this regard, I agree with the Defendant's Counsel's submission that in judicial or quasi-judicial proceedings, a dissatisfied party has the liberty to move the High Court by way of Judicial Review Proceedings.”

32. Similarly in the case of **Felix Kiprono Matagei vs. Attorney General & 2 others; Anthony Kihara Gethi (Interested Party) Petition 304 of 2016 [2019] eKLR** the Court addressed the issue on appeals disguised as Constitutional Petitions and it held that:-

“The wrong is corrected by an appeal or review but not by a separate Constitutional Petition. The logic and justification for this rule is that to leave every decisional error by a subordinate court to be challenged by a Petition would be to not only unduly engage judicial time but also upset the well-established modes of challenging erroneous decisions.” (Emphasis added)

33. In view of the clear provision of **Section 20(9) of the Medical Practitioners and Dentists Act**, and the authorities stated herein above, I find that where a procedure is clearly provided to be followed by an aggrieved party the same cannot be substituted by filing a Constitutional Petition, but such aggrieved party is bound by procedure and should file what is clearly provided for in the statute. The wrong complained of can only be corrected by filing of appeal or a Judicial Review but not by a Constitutional Petition as is the case in this Petition.

34. In the instant Petition, the Petitioner prays for an award of damages arising out of infringement of his rights. **Section 20(6) of the Act** provides that after an inquiry and where the Council determines a person guilty, the Council may amongst other orders, impose a fine on the practitioner which the Medical Council deems appropriate including directing a complainant and the practitioner or institution to enter into negotiations on compensation. It further gives the medical Council power to make such orders as it may deem fit which in essence grants wide powers to the Council.

35. Upon consideration of the clear provisions of **Section 20(6) of the Act**, I find the complaint made against the 1st and 2nd Respondents and the prayers sought in the instant Petition are clearly within the jurisdiction of the Medical Council. I find the issues before this Court ought to have been raised before the Medical Council and not before this Court through a Constitutional Petition.

36. Reliance in support of Applicant's contention that the Petitioner's Petition is not before the proper forum is placed in a decision of the Court of Appeal in the case of **Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority and another Civil Appeal 67 of 2015 [2016] eKLR** which cited the decision of **Re Application by Bahadur [1986] LRC (Const.) 297, Trinidad & Tobago**, wherein the Court held emphatically that:-

“...The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution.”

37. Further reliance is placed in the case of **Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority and another Civil Appeal 67 of 2015 [2016] eKLR**, where the Court stated:-

“Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In the case of Daniel N. Mugendi v. Kenyatta University & 3 others [2013] eKLR, this Court observed:- Citing the case of Alphonse Mwangemi Munga & Others vs. African Safari Club Ltd [2008] eKLR, the learned Judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.”

38. The Applicant / 3rd Respondent contend that by the Honourable Court hearing and determining this Constitutional Petition, when it raises same issues that were heard and determined by quasi-judicial body, the Court will respectively be encroaching on the mandate of the Medical Council, a statutory body. I find the issue in controversy or rather in dispute relate to the practice of medicine and that it is only the Medical Council, a body with the technical knowledge and expertise to determine such issues. This Court cannot therefore encroach on the Medical Council mandate, and purport to determine the issue therein.

39. It is trite that Constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in Civil or Criminal Law. In support of this proposition reliance is placed in the case of *C. N. M vs. W M G, Petition 586 of 2017 [2018] eKLR* in which the Court stated as follows:-

“...The Court of Appeal in *Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority and another* underlined the conventional judicial policy as established by the Courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanisms for redress in civil or criminal law as follows:- Then there is the case of *Speaker of National Assembly v James Njenga Krume [1992] eKLR*, where this Court again emphasised:- “...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...”

40. Further in the case of *Felix Kiprono Matagei v Attorney General & 2 others; Anthony Kihara Gethi (Interested Party) Petition 304 of 2016 [2019] eKLR; Petition No. 304 of 2016* which involved a Petition challenging their constitutionality of various provision of the Proceeds in *Crime and Anti-Money Laundering Act*. In the case the Court noted that where a remedy is provided for under statute then the same should be followed. I have considered **Section 20(9) of the Medical Practitioners and Dentist Act** and from the plain reading of the same, it is not correct as alluded to by the Petitioner, that the Section is only available to Patients and doctors and that the Petition is properly before this Court.

41. There is no dispute in this matter that the complaint before the Medical Council relates to the alleged unethical/unprofessional conduct of the 1st Respondent, which the Petitioner contended was in breach of his rights to privacy and dignity. The Medical Council heard the matter and delivered a ruling dated 20th April 2016, which fact remains undisputed **Section 20(9) of the Medical Practitioners and Dentist Act**, provides that a person aggrieved with the decision of the Medical Council is required to appeal to the High Court within a limited period of 30 days. There is no provision to pursue even a right of appeal through filing of a Constitutional Petition, as is the case in the matter. I find by virtue of clear provisions of **Section 20(9) of the Medical Practitioners and Dentists Act** the Petitioner ought to have filed an appeal within the period provided by the Act or Judicial Review proceedings for appropriate relief.

B. WHETHER THE APPLICATION HAS MET THE THRESHOLD FOR COURT TO VARY ITS ORDERS ON THE PETITION BEING HEARD BY WAY OF VIVA VOCE EVIDENCE.

42. The Applicant/3rd Respondent in the alternative relief in the application pray for variation of the orders that the Petition be heard viva voce if the Court finds that the Petition should be heard on its merit.

43. The Applicant / 3rd Respondent urge that the Petition was filed on 10th April 2018 and on 16th October 2018, this Honourable Court gave orders, on the Petitioner’s request, that the Petition will be heard by way of viva voce evidence. It further directed that the Petitioner to file his witness statement(s) and bundle of documents within fourteen (14) days. Thereafter the Petitioner filed a Notice to Produce. The Respondents had no objection to provide the documents, subject to payment of the requisite fees, and that was communicated to the Petitioner vide a letter dated 16th November, 2018. The said communication is annexed at page 1 of the annexures to the Petitioner’s Replying Affidavit sworn on 13th March, 2020. The Petitioner did not respond to the said letter hence the letter dated 29th March, 2019 which is annexed at page 2 of the Petitioner’s Replying Affidavit.

44. It is stated by the Applicant/3rd Respondent that the documents sought were provided immediately, on 5th April, 2019, after the payment requested was made by the Petitioner on 4th April, 2019. However, it was only until 18th August 2019, when the Petitioner filed his witness statement and bundle of documents. The Respondents also filed their respective witness statements.

45. The Petitioner on his part is opposed to the variation of the Courts orders contending that the Applicant/3rd Respondent has not advanced reason as to why the orders should be varied as the nature of the case calls for viva voce evidence. In the Petition the Petitioner pleads:-

i. That while at Aga Kahn Hospital’s examination room, the 1st Respondent without the consent of the Petitioner let into the room and that these ladies kept touching the Petitioner’s private parts. Further that his complaint to Aga Kahn Hospital on the degrading treatment was ignored. **To this, Valentine Achungo, Aga Khan’s Legal Officer depones an affidavit denying the presence of the ladies in the examination room and the fact that the Petitioner was touched.**

ii. That the Medical Council did not afford him an opportunity to be heard and denied him access to the documents they considered prior to making their decisions despite requests for access to them. **To this, Dr. Jackson, the Director of Medical Services denies refusing such access to the documents.**

46. The Petitioner contend that the above different accounts of events can only be tested through an oral hearing where parties will be subjected to cross-examination and the true account ascertained. It is further stated that the 3rd Respondent has not established why the directions of the Court should be varied. The Courts have on several occasions pronounced themselves on the instances in which Court Orders can be varied.

47. The Applicant / 3rd Respondent further in support of the alternative / relief submit that a reading of the witness statement and the bundle of

documents filed by the parties expressly or clearly shows that the Petitioner is seeking to have the Honourable Court hear the Complaint against the 1st and 2nd Respondent a second time whereas the Medical Council had already determined the matter. Consequently, the facts and issues arising therefrom, as gleaned from the Petitioner's statement, shows that they raise the same issues which were determined by the PLC.

48. The Applicant / 3rd Respondent averment is that in arriving at the decision of 20th April 2016 the PLC considered the copies of the patient's file and all the other documents that had been submitted by the parties. It is noteworthy that the complaint before the Medical Council is on a professional issue and the members of the PLC are medical and dental professionals who understand the practice or medicine and dentistry hence their ability to understand and determine the issues before the Committee appropriately. It is also noteworthy that in the practice of medicine everything is recorded in the patient's file and hence the ability by the Committee to understand what transpired in each situation or case and where necessary the Rules allow the Committee to invite viva voce evidence. Members of the PLC unanimously agreed during the sitting that the documents before them at the material time were sufficient to determine the inquiry without calling oral evidence. Having analysed and reviewed the documents before it, ***the PLC delivered the Ruling dated 20th April, 2016 and the same given to the parties.***

49. In support of the position taken by the Applicant to object to taking oral evidence or having the Petition determined by way of viva voce evidence, reliance is placed in the case of ***David Gombe Githinji vs. Mary Wanjiku Githinji (legal representative of Andrew Maina Githinji) [2014] eKLR*** where the Court cited at paragraph 11 the case of ***George Jumba vs. Joseph Metto Eldoret HCCC No. 200 of 1996*** (unreported), where the Plaintiff filed the suit against the Defendant in which he sought to have the decision of the Land Tribunal set aside on grounds that it was null and void. By filing a Pliant, the Plaintiff sought to have the Court hear the matter by taking oral evidence afresh. An application was filed seeking to have the suit dismissed. In allowing the application, Justice Nambuye (as she then was) held that:-

“There is no doubt from the plaint that what the Plaintiff wants this Court to do is to quash the tribunal proceedings. As admitted by Counsel for the defendant/applicant the provisions of the Tribunal Act are specific and clear as to what matters are to come before the High Court. The procedure is that once an award of the tribunal has been adopted as an order of the Court, an aggrieved party can only come to the High Court to seek Judicial Review and secondly by way of Appeal on points of law form an appeal to the Provincial Tribunal Board...”

50. In The instant Petition and upon considering the rival submission I find that there is no dispute that what the Petitioner is seeking is to have this Honourable Court hear the complaint against the 1st and 2nd Respondents afresh, on second time, whereas the Medical Council had already heard and determined the matter. The facts and issues arising therefrom, as evidenced from the Petitioner's witness statements, show that they raise the same issues which were determined by the PLC in view of the fact that the Petitioner is seeking to quash the decision of the Medical Council, I find that the Medical Practitioner, and Dentists Act, is specific and clear as to what steps should be taken after its decision. An aggrieved party by the decision can lodge an appeal or file a Judicial Review and secondly by way of Appeal setting out the points of law from the decision but not by way of Constitutional Petition. I find in view of clear and unambiguous provisions of the Medical Practitioners and Dentist Act an aggrieved party cannot invoke constitutional provisions to avoid the procedure laid out under statute.

51. I have considered the Petitioner's response in which it is stated that disciplinary proceedings by administrative bodies, including the 3rd Respondent, are subject to judicial oversight by the Court. I find indeed the Honourable Court has supervisory jurisdiction over bodies that include the 3rd Respondent under ***Article 165 of the Constitution***. However as regards the instant Petition, I find in invoking the Court's power, I have to reiterate that it is a must to follow the right procedure, as stipulated or provided under the specific statute.

52. The Applicant/3rd Respondent placed reliance in support of the above proposition in the case of ***Costa Sote Kandie vs. Legetyo Kosyin, Civil Suit No. 31 of 2011 [2014] eKLR***, where the Court noted at paragraph 15 and 16 that:-

“The proceedings which the Plaintiff is seeking to have declared null and void were as a result of a procedure provided under the defunct Land Disputes Tribunal Act. The Act provided for a special procedure by which an aggrieved party can proceed. After the verdict of the Cherangay Land Disputes Tribunal was read, the Plaintiff was at liberty to file an appeal to the Provincial Land Disputes Appeals Committee and if she was to be unsuccessful, she had the option to appealing to the High Court against the Committee's decision on points of law. Alternatively, she had the option of moving to the High Court seeking to quash the decision of the Tribunal as well as the Chief Magistrate's adoption of the award as judgment of the Court. The Plaintiff had no option of filing a suit by way of plaint seeking to quash the proceedings. The Act provided an elaborate way out for the plaintiff and she had to follow the process. The procedure provided under the Land Disputes Tribunal Act (now repealed) were not procedural technicalities which could be overlooked. The plaintiff cannot therefore invoke provisions of the Constitution which vests, the Court with supervisory jurisdiction over subordinate courts and Tribunals. The Court has to be properly moved under the respective statutes providing procedures on how to go about achievements of certain reliefs. In the present case, the plaintiff had to follow the provisions of the defunct Land Disputes Tribunal Act.” (Emphasis ours).

53. In the instant Petition I have no doubt, though the Petitioner has deponed specifically that he seeks to quash the Ruling dated 20th April 2016, the Petitioner seeks to have the Honourable Court make a determination on issues already determined by Medical Council. I find infact by proceeding to allow taking of oral evidence, this Court will be hearing a matter a second time, a matter that has already been heard and determined by Medical Council. I therefore find that the Applicant/3rd Respondent has laid out sufficient reasons and grounds to warrant the orders made for hearing this Petition by way of viva voce evidence varied or set aside.

54. The upshot is that the Applicant's / 3rd Respondents application dated 27th November 2019 is allowed and I proceed to make the following orders:-

a. The Petition dated 9th April 2018 be and is hereby struck out.

b. In view of the nature of the Petition and in view that the Petition has not been determined on merits I direct each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF OCTOBER, 2021

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA