



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 686 OF 2019

DR. FRANK ENDERE.....APPELLANT

AND

JOHN KENYATTA ONCHIRI

FOR THE ESTATE OF PAULINE KASESYA MWINZI.....RESPONDENT

[Appeal from a ruling on an inquiry by the Disciplinary and Ethics Committee of the Medical Practitioners and Dentist Council (Prof. Alice Mutungi, chairperson) dated 30th October 2019 in PIC Case No 31 of 2014,

BETWEEN

JOHN KENYATTA ONCHIRI

FOR THE ESTATE OF PAULINE KESESYA MWINZI.....COMPLAINANT

AND

DR. FRANK KIBET ENDERE.....1ST DEFENDANT

ST . MARY’S MISSION HOSPITAL – LANGATA2ND DEFENDANT

RULING

1) John Kenyatta Onchiri, the Respondent herein, filed a complaint on behalf of the estate of Pauline Kesesyia Mwinzi, deceased, against Dr. Frank Kibet Endere, the Appellant herein and St. Mary’s Mission Hospital – Langata, before the Medical Practitioners and Dentists Board (now known as the Medical practitioners and Dentist Council), hereinafter referred to as the council. The complaint arose from the treatment and management of the deceased by the Appellant at St Mary’s Mission Hospital. The Council heard the complaint and on 30th October 2019, delivered its decision through its Chair, Prof. Alice Mutungi, whereof the Appellant was inter alia, suspended from practicing for 6 months and also ordered to pay a fine of ksh. 250,000/=. The complaint as against St. Mary’s Mission Hospital was dismissed.

2) The Appellant being aggrieved by the aforesaid decision filed this appeal and put forward the following grounds:

- i. THAT the committee erred in law by proceeding with the hearing and then delivered a ruling on a mere complaint without (a) formal charge (s) being formulated contrary to the express provisions of the governing law.*
- ii. THAT the committee erred in law by proceeding with the hearing without (a) formal charge(s) being served upon the appellant to enable him prepare his defence thereto contrary to the governing law as well as the principles of natural justice.*
- iii. THAT the committee erred in law by relying upon documents and reports that had never been supplied to the appellant.*
- iv. THAT the committee erred in law by convicting the appellant of acts that had not been classified as offences under the governing law.*
- v. THAT the committee erred in law by delivering a legally incompetent ruling.*

3) The Appellant has now taken out the motion dated 5th December 2019, the subject matter of this ruling whereof he sought for the

following orders,

i. THAT this application be certified as urgent and its service be dispensed with in the first instance.

ii. THAT there be a stay of execution of the ruling by the Disciplinary and Ethics Committee of the Medical Practitioners and Dentist Council dated 30th October, 2019 in PIC case No. 31 of 2014 pending the hearing and final determination of this application inter partes or until further order of the court.

iii. THAT there be a stay of execution of the ruling by the Disciplinary and Ethics Committee of the Medical Practitioners and Dentists Council dated 30th October, 2019 in PIC Case No 31 of 2014 pending the hearing and final determination of the substantive appeal herein.

iv. THAT provision be made for the costs of this application.

4) The motion is supported by the affidavit of Frank Kibet Endere.

5) When served with the motion, the Respondent filed a notice of preliminary objection to oppose the application. The preliminary objection had to be determined first before considering the merits of the motion.

6) It is the submission of Mr. Omoke, learned advocate for the Respondent that the motion and the entire appeal should be ordered struck out. The Respondent avers that the orders being challenged on appeal and being sought to be stayed vide the instant motion will basically affect the benefit due the Medical Practitioners and Dentists Council and therefore the council; should have been enjoined as a party to this appeal and motion.

7) It was pointed out that the fine imposed against the appellant is supposed to be paid to the council hence if an order for stay is granted it would in effect deprive the council the right to receive such money. Mr. Omoke was of the view that the council must be enjoined since the order sought would adversely affect it before being heard under Articles 47 and 50 of the constitution of Kenya, 2010.

8) Mr. Okeke, learned advocate for the Appellant opposed the preliminary objection. The learned advocate argued that the council was the adjudicating body which made the decision now being challenged on appeal and therefore it cannot be made a party to this appeal.

9) The main question which was raised as a preliminary point is whether the Medical Practitioners and Dentists Council should be enjoined as a party in this appeal.

10) I have already set out the arguments put forward by the learned advocates appearing in this matter. It is not in dispute that the decision which is sought by the impugned on appeal was made by the Council. The council is therefore the adjudicating body. The fine imposed upon the Appellant is a penalty pursuant to the provisions of section 20 (6) (g) of Medical Practitioners and Dentists Act hence it cannot be said to be a benefit to the Council.

11) It will be absurd if the adjudicating body is enjoined as a party for purposes of being heard in defence of its decision. With respect, I agree with the submissions of the Appellant’s advocate that the preliminary objection is misplaced and cannot be countenanced.

12) In my view, the Council is akin to the subordinate courts and Tribunals whose decisions are challenged before this court. The subordinate or Tribunal cannot be made a party to the appeals preferred against their decisions to this court.

13) The fines they impose do not directly benefit those courts or tribunals just like the council whose decision is being impugned before this court. Even if the council was found to be a necessary party to these proceedings, the non-joinder is not fatal because the main parties to the dispute are already before this court.

14) In the end I find no merit in the preliminary objection. The same is ordered dismissed with costs abiding the outcome of the motion. The motion to be heard on its merits.

Dated, signed and delivered at Nairobi this 18th of December, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for 1st the Defendant

..... for the 2nd Defendant