REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 320 OF 2019

BETWEEN

REPUBLIC...APPLICANT

VERSUS

MEDICAL DENTISTS AND

PRACTITIONERS BOARD...RESPONDENT

AND

SOSPETER ONYATTA MIYAYI ....INTERESTED PARTY

EX PARTE APPLICANT:.............AGA KHAN HOSPITAL KISUMU

JUDGMENT

Introduction

1. On 2nd June 2016, Sospeter Onyatta Miyayi, the Interested Party herein, lodged a complaint with the Medical Dentists and Practitioners Board (the Respondent herein) against the Aga Khan Hospital Kisumu which is the *ex parte* Applicant herein, following the death of his son who was at the material time a patient at the *ex parte* Applicant's Hospital. After the Respondent concluded the hearing, and before it could deliver its ruling, the *ex parte* Applicant filed an application by way of a Notice of Motion dated 5th November 2019, in which it was seeking the following orders:-

a) THAT this Court be pleased to grant an order of Prohibition directed to the Respondent, its officers or agents or any other person or entity acting under its authority prohibiting the Respondent from taking or conducting any further proceedings and/or taking any further steps in relation to PIC Case No. 18 of 2016 including delivering any judgment/ruling/decision/award and/or determination thereof.

b) THAT this Court be pleased to grant an order of Certiorari directed at the Respondent, its officers or agents or any other person or entity acting under its authority to remove into this Court to quash in its entirety the proceedings of PIC Case No. 18 of 2016 including any judgment/ruling/decision/award and/or determination thereof.

c) THAT the costs of this application be provided for.

2. The application is supported by a Statement of Facts dated 29th October, 2019 and a verifying affidavit and supporting affidavit both sworn on 29th October, 2019 and 5th November, 2020 respectively by Dr. Patrick Eshiwani, the Acting Medical Director of the *ex parte* Applicant. In response the Respondent filed a replying affidavit sworn on 4th February, 2020 by Daniel Yumbya, its Chief Executive Officer . The Interested party adopted and relied on the Respondent's affidavit. A summary of the parties' respective cases as set out in their respective pleadings is in the following sections.

The *ex parte* Applicant's case

3. The *ex parte* Applicant averred that 10th June 2016, after the Interested Party lodged his complaint with the Respondent, it was requested

to respond to the allegations raised in the complaint and provide statements together with the patient file to the Respondent which it did. Further, that on 19th January 2018, the Respondent through the Preliminary Inquiry Committee convened a hearing which did not proceed, as the Interested Party sought an adjournment on the ground that his advocate had been newly instructed and required time to prepare.

4. It was further averred that the said adjournment was granted on condition that the Interested Party settled the costs of the day for the *ex parte* Applicant's witnesses before 16th March 2018, and that notwithstanding non-compliance with the condition, the Respondent maintained proceedings against the *ex parte* Applicant, which he believes were irregular and irrational. The *ex parte* Applicant stated that on 21st August 2019 it was served with a notice to appear before the Disciplinary & Ethics Committee (hereinafter "the Committee") of the Respondent's Council for directions on hearing of the complaint which was set for 11th October 2019, and that its witness attended the hearing held on that date.

5. The *ex parte* Applicant contended that the Committee while giving the Interested Party's advocate leeway in cross-examination of the *ex parte* Applicant's witness, did not permit the *ex parte* Applicant's advocates to cross-examine the Interested Party on his evidence and testimony, and took over and proceeded to cross-examine the said witnesses. Further, that while cross-examining the *ex parte* Applicant's witness, it was apparent that there was bias on the part of the Committee through the utterance of concluding statements such as, *"…the doctor acted illegally"*, and *"…the hospital had a duty to provide the catheter to the patient…*Therefore, that the Committee failed to meet the standard required under Article 50 of the Constitution of Kenya 2010 and contravened the Applicant's right to a fair hearing and the rules of natural justice.

6. The *ex parte* Applicant further averred that the Committee was not created under any statute neither did it have any powers to conduct proceedings on behalf of the Respondent. It was also averred that the Preliminary Inquiry Committee (PIC) was the correct body to conduct inquiries into complaints before the Respondent, and that in any event, the said Preliminary Inquiry Committee did not have jurisdiction to conduct inquiries against medical institutions as opposed to individual medical practitioners. Accordingly, that the entire proceedings had no binding force in law due to the foregoing, as thee Respondent through the Disciplinary and Ethics Committee acted *ultra vires* in conducting proceedings on the 11th October 2019 .

<u>The Respondent's and Interested Party's Case</u>

7. The Respondent stated that it was previously known as Medical Practitioners and Dentist Board, and is now known as the Medical Practitioners and Dentists Council by virtue of the Health Laws Amendment Act, 2019, which came into force on 17th May, 2019. Further, that it is a statutory body established pursuant to section 3 of the Medical Practitioners and Dentists Act (hereinafter "the Act"), and its functions are set out in the Act. The Respondent also stated that by virtue of the afore-stated amendments, the Committee previously known as the Preliminary Inquiry Committee and the Professional Conduct Committee are now known as the Disciplinary and Ethics Committee, and section 4A (1)(b) of the Act set out the functions of the Disciplinary and Ethics Committee.

8. According to the Respondent, it is empowered to receive complaints against medical or dental practitioners or medical institutions, and confirmed that on 31st May 2016, a complaint was lodged with it by the Interested Party herein, against the *ex parte* Applicant as aforestated. Further, that upon receipt of the said complaint, the Respondent wrote to the *ex parte* Applicant and also served it a copy of the complaint, and requested for statements and a copy of the patient's file, among other documents. That the *ex parte* Applicant responded by submitting a case summary, a statement of the medical personnel who were involved in the treatment and management of the subject patient, together with copies of the patient's file.

9. By a letter dated 29th November 2017, the Respondent stated, it then requested Dr. Julius Okel, who was the Consultant Physician and Nephrologist at the Hospital, to appear before the Preliminary Inquiry Committee so as to respond to the issues relating to the management of the patient. The Respondent further stated that the documents received from all the parties were reviewed by the members of the Preliminary Inquiry Committee, who were practicing medical and dental practitioners and consultants in the applicable fields, prior to the date for the inquiry. Further, that following the amendments to the Act, by virtue of the Health Laws Amendment Act, which came into force on 17th May, 2019, the complaints that were before the Preliminary Inquiry Committee are now handled by the Disciplinary and Ethics Committee, which consists of practitioners and consultants in different specialties in medicine and dentistry.

10. On the hearing held on 11th October, 2019 in PIC Case No. 18 of 2016, the Respondent stated that the Disciplinary and Ethics Committee heard evidence from the Interested Party's and the *ex parte* Applicant's witnesses, and all witnesses were cross examined and re-examined. The Respondent contended that after close of the hearing, both parties filed their submissions which were both dated 15th October, 2019 and the Disciplinary and Ethics Committee then retired to write its decision which would then be either adopted or rejected by the full Medical Council and delivered to the parties. However, that the term of the Respondent Council lapsed before the decision was delivered, and that a new Council was inaugurated on 30th January, 2020.

11. It is thus the Respondent's case that the allegations made by the *ex parte* Applicant are not merited and presumptuous, as the Respondent is yet to deliver its ruling. Further, that the *ex parte* Applicant has a right and an opportunity to challenge the decision of the Respondent, as it has a right of appeal therefrom to the High Court.

<u>The Determination</u>

12. The instant application was urged by way of written submissions. Menezes & Partners, the advocates on record for the *ex-parte* Applicant filed written submissions dated 4th May, 2020, while Muriu Mungai & Co Advocates for the Respondent filed its written submissions dated 26th June, 2020. The Interested Party's submissions dated 3rd July 2020 were filed by Gichuru & Gichuru Advocates on his behalf. Two preliminary issue canvassed by the parties will need to be decided first. These are firstly, as to whether this application is competently and properly before this Court, and if so, secondly whether the Respondent's has jurisdiction to hear and determine the complaint brought against the *ex parte* Applicant.

13. If the Respondent is found to have jurisdiction, the Court will proceed to determine the substantive issue raised from the pleadings and submissions filed by the parties, which is whether the Respondent's Disciplinary and Ethics Committee proceedings on 11th October, 2019 were procedurally fair. The final issue is whether the *ex parte* Applicant merits the relief sought.

On the Competency of this Application

14. The propriety of the instant application was raised by the Interested Party in his submissions, and he pointed out that no final decision had been made by the Respondent in PIC Case No. 18 of 2016, and only evidence and written submissions had been tendered therein by the Parties. Further, that no typed and or certified copies of the impugned proceedings of the Respondent in which the *ex-parte* applicant fully participated in have been adduced before this Court. Lastly, that the *ex-parte* applicant herein has a statutory right of appeal against any decision that the Respondent may eventually make as provided for under Section 20(9) of the Medical Practitioners and Dentists Act.

15. The challenge to the jurisdiction of the Respondent in these proceedings was termed by the Interested Party as delving into the merits/demerits of the pending proceedings, which disqualified the application before this Court, and that it would have been trite for the *ex parte* Applicant to await a decision of the Respondent which could go either way including upholding the *ex parte* Applicant's objection. The Interested Party further submitted that under the provisions of Section 20(9) of the Act a person aggrieved by a decision of the Council may, appeal to the High Court. He contended that it was improper for the *ex parte* Applicant to attempt to short circuit a statutory process to which it was subject, and that if the *ex parte* Applicant's position was to be accepted by this Court, a bad precedent would have been set with the undesired result that persons seeking medical services from medical institutions would be left exposed to the perils of an unregulated practice and service delivery, which would be discriminatory and go against the public interest

16. The Interested Party therefore submitted that until a final decision was made, and the aggrieved party if any, exhausted the appeal process, this Court was barred by statute from entertaining the motion by the *ex parte* Applicant. Reliance was placed on the holding of the Court of Appeal in **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others, [2017] eKLR** that where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

17. In addressing this issue, I recognize that exhaustion of alternative remedies is now a constitutional imperative under Article 159 (2)(c) of the Constitution, as explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

18. In addition, sections 9(2) and (3) of the Fair Administrative Action Act requires the exhaustion of statutory and other internal review or appeal mechanisms before a party can seek judicial review. Under section 9 (4) of the Act, the Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. While the exceptions to the exhaustion requirement are not clearly delineated the Court of Appeal gave guidelines when they would apply in **Republic vs. National Environment Management Authority, Civil Appeal No. 84 of 2010**, as follows:

> **"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge."**

19. Likewise, it was held by the High Court **In the *Matter of the Mui Coal Basin Local Community (2013) e KLR*, *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya*** *and* **Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR** that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issues and the ability of a statutory forum to determine them.

20. In the present case, it is not in dispute that the Respondent is currently seized of the Interested Party's complaint, and in my understanding the contention by the Interested Party appears to be that the issue of the Respondent's jurisdiction and proceedings cannot be raised in this Court before the Respondent has made its decision. My finding in this regard is that the *ex parte* Applicant's application is properly before this Court for two reasons.

21. Firstly, while it is preferable that the issue of jurisdiction should be raised at the earliest opportunity before the tribunal seized of a matter, it is such an important matter that it can be raised at any stage of proceedings and even on review and appeal, as held by the Court of Appeal **in Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR**:

> **"We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:**

"….at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the Court itself

- provided only that where the Court raises it *suo motu*, parties are to be accorded an opportunity to be heard."

(See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing)."

22. Secondly, the existence of an alternative remedy does not divest this Court of jurisdiction in such a circumstance, as was noted by the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR:**

Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

23. Lastly, it needs to be restated in this respect that this Court has **inherent and wide jurisdiction under Articles 47 and 165(6) to supervise the Respondent in this respect.**

24. In the premise, I find that the *ex parte* Applicants Notice of Motion application dated 5th November 2019 is properly before this Court for the foregoing reasons.

On the Respondent's Jurisdiction

25. The preliminary issue as regards the Respondent's jurisdiction was urged on two fronts, namely its jurisdiction at the time of initiation of the Interested Party's complaint, and at the time of the hearing of the complaint. This was because after the initiation of the complaint there were intervening amendments to the law made by the Health Laws (Amendment) Act 2019. The first aspect of the issue that was urged was whether the Respondent had jurisdiction to hear a complaint brought against a medical institution such as the *ex parte* Applicant at the time of initiation of the Interested Party's complaint, and the effect thereof of the intervening amendments to the law made by the Health Laws (Amendment) Act 2019. The second was whether the Respondent's Disciplinary and Ethics Committee's proceedings on 11th October, 2019 were *ultra vires*, in light of the amendments made by the Health Laws (Amendment) Act 2019.

***Whether the Respondent has jurisdiction to hear a complaint against a medical institution*.**

26. Counsel for the *ex parte* Applicant relied on the decision by the Court of Appeal in **Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd [1989] KLR 1** to submit that jurisdiction is and should be the first point of consideration before any adjudicatory body attempts to handle any matter before it, and contended that the Respondent lacked jurisdiction at initiation of the complaint on the 2nd June, 2016, as it could only sustain proceedings against individual practitioners and not against medical institutions such as the *ex parte* Applicant. Reliance was placed on the holdings to this effect in in the cases of **Republic vs Medical Practitioners & Dentists Board & 2 others ex parte Majid Twahir & Another [2016] eKLR** and **Kenya Hospital Association t/a Nairobi Hospital vs Medical Practitioners and Dentists Board & 4 Others [2018] e KLR.** Therefore, that the Respondent had no power to entertain the complaint against the *ex parte* Applicant herein for the reason that the *ex parte* Applicant is not an individual practitioner, but a medical institution. Likewise, that the complaint against the *ex parte* Applicant was void *ab initio* as the *ex parte* Applicant is a medical institution and not a medical practitioner, and reliance was placed on the decision as regards the effect of a void act in the case of **Macfoy vs United Africa Co. Ltd [1961] 3 ALL E.R. 1169** as cited by the Supreme Court of Kenya in the case of **Republic vs Karisa Chengo & 2 Others [2017] eKLR** .

27. Counsel further submitted that the transition provisions in the Health Laws (Amendment) Act 2019 do not expressly provide for retrospective application of the amendments therein, and that the Respondent could not therefore cloth itself with jurisdiction by virtue of an amendment to law that was made two years after the initiation of the complaint in a bid to sanitize that which is void *ab initio.* Further, that such retrospective application of the law is prohibited under the Constitution, and reliance was placed on the holding in the case of **Republic vs Kenya Revenue Authority & another ex parte Tradewise Agencies [2013] eKLR** that retroactive application of law as an antithesis of certainty and regularity of law.

28. The Respondent on its part submitted that under the Act and the Rules made thereunder, the Medical Council is empowered to receive complaints against medical or dental practitioners or medical institutions, and noted that while the complaint which is the subject of the instant application was lodged before the Health Laws (Amendment) Act of 2019, it was however heard after the coming into force of the amendments to the Act. On the existing provisions of the law before the amendments to the Act, the Respondent contended that the then section 4(14) of the Act gave the Medical Board powers to regulate its own procedures subject to the Act and to any rule as to procedure made under section 23 of the Act. Further, that the that the Act empowers the Cabinet Secretary, in consultation with the Medical Council, to develop Rules for conducting inquiries into complaints, and that the Preliminary Inquiry Committee, as it was then, had been established as a Committee of the Medical Board under Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules as variously amended, for purposes of undertaking inquiries on complaints lodged before the Medical Board.

29. In addition, and that pursuant to the provisions of Rule 4 (1) of the said Disciplinary Rules, as read with Rule 10P of the Rules, the Medical Council has powers to receive and review documents and statements relating to any complaint lodged against a medical or dental practitioner or an institution. Further, that the Preliminary Inquiry Committee was empowered by the said rule to conduct inquiries into the complaints submitted to it under these Rules and make appropriate recommendations to the Board including rejection of the complaint, or if the complaint warranted a reference to the Board for inquiry, cause it to be referred to the Professional Conduct Committee whose functions

were set out at Rule 4A (2) included the conduct of inquiries into the complaints within such counties as the Board may specify and make appropriate recommendations to the Board. Reference was also made to the powers of the Professional Conduct Committee under the provisions of Rule 4A (3) of the Rules, which included suspending of licenses for medical institutions for up to six months closure of institutions until compliance with the requirements of the operating licence; and admonishment of a doctor, dentist or the institution.

30. Therefore, that the Respondent acted within its jurisdiction by constituting the Preliminary Inquiry Committee as provided under the Medical Practitioners and Dentists Act and the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, to hear complaints made against medical institutions Further, that the said Rules provide for the procedure to be followed by the Preliminary Inquiry Committee, and that the same Rules further provide for the manner in which decisions are to be made by the said Committee, including approval of the Committee's decisions by the Respondent. The Respondent's case therefore is that in view of the provisions of the above-stated Rules, the Preliminary Inquiry Committee and Respondent had, at the time of imitation of the complaint, the jurisdiction for consider the complaint.

31. The Respondent thus submitted that the Disciplinary & Ethics Committee was clothed with the jurisdiction pursuant to the amendments to the Act, vide the Health Laws Amendment Act, which abolished the Preliminary Inquiry Committee and the Professional Conduct Committee, whose roles were taken up by the Disciplinary and Ethics Committee. Further, once a Committee of the Respondent has made its decision on a complaint made against a medical institution or practitioner, it has to present it to the Full Medical Council for adoption. The Respondent further submitted that the Preliminary Inquiry Committee, the Disciplinary & Ethics Committee and the Respondent thereby had the mandate and basis in law to conduct proceedings filed against the *ex parte* Applicant. Reliance was in this respect also placed on the decisions in **Republic vs Medical Practitioners and Dentists Board ex-parte Dr. Yamal Patel & 2 others, [2016] eKLR,** and **Kenya Hospital Association t/a Nairobi Hospital vs Medical Practitioners and Dentists Board & 4 others [2018] eKLR**,

32. The Interested Party's submissions were that the *ex parte* Applicant's argument that the Respondent does not have statutory jurisdiction to undertake disciplinary proceedings against it begged the question as to which statute governed its licencing and operations, and raised the issues of the legal status of a corporate body like the *ex-parte* Applicant under the provisions of the Medical Practitioners and Dentists Board Act, and whether such corporate bodies are exempt from some sections of the Medical Practitioners and Dentists Board Act,. Lastly, the Interested Party also raised the issue of the transitional provisions in the Medical Practitioners and Dentists Board Act.

33. The Interested Party in addressing these issues made reference to the definitions of the terms "heath institution", "professional misconduct" and "register" provided in Section 2 of the Act, to argue that the disciplinary and complaints mechanisms set out in the Act apply to the *ex parte* Applicant. Further, that upon accepting to be licenced in line with the provisions of the Act, the *ex parte* Applicant became subject to the applicability of the entire Act. Further, that from the preamble to the Act, the intention of the Legislature was not to exempt medical institutions from the disciplinary and supervisory jurisdiction of the Respondent. It was submitted that the Respondent has the legal mandate to hear and determine any complaints made against medical practitioners, institutions or purposes connected therewith or ancillary thereto.

34. On the transitional provisions in the Medical Practitioners and Dentists Board Act, the Interested Party made reference to section 26(1) and (3) of the Act and submitted that his understanding of this provision was that the law does not envisage a vacuum in its enactment, operation, amendment or repeal and there is always a smooth flawless transition from an existing legal position to another. It was averred that the Applicant was on one hand arguing that the previous Preliminary Inquiry Committee did not have the legal mandate to handle a complaint against it, while on the other hand it argued that the successor body, the Disciplinary and Ethics Committee created by virtue of enactment of law was illegal and non-existent, and ultimately no disciplinary proceedings could and should be conducted as against the Applicant. The Interested Party submitted that the intention of the legislature was not to create loop-holes through which rights and obligations that had been legally acquired were compromised or lost, and that he had a legal right to pursue redress before the Respondent and until the pending matter is heard and determined on merits, then such right could not just be wished away. Counsel placed reliance on the provisions of Section 23(3) of the Interpretation and General Provisions Act, Cap 2 on the effects of a repealing law.

35. The Interested Party further submitted that the provisions of the law were clear that where there are accrued rights and liabilities in regard to the parties herein, it would only be fair just and equitable that the Interested Party be allowed to pursue his legal remedies before the Respondent as he had already done prior to the amendment of the law.

36. On this issue of jurisdiction of the Respondent, I am guided by the decision of the Court of Appeal in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1,** wherein it was held as follows:

> **"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

37. The Court of Appeal proceeded to define jurisdiction and its source as follows:

> **"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to**

nothing. Jurisdiction must be acquired before judgement is given"

38. As regards the time when jurisdiction vests and is required to exist, Ringera J. (as he then was) held as follows in **Adero & Another vs Ulinzi Sacco Society Limited** [2002] 1 KLR 577,

> **"it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal. Having taken the view that this court had no jurisdiction to entertain the matter, it follows that it could not transfer the same to another court. In that regard it is trite law that where a cause is filed in court without jurisdiction, there is no power in that court to transfer it to a court of competent jurisdiction**."

39. **Therefore, jurisdiction either exists or does not *ab initio*, and** mere acquiescence will not give jurisdiction to an authority who has no jurisdiction. Likewise, participation by a party in proceedings without jurisdiction will not vest/confer jurisdiction on the authority**.**

40. Coming to the facts of the present case, it is not in dispute that the ex parte Applicant is a health institution. It is also notable that before the changes brought by the Health Laws (Amendment) Act of 2019, the Medical Practitioners and Dentists Act did not have any provisions on the functions of the Respondent. In addition, the provisions on licensing under the then section 13 of the said Act, and on disciplinary proceedings under the then section 20 were specific to medical practitioners and dentists. The medical practitioner was defined under the Act as a person registered under the Act as a medical practitioner, while a similar definition was provided with respect to a dental practitioner and dentist. It is necessary at this stage to clarify that the definitions referred to by the Interested Party, including of that of a health institution, were among the amendments made by the Health Laws (Amendment) Act of 2019. It is thus evident that there was no provision in the Medical Practitioners and Dentists Act before the 2019 amendments, that specifically gave the Respondent any disciplinary powers over health institutions.

41. The jurisdiction of the Respondent to hear complaints against health institutions before the amendments to the Act was exhaustively addressed by Odunga J. in **Republic vs Medical Practitioners & Dentists Board & 2 others ex parte Majid Twahir & Another [2016] eKLR** as follows:

> **"It follows that section 2 of the Act cannot be read in isolation to the other provisions of the Act. If the Court is to construe the word "person" in section 2 to refer to institutions offering medical services, that interpretation will have to apply to all the other provisions of the Act since he Act does not define the word "person". However one only needs to look at the subsequent provisions in particular sections 5 to 20 of the Act which deal with the registration of medical practitioners in order to realise the absurdity of interpreting the phrases "medical practitioner" and "dentists' as including Hospitals. Section 15(1) of the Act, for example provides that:**
>
> ***The Board may authorise the Registrar to issue to a medical practitioner or a dentist who has applied in the prescribed form and whom the Board considers has had suitable working experience in medicine or in dentistry, as the case may be, a licence to engage in private practice on his own behalf as a private practitioner or to be employed, either whole time or part time, by a private practitioner.***
>
> **Section 20 of the Act on the other hand provides as follows:**
>
> ***If a medical practitioner or dentist registered or a person licensed under this Act is convicted of an offence under this Act or under the Penal Code (Cap. 63),whether the offence was committed before or after the coming into operation of this Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, subject to subsection (9), remove his name from the register or cancel any licence granted to him.***
>
> **Clearly these provisions do not lend themselves to an interpretation other than that a "medical practitioner" or a "dentist" must necessarily apply to an individual…..**
>
> **It is therefore my view and I so hold that the** *Medical Practitioners and Dentists Act* **applies to individuals licenced by the Board and not to institutions. Whereas this Court does not rule out the vicarious liability of the institutions under which such individuals operate, it is my view and I so hold that liability of medical practitioners and dentists under the Act is distinct from such vicarious liability under a tort. …**
>
> **Having considered he issues raised herein, it is my view and I so hold that under the Medical Practitioners and Dentists Act, the Board has no power to institute disciplinary proceedings against medical institutions as opposed to individual medical practitioners and dentists. It follows that such proceedings cannot also be instituted against the administrators of such institutions in their capacities as such administrators.**

42. I am in agreement with the said decision in light of the prevailing legal provisions at the time. It is thus my finding that at the time of institution of the complaint by the Interested Party on 2nd June 2016, the Respondent had no jurisdiction to hear and determine the said complaint since the ex parte Applicant was a health institution.

43. After the amendments brought by the Health Laws (Amendment) Act of 2019, a new section 4 (1) (m) of the Medical Practitioners and Dentist Act was enacted, which now expressly provides that the regulation of health institutions and taking of disciplinary action for any form of misconduct by a health institution as one of the functions of the Respondent. In this respect there is a general presumption against

retrospective operation of an amendment, and unless the contrary intention appears, such an enactment is presumed not to be intended to have a retrospective operation, especially where such a construction of the enactment inflicts a detriment, as it does in this case upon the *ex parte* Applicant. Furthermore, in the absence of a clear indication in an amending enactment the substantive rights of the parties to any civil legal proceedings fall to be determined by the law as it existed when the action commenced.

44. The Supreme Court of Kenya restated the law in this regard in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** **[2012] eKLR** as follows:

> **"(59) Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. *Black's Law Dictionary* (6th Edition) to which we have been referred, defines retrospective law as:**
>
> > ***" A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring , or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."***
>
> **(60) Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of the Constitution. That article provides that:**
>
> > ***"Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law".***
>
> **(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury's Laws of England*, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:**
>
> > ***(i) is in the nature of a bill of attainder;***
> >
> > ***(ii) impairs the obligation under contracts;***
> >
> > ***(iii) divests vested rights; or***
> >
> > ***(iv) is constitutionally forbidden."***

45. Arising from the foregoing reasons, it is also the holding of this Court that the amendments brought by the Health Laws (Amendment) Act of 2019 did not retrospectively confer jurisdiction to the Respondent to hear and determine the complaint against the *ex parte* Applicant, as there was no intention expressed in the said amendments that they would act retrospectively, and particularly since the amendments affected the substantive rights of the *ex parte* Applicant.

Whether the Respondent's Disciplinary and Ethics Committee's proceedings on 11th October, 2019 were ultra vires

46. The *ex parte* Applicant in this respect also contended that the Respondent, through the Disciplinary and Ethics Committee, acted ultra vires in conducting proceedings on 11th October, 2019 as the said Committee is not created pursuant to the Medical Practitioners and Dentist Act as read with the Medical Practitioners and Dentist Board (Disciplinary Proceedings) (Procedure) Amendment) Rules 2013. Further, that it was the Preliminary Inquiry Committee which was the correct body that ought to have heard the matter and not the Disciplinary and Ethics Committee, which came into being through the Health Laws Amendment Act, 2019, which came into force on 17th May, 2019.

47. The Respondent on its part reiterated that by virtue of the amendments made through the Health Laws Amendment Act, 2019, the Committee previously known as the Preliminary Inquiry Committee and the Professional Conduct Committee are now known as the Disciplinary and Ethics Committee. Additionally, that pursuant to Rule 10N of the Medical Practitioners and Dentists (Disciplinary Proceedings) Rules, the Preliminary Inquiry Committee has the power to conduct hearings in such manner as it considers suitable for the proper, fair and expeditious determination of any complaint in fulfilment of its objectives and that of the Medical Council. He averred that the Complaint made was heard on 11th October, 2019 and hence the hearing was undertaken after the above-stated amendments to the Act. Accordingly, by virtue of the amendments to the Act, the cited functions are now performed by the Disciplinary and Ethics Committee and the said Committee could not be faulted in any way.

48. It was submitted that it was therefore erroneous for the Applicant to allege that the Disciplinary and Ethics Committee acted ultra vires in conducting the proceedings on 11th October, 2019 on the grounds that it was not created under the Act and the Rules made thereunder. In view of the above, counsel submitted that the *ex parte* Applicant's argument that it is the Preliminary Inquiry Committee and not the Disciplinary and Ethics Committee that has jurisdiction to deal with the complaint was erroneous, and an attempt by the said Applicant to urge this Court to apply the amended Act retrospectively. Reliance was placed on the decision of the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** **[supra] .**

49. According to the Respondent, had the legislature intended that the matters proceeding before the Preliminary Inquiry Committee and Professional Conduct Committee still continue before the said committees, it would have expressly stated so, and that the *ex parte* Applicant

submitted itself before the Disciplinary & Ethics Committee and after the hearing, it proceeded to file its submissions to enable the Committee make its decision.

50. This Court has already found that the Respondent had no jurisdiction, despite the amendments by the Health Laws (Amendment) Act of 2019, to hear and determine the complaint made by the Interested Party against the *ex parte* Applicant. It therefore follows that consequently neither the Preliminary Inquiry Committee nor the Professional Conduct Committee being committees and acting as delegates of the Respondent, had jurisdiction to hear the said complaint. Given that this was the circumstance obtaining at the time of the enactment of the Health Laws (Amendment) Act of 2019, any saving provisions in section 26(3) of the said Amendment Act with respect to pending legal proceedings could not legally transit the proceedings from the Preliminary Inquiry Committee to the Disciplinary & Ethics Committee.

51. I am alive to the effect of transitional provisions in facilitating the change from one statutory regime to another, but also acknowledge that this transition takes place in the context of the circumstances that exist at the time the new legislation comes into force. In the present case, the circumstances were that no valid proceedings for want of jurisdiction obtained before the Preliminary Inquiry Committee that could be taken over by the Disciplinary & Ethics Committee. To this extent, the hearing held by the Disciplinary & Ethics Committee on 11th October 2019 was *ultra vires*, as it also thereby had no jurisdiction to hear the Interested Party's complaint made on 2nd June 2016 against the *ex parte* Applicant.

52. In light of the findings in the foregoing, the issue of the fairness of proceedings on 11th October 2019 before the Disciplinary & Ethics Committee becomes moot. I must at this stage also emphasize for the avoidance of doubt, that the findings herein are only in relation to the Respondent's jurisdiction to hear and determine the complaint made against the *ex parte* Applicant by the Interested Party on 2nd June 2016, and not any other complaint that may be made hereafter, or made under any other civil or criminal proceedings.

53. The *ex parte* Applicant's Notice of Motion dated 5th November, 2019 is accordingly merited only to the extent of the following orders:-

I. An order of Prohibition be and is hereby granted directed to the Respondent, its officers or agents or any other person or entity acting under its authority prohibiting the Respondent from taking or conducting any further proceedings and/or taking any further steps in relation to the Interested Party's complaint against the ex parte Applicant made on 2nd June 2016.

II. An order of Certiorari be and is hereby issued directed at the Respondent, its officers or agents or any other person or entity acting under its authority to remove into this Court to quash the proceedings in relation to the complaint made on 2nd June 2016 by the Interested Party against the ex parte Applicant.

III. Each party shall bear their respective costs of the Notice of Motion dated 5th November 2019.

54. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the ex parte Applicant's, Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE