



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 398 OF 2016

IN THE MATTER OF: AN APPLICATION BY THE APPLICANT, THE KENYA

HOSPITAL ASSOCIATION T/A THE NAIROBI HOSPITAL FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF

CERTIORARI AND MANDAMUS DIRECTED TO THE

PROFESSIONAL CONDUCT COMMITTEE AND THE

MEDICAL PRACTITIONERS AND DENTISTS BOARD.

AND

IN THE MATTER OF: THE MEDICAL PRACTITIONERS AND DENTISTS ACT CAP 253.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION, 2015

BETWEEN

THE KENYA HOSPITAL ASSOCIATION T/A

THE NAIROBI HOSPITAL.....APPLICANT

VERSUS

THE MEDICAL PRACTITIONERS AND

DENTISTS BOARD.....1ST RESPONDENT

THE PROFESSIONAL CONDUCT COMMITTEE....2ND RESPONDENT

DR. BARTILOL KIGEN.....1ST INTERESTED PARTY

DR. GERALD MONIZ.....2ND INTERESTED PARTY

JOHN PAUL ODERO (On behalf of the late

JUDGMENT

1. By a notice of motion dated 5th September 2016, the ex parte applicant herein, The Kenya National Association T/A The Nairobi Hospital seeks from this court orders of :

a. Certiorari to remove into this court and quash the entire decision of the professional conduct committee in its ruling dated 3rd March 2016 in professional conduct committee case No. 1 of 2013;

b. Mandamus compelling the 2nd respondent to refer the complaint to the 1st respondent.

c. A declaration that Rule 4(A)(2)(e) of the Medical Practitioners and Dentists(Disciplinary proceedings ((Procedure) Rules is inconsistent with Section 20 of the Medical Practitioners and Dentists Act and is therefore null and void.

d. An order of costs.

2. The application is predicated on the amended statutory statement dated 4th October 2016, verifying affidavit of **Maxwell Maina** sworn on 2nd September 2016 and annexures thereto.

3. The ex parte applicant's case is that on 11th February 2011 the deceased **Sybil Masinde Odero** was admitted into the applicant's labour ward at 10.00a.m. in the ex parte applicant's Hospital on 11th February 2011 under instructions of her doctor, **Dr Bartilol Kigen** who is the 1st interested party herein, and who is a medical practitioner in private practice with admitting rights at the Nairobi Hospital, not an employee of the applicant. It is claimed that the said 1st interested party is an independent contractor.

4. It is alleged that on admission the deceased delivered a baby through caesarian section at around 1.00pm on the same day but she developed complications after surgery and had to be moved to the Intensive Care Unit of the same hospital at about 6.00p.m. wherein she succumbed to the complications developed during surgery.

5. On 27th May 2011 **Mr John Paul Odero** the 3rd interested party (complainant) who is the father to the deceased lodged a complaint with the Medical Practitioners and Dentists Board alleging that the ex parte applicant herein, the 1st interested party doctor and the 2nd interested party who is also a doctor (**Dr Gerald Moniz**) were negligent and caused the untimely death of the deceased **Sybil Masinde Odero**.

6. By a letter dated 30th May 2011 the MPDB- (the Board) requested the applicant to submit to it a full report on the complaint and upon receipt of the said letter, the ex parte applicant referred the matter to its Standard Audit and Ethics Committee for investigations and upon completion of the said investigations, the ex parte applicant Hospital by a letter dated 25th July 2012 forwarded a full report to the Board.

7. The ex parte applicant was thereafter notified by a letter dated 12th July 2012 to appear before the Board's Preliminary Inquiry Committee(PIC) on 27th July 2012 for clarification concerning the management of the deceased patient on 27th July 2012. The applicant appeared before the Preliminary Inquiry Committee whereupon the deceased's father, and Dr Bartilol Kigen testified and the inquiry continued on 23rd November 2012 when Dr Martin Wanyoike, Dr Omondi Ogutu, Dr Gerald Moniz and Sister Rosemary Karitu testified.

8. It is further asserted that on 8th February 2013 the ex parte applicant received a letter from the Board containing the recommendations of the Preliminary Inquiry Committee which included a recommendation that the complaint was merited and that it be referred to the full Board/Tribunal. The applicant was then on 1st July 2013 notified to appear before the full Board on 22nd July 2013 and on appearing they were notified to appear on 25th July 2013.

9. That on 22nd July 2013 the applicant raised a preliminary objection on the ground that the Board lacked jurisdiction to hear and determine the report of the Preliminary Inquiry Committee and that the proper body to hear and determine the report of Preliminary Inquiry Committee is the Professional Conduct Committee (PCC), who are the 2nd respondents herein.

10. However, it is claimed that the ex parte applicant's preliminary objection was overruled by the Board which directed that the inquiry proceeds on 25th July 2013. Being aggrieved by the finding of the Board, the ex parte applicant and the 2nd interested party **DR. GERALD MONIZ** filed **JR Miscellaneous Application No. 274 of 2013 and JR Miscellaneous 270/2013** respectively and when the said applications came up for hearing on 25th July 2013 the parties recorded a consent referring the inquiry to the Professional Conduct Committee.

11. That the Board then constituted the Professional Conduct Committee which heard the complaint on 24th November 2015 and a ruling was delivered on 3rd March 2016 against the ex parte applicant to the effect that;

i. The applicant is directed to develop protocols for management of obstetric emergencies within a period of sixty(60) days from 3rd March 2016 and thereafter confirm compliance by a copy to the Board.

ii. The Nairobi Hospital (applicant) is directed to confirm dissemination of the protocols developed under (i) above to its

divisional meetings and also display of the same within the facility within the period of sixty(60) days.

iii. The Nairobi Hospital is directed to put in place measures for management of emergency patients under the care of private doctors operating within its facility and thereafter confirm compliance to the Board within a period of sixty(60) days from 3rd March 2016.

iv. The Nairobi Hospital is to put in place and document a policy for intervention and involvement of Senior Gynecologists in the event of severe post partum haemorrhage (PPH) within a period of sixty(60) days from 3rd March 2016 and thereafter confirm compliance to the Board .

v. The Nairobi Hospital is to pay the Board a sum of kshs 150,000 within the next 30 days as part of the costs for proceedings.

12. According to the ex parte applicant, the Professional Conduct Committee exceeded its jurisdiction when it made final orders and concluded the case; that the Board wrongly abdicated one of its key functions to the Professional Conduct Committee by allowing the latter to make final orders and conclude the case before it; that the Professional Conduct Committee acted unreasonably, irrationally and illegally; that the Professional Conduct Committee breached the applicant's fundamental right to fair administrative action guaranteed by Article 47 of the Constitution and that the Professional Conduct Committee failed to give effect to Section 20 of the Medical Practitioners and Dentists Act.

13. It is therefore feared that as a result of the Professional Conduct Committee's decision, the ex parte applicant risks losing its right to have the matter heard by the Board which is the tribunal legally mandated by law to conclude the matter hence these Judicial Review proceedings.

14. The ex parte applicant further asserted that the Professional Conduct Committee and the Board have no power to institute disciplinary proceedings against medical institutions as opposed to individual Medical Practitioners and Dentists. Further, that the Act applies to individuals licenced by the Board and not to medical institutions.

15. The 3rd interested party **JOHN PAUL ODERO** filed a replying affidavit sworn by himself on 27th February 2017 contending that the deceased Sybil Masinde Odero was his daughter and died after delivery of a baby via caesarian section at the ex parte applicant's hospital while being attended to by her personal doctor the 1st interested party herein.

16. The 3rd interested party then lodged a complaint with the Board which complaint was later referred to the Preliminary Inquiry Committee and upon the latter carrying out an inquiry, the applicant raised a preliminary objection which led to JR 270/2013 and JR 274/2013 respectively wherein the parties compromised the applications by consent and referred the inquiry to the Professional Conduct Committee which latter was duly constituted by the Board.

17. That after hearing the parties to the inquiry, the Professional Conduct Committee referred the decision to the full Board which on **30th November 2015** adopted the decision and orders of the Professional Conduct Committee.

18. According to the 3rd interested party, Section 20(1) of the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya gives the Board powers to conduct an inquiry on a medical practitioner whereas Section 20(2) provides that the person shall be accorded an opportunity of being heard either in person or by an advocate.

19. The rest of the depositions by the 3rd respondent allude to legal provisions under Medical Practitioners and Dentists Act and Rules and which ought not to be depositions but submissions on points of law therefore this court shall consider them at submissions.

20. The 3rd interested party also deposed that the matter was referred to the Professional Conduct Committee by the full board and that the Professional Conduct Committee heard all parties and recommendations made to the Board hence there was no illegality, procedural unfairness and or unreasonableness as claimed by the ex parte applicant.

21. It was contended that the law allows the Professional Conduct Committee to regulate its own procedure and to make orders it deems fit but which orders must be adopted by the Board, which the Board did adopt hence the motion as filed by the ex parte applicant must be dismissed.

22. The 3rd interested party maintained that the Board adopted the Professional Conduct Committee to make orders that it deems fit.

23. The 1st respondent also filed a replying affidavit sworn by **Daniel Yumbya** the Chief Executive Officer of the MPDB on 31st March 2017 contending that the Board did receive a complaint and that it processed it but that upon the consent being recorded in the two cases filed in court, the matter was referred to the Professional Conduct Committee for consideration of all documents before it, heard the parties before it through their respective advocates and made its decision which decision was placed before the Board for adoption and was adopted hence this application is made in bad faith and an afterthought as the parties have substantially complied with the Board's directions and that the application does not meet the threshold to warrant the orders of Judicial Review as sought.

24. It was further contended that it is in the general public interest of Kenyans that the Board be left to perform its functions as stipulated in the Act and the applicable rules, considering the nature of the complaint.

25. The 2nd interested party filed a replying affidavit wholly supporting the ex parte applicant's motion.

26. The parties' advocates filed written submission to canvass the application and made oral highlights on 29th November 2017.
27. On the part of the exparte applicant, Mr Muiruri submitted, relying on the filed documents and written submissions filed on 16th June 2017. Mr Muiruri submitted focusing on the question of jurisdiction emphasizing that the disciplinary proceedings only apply to Medical Practitioners and Dentists and not medical institution. He submitted that the definition of "**medical practitioner**" under the Act does not include institutions.
28. It was further submitted that the Board and the Professional Conduct Committee had no powers to discipline institutions. Reliance was placed on **Medical Practitioners and Dentists Board & 2 Others vs Masjid Twahir & Others [2016] e KLR** where it was held inter alia, that the Board could only discipline medical practitioners and not a hospital. It was also submitted that only the Board can make the final decision not the Professional Conduct Committee.
29. Further, that Rule 4A 3(e) of the Rules made under the Act is inconsistent with Section 20(1) of the parent Act. It was therefore submitted that there was improper delegation of powers without jurisdiction and that such a decision made without jurisdiction is amenable for quashing.
30. Mrs Woodward counsel for the 2nd interested party submitted at length associating herself with the submissions made by the exparte applicants and reiterated her client's written submissions filed in court on 7th July 2017.
31. Counsel for the 2nd interested party added that Section 20 of the Medical Practitioners and Dentists Act empowers the Board to make the final decision on whether there was any disgraceful conduct on the part of the medical practitioner. Further, that the Act does not allow any delegation of functions by the Board to the Professional Conduct Committee. She referred to Rule 4A under the Act and submitted that the Rule is inconsistent with the Act.
32. It was submitted that the decision by the respondents being illegal and uprocedural, has brought her client into disrepute and that an illegality cannot be relied on to punish affected parties.
33. It was further submitted that the actions of the respondents are also ultra vires the Rules of Natural Justice and in violation of Article 47 of the Constitution. Reliance was placed on several decisions including **Republic vs CM's Court at Kibera Law courts Nairobi & 2 Others exparte Qlan Guo Jun & 2 Others[2013] e KLR** on the threshold for Judicial Review.
34. It was further submitted that where subsidiary legislation like Rule 4A of the Rules was inconsistent with substantive law, Section 31(1)(b) of the Interpretation of General Provisions Act stipulates that subsidiary legislation cannot be inconsistent with the provisions of the Act as is restated in Section 7(2) (a) (111) of the Fair Administrative Action Act and Section 7(1) (g) of the same Act.
35. It was submitted that as only 2 members of the 2nd respondent are required to be members of the 1st respondent, there was need to refer the matter back to the 1st respondent for final decision making hence the delegation by the 1st respondent to the Professional Conduct Committee to make a final decision was unlawful abdication of the Board's statutory mandate hence such a decision is invalid and must be quashed.
36. It was submitted that as the 2nd respondent had no power to establish the guilt of the applicant and that of the 2nd interested party, the 1st respondent acted ultra vires by delegating its powers to the 2nd respondent PCC to assume jurisdiction in concluding the matter and making final orders without prior consultation with the 1st respondent Board.
37. Counsel maintained that the 2nd respondent exceeded its jurisdiction as Section 20 of the Act only empowers the 1st respondent Board to determine culpability of the accused following disciplinary proceedings. Reliance was placed on **Pastoli v Kabale District Local Government Council & Others[2008] 2 GA 300 page 304** where the court held that acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality.
38. It was submitted that delegating power to the 2nd respondent is abuse of power contrary to Section 7(1)(o) of the Fair Administrative Action Act.
39. Further, that in this case it was evident that the decision was made negligently, arbitrarily, irrationally, and in total disregard of the applicable law and its powers.
40. The 2nd interested party's counsel further submitted that the decision was made in breach of the general legitimate expectation that where a statute provides for a procedure, that procedure would be followed where applicable, as stipulated in Section 7(1) (m) of the Fair Administrative Action Act, 2015. Reliance was placed on **Seventh Day Adventist Church of East Africa Ltd vs Permanent Secretary Ministry of Nairobi Metropolitan Development & Another [2014] e KLR** where the court relied on **Keroche Industries Ltd vs KRA & 5 Others Nairobi HCMA No. 743/2006 [2007] 2 KLR 240 and held** that Judicial Review orders may be granted where the impugned decision goes against the legitimate expectations of the applicant.
41. In this case it was submitted that the 2nd interested party had a legitimate expectation that Section 20 of the Act would be honoured and that the final decision lay with the 1st respondent, not the 2nd respondent.
42. On the 3rd interested party's submission that the 1st respondent cannot be accused of abdicating its mandate to the 2nd respondent when parties had moved to court and consented to the inquiry being carried out by the Professional Conduct Committee, it was submitted that

the consent entered into was for the PCC to carry out an inquiry and make recommendation to the 1st respondent Board and not for the PCC to make final decisions.

43. It was also submitted that quasi-judicial and judicial bodies derive their mandate expressly from statutes and not from the consent of the parties, and that where a statute specifically delineates jurisdiction over a judicial or quasi-judicial body, parties to a dispute cannot consent or otherwise grant jurisdiction to such a body as that would contravene public policy and would be deemed ultra vires as was held in **Republic vs CM's Court Kisumu exparte Micah Kisoo[2016] e KLR**.

44. The 2nd interested party therefore urged the court to grant the prayers sought by the exparte applicant in the notice of motion with costs.

45. The 1st and 2nd respondents (The Board and Professional Conduct Committee) respectively filed joint submissions on 10th July 2017 and Mr Muthee advocate submitted orally highlighting the written submissions in opposition to the exparte applicant's motion. Counsel for the respondents maintained that the Preliminary Inquiry Committee was established in 2012 and the Rules were amended in 2013 giving power under Rule 4A(3) to the 2nd respondent to conduct disciplinary proceedings which were commenced on 25th July 2013. It was submitted that the 2nd respondent had jurisdiction to make recommendation under Section 23 of the Act and that when the matter was referred to the Preliminary Inquiry Committee, the applicant raised a Preliminary Objection and the subsequent suits as filed were compromised for the matter to be heard before Professional Conduct Committee and that Rules 4A(3) is clear on the powers of the Professional Conduct Committee. Reliance was placed on **Republic vs MP & D B & Another Exparte Wainyoke Kihara [2015] e KLR and Republic vs MP & DB exparte Dr Yanal Patel & 2 Others [2016] e KLR**.

46. It was also submitted that Sections 4(14) and 20(4) of the Act provide that the Board may regulate its own procedures in disciplinary proceedings. It was therefore submitted relying on **Kenya Revenue Authority v Menginya Salim Murgani CA 108/2009** where it was held, *inter alia*, that provided that the bodies achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed. It was submitted that this court cannot sit as an appellate court over a High Court decision and that in any event the Board adopted the Professional Conduct Committee proceedings hence there is no illegality or bias and that the issue of jurisdiction is raised in bad faith since the 2nd interested party has substantially complied with recommendations of the Board.

47. It was also submitted in contention that all the parties were heard after the matter was compromised in court.

48. On the question of whether mandamus can issue, it was submitted that the applicant does not deserve mandamus because the Professional Conduct Committee duly referred its recommendations to the Board which approved and adopted the final determination.

49. Mrs Guserwa counsel for the 3rd interested party, Mr John Paul Odera who was the complainant before the Preliminary Inquiry Committee and Professional Conduct Committee submitted, opposing the applicant's motion and relying on written submissions filed on 30th June 2017. It was submitted that the preamble to the Act applies to personnel and places or institutions where such doctors practice, and that Rule 4A(3) (c),(d),(e) of the Rules made under the Act gives the Professional Conduct Committee the power to suspend licences, close and admonish, depending on the weight of the evidence placed before it.

50. It was also submitted that the Professional Conduct Committee under the Rules could determine a case conclusively and make recommendation as it deems it. Further, that the Professional Conduct Committee has powers under Rule 10(g) to determine orders relating to costs as it may think fit. Further, it was submitted that the Professional Conduct Committee accorded all parties a hearing hence there is no illegality, procedural impropriety or unreasonableness established by the applicant.

51. Mrs Guserwa further submitted that parties entered a consent in JR 270 & 274 of 2013 to the effect that the hospital and the two doctors be investigated by the Preliminary Inquiry Committee and recommendations be made to the Board. Further, that the 2nd respondent having concluded investigations and placed before the Board its recommendations which were adopted by the Board on 30th November 2015 as per the attached minutes of the full Board meeting, the issue of jurisdiction did not arise and is therefore an afterthought. It was further submitted by Mrs Guserwa that death of a professional cannot be compared to loss of reputation.

52. Further submissions was that there was no claim that Rule of Natural Justice were breached and that therefore the orders sought are only intended to defeat the 3rd interested party's civil claim for compensation for the loss of his daughter. It was submitted that the alleged delegation of power was in compliance with the directives of the court by consent of the parties and that the legitimate expectation principle urged by the applicant is baseless and misconceived against the rights of the 3rd interested party. Reliance was placed on **HCC 34/2013 Silas Mugendi Nguru v Nairobi Women's Hospital** where the deceased died from complications developed after child birth in the hospital on 7th January 2012. The court relied on evidence in the autopsy report and found the hospital to have been negligent and therefore 100% liable and awarded the family shs 9.3 million. A similar holding was made in **HCC 399/2010 P.B.S. & I.N.S. vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others** where this court found both doctors and the hospital liable in negligence for damages to the patient who died during child birth.

53. Further reliance was placed on **JR 34/2013 Republic vs Directorate of Public Prosecutions & Others exparte George Peter Opondo Kaluma** where the court dismissed a Judicial Review application filed to stop a criminal prosecution on the basis that a party cannot be protected from answering for private wrongs through civil process, and that the applicant member of the legal profession could not avoid a probe of his professional conduct by the Disciplinary Committee by hiding behind the double jeopardy principle.

54. On the authority cited by the applicant, it was submitted that it is distinguishable from this case because an institution where negligence was committed cannot be left out as per the decision of this court in **HCC 399/2010, PBS & INS vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others[supra]**.

55. Counsel for the 3rd interested party further submitted that the preamble to the Act and the 2013 Rules refer to sanctions on institutions as well as medical practitioners and that it would defeat the purpose of the Act if the Rules refer to institutions which are not intended to operationalise the Act. She urged the court to dismiss the exparte applicant's claim with costs.

56. In a rejoinder, Mr Muiruri counsel for the exparte applicant submitted that the decision of Odunga J in **Medical Practitioners and Dentists Board & 2 Others vs Masjid Twahir & Others [2016] e KLR** at paragraph 61 is clear on the liability in tort and in disciplining of institutions. That paragraph 65 the decision is clear that if there is a lacuna in law, subsidiary legislation cannot fill the lacuna to discipline institutions. It was submitted that the Regulations are inconsistent with the Act which is contrary to Cap 2 of Laws of Kenya.

57. On the contention that the Professional Conduct Committee proceedings were subject of a consent order, it was submitted that the applicants never consented to the Preliminary Inquiry Committee making substantive findings hence the Preliminary Inquiry Committee exceeded its mandate by making final determination of the complaint.

58. On the issue that the Board considered recommendations of the Preliminary Inquiry Committee, it was submitted that the ruling of the Preliminary Inquiry Committee was made on 3rd March 2016 yet the Board sat on 30th November 2015 hence it is not possible that the Board adopted that which was not in existence at that time.

59. It was further submitted that mandamus would only issue if the court found that the Board had jurisdiction to discipline hospitals upon which the court can refer the matter or inquiry to the Board for adoption.

60. It was submitted that the power to establish procedures cannot be extended to decision making duties in contravention of statutes. The court was urged to examine the decision by Honourable Odunga J in **Medical Practitioners and Dentists Board & 2 Others vs Masjid Twahir & Others [2016] e KLR** which is clear that the Board has no power to discipline hospitals hence the decision even if made by the Board should be quashed and the orders of declaration and mandamus do issue.

DETERMINATION

61. I have carefully considered the exparte applicant's application as supported by the 2nd interested party and vehemently opposed by the respondents and 3rd interested party. I note that the 1st interested party did not file any response to the motion. I must first and foremost empathize with the 3rd interested party Mr John Paul Odera who lost his dear daughter during the unfortunate incident where doctors and the hospital are alleged to have been negligent.

62. In my humble view, the main issues for determination in this matter where a young mother and professional lawyer lost her life are:

1) Whether the Medical Practitioners and Dentists Board has power to inquire into complaints having a bearing on alleged negligence of hospitals/medical institutions.

2) Whether the Board ever adopted the decision or findings of the Professional Conduct Committee and if it did adopt, whether the PCC had any jurisdiction to entertain the complaint.

3) Whether the Professional Conduct Committee had jurisdiction to inquire into the complaint in issue and make a conclusive finding on the misconduct and or negligence of the applicant hospital and the two doctors who attended to the deceased patient, Sybil Masinde Odera.

4) Whether the applicant is entitled to the Judicial Review orders sought.

63. On whether the Board has power or jurisdiction to inquire into the complaints against medical institutions, the exparte applicant Hospital asserts that the Professional Conduct Committee and the Board have no power to institute disciplinary proceedings against medical institutions as opposed to individual medical practitioners and dentists. It maintains that the Act applies to individuals licenced by the Board and not to medical institutions. It is averred that Section 20 of the Act mandates the Board to conduct inquiries into the conduct of medical practitioners and dentists and decide whether there has been infamous or disgraceful conduct in a professional respect.

64. On the part of the respondents and the 3rd interested party, it was contended that Rule 4A, (3) of the Rules made under the Act allows the Board to deal with matters or complaints against the institution and individual Medical Practitioners and Dentists. They urged the court to interpret the Act (preamble) thereof purposively to find that the Rules could not have been enacted in vain, since the long title to the Act stipulates that the Act is "***an Act of Parliament to consolidate and amend provisions for the registration of medical practitioners and dentists and for purposes connected there with and incidental thereto.***" As such, it was contended that the law must be interpreted purposively to mean that the connected purposes include institutions as stipulated in the Rules made in 2013.

65. The exparte applicant on the other hand maintained that where there is a conflict between the Parent Act and Rules, the provisions of the Act prevail as stipulated in Cap 2 Laws of Kenya.

66. This court has had occasion to determine the issue of jurisdiction of the Board vis a vis medical institutions and the import of the Rules made under the Act conflicting with the Act.

67. The long title of the Act is set out at the commencement of the Act and consists of a single long sentence divided by several semi colons into various limbs, each of which deals with a principal purpose of the Act. With large and complex Acts, it is common for the long title to end with a form of words such as "***and for connected purposes.***" A connected purpose is something that the Bill or Act does

that is not sufficiently distinct to merit a limb to itself, but which does not fall entirely within one of the preceding limbs.

68. Traditionally, the long title in an Act of Parliament is usually included in the Bill and acts as a guide to Parliament in amending the Bill so as to avoid amending the Bill beyond its scope, and it is for that reason that the words “**and for connected purposes**” are added at the end. It follows, therefore, that the long title in any legislative enactment serves to inform Parliament and the end users of the legislation, and what the Act sets out to do. However, since the Act is enacted and subject to amendment, courts treat the long title as an intrinsic explanatory and interpretative aid.

69. The long title also provides a guide to the scope of an Act when there is ambiguity as to the meaning of its provisions.

70. Accordingly, it is not true that the policy objectives underlying the Bill or Act are to be found in the long title but are to be inferred from the nature of the changes in the new law that the long title says are to be made.

71. Thus, long titles only set out the purposes of legislation in this limited sense of stating the way in which the amendments will affect the existing law. This is what I learnt from my legislative drafting class at the University of London school of Advanced Studies.

72. In this case, the respondents and the 3rd interested party contend that the amended Regulations give jurisdiction to the Board to hear and determine complaints against institutions. That is so and that fact is undisputed. However, in the absence of a substantive Parent Act provision stipulating that the Act applies to institutions, a regulation cannot amend the Parent Act. Furthermore, Section 31(1) (b) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya stipulates that”

“Subsidiary legislation cannot be inconsistent with the provisions of the Act.”

73. In the same vein, the newly enacted Fair Administrative Action Act, 2015 at Section 7(2) (a) (111) provides that “**the court or tribunal may review an administrative action or decision if the person who made the decision acted pursuant to delegated power in contravention of any law prohibiting such delegation.**”

74. Similarly, Section 7(1)(g) of the same Act provides **that judicial review would issue where the administrator acted on the directions of a person or body not authorized or empowered by any written law to give such directions.** In **Pastoli v Kabale District Local Government Council & Others**[2005] 2 EA 300 the court held, inter alia, that

“Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality”.

75. It follows that where the Board or Professional Conduct Committee on behalf of the Board proceeds to hear and determine complaints against the medical institutions, in the absence of specific provisions of the law granting it such power, then the PCC acts illegally and ultra vires the powers granted by the Act. In **Republic v Medical Practitioners & Dentists Board & 2 Others Ex parte Majid Twahir & another** (supra) Odunga J held thus I agree, inter alia and i concur:

“ Having considered the 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.”

76. It is worth noting that regulations cannot fill a void or gap in a parent statute. Accordingly, without jurisdiction to hear and determine disciplinary proceedings against the medical institutions, in this case, the Nairobi Hospital, I find and hold that the Board or Professional Conduct Committee acted without jurisdiction.

77. The law is clear that jurisdiction is everything without which a court of law or tribunal acts in vain and that the moment a court of law or tribunal finds that it has no jurisdiction, it must down its tools and say no more. This is the principle espoused in **Owners of Motor Vessel Lilian ‘S’ V Caltex (K) Ltd (1989) KLR 1. Therefore**, where a decision is made without jurisdiction as was in this case, it is void. The duty of this court is to declare such decision or action a nullity as was held in **Mcfoy v United Africa Company Ltd [1961] 3 ALL ER 1169 at 1172** that:

“If an act is void, it is in law a nullity. It is not only bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.”

78. The court also warned in **Republic vs Medical Practitioners and Dentists Board and Another Ex parte J Wanyoike Kihara [2015] e KLR** against expanding powers of a quasi judicial body as follows :

“Therefore where the law exhaustively provides or the jurisdiction of an executive body or authority, the body or authority must operate within those limits ought not to expand its jurisdiction through the administrative craft or innovation. The courts would be no rubber stamp of the decision of administrative bodies. Whereas, if parliament gives great powers to them, the courts must allow them to it, the courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law.”

79. As earlier stated, this court does empathize with the 3rd interested party for the unfortunate loss of his dear daughter who was a legal professional and at such a young age, while bringing forth a life. And whereas this court does appreciate that the 2013 regulations are intended to protect the public from substandard medical or health services offered by institutions and medical Practitioners and

Dentists, so as not to negate to citizen's rights to health as espoused in Article 43(1) (a) Constitution, this court is duty bound to interpret the law in a manner that upholds the constitutional rights aforesaid.

80. The 3rd interested party relied on this court's decision on **PBS & Another vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016] e KLR** to submit that medical instructions have been held to be liable in negligence. That is absolutely correct as that decision is elaborate enough on the issue of liability of medical institutions for negligence on the part of the medical personnel under the hospital's instructions. However, there is a whole difference between a claim for medical negligence in tort and disciplinary proceedings being commenced against an institution. Where the statute clearly excludes medical institutions from being subjected to disciplinary proceedings by the Board, the Board cannot, by craft or innovation attempt to expand its jurisdiction through discretion borrowed from rules which are subsidiary legislation.

81. It follows that the findings in these proceedings that the Board and or PCC had no jurisdiction to entertain disciplinary proceedings against the exparte applicant Hospital cannot obstruct the 3rd interested party from seeking compensation for alleged medical negligence against the applicant herein and therefore the case of **P.B.S. & I.N.S. vs Archdiocese of Nairobi** [supra] is not applicable in the circumstances of this case. What was in issue in the cited case was not whether or not the MPDB had jurisdiction to discipline the hospital but whether the hospital and the Doctors were liable in negligence for the death of the deceased who was labour induced and died in the process before delivering a baby.

82. In addition, what the court based its decision on in the above cited case was not the findings against the 1st defendant's hospital. In the said case the court found the hospital vicariously liable in negligence for acts of its doctors who were its agents at the material time.

83. For all the above reasons, I have no hesitation in finding and holding that the Board had no jurisdiction to handle disciplinary proceedings against the exparte applicant herein and that by so doing it acted without and in excess of jurisdiction and *ultra vires* the provisions of the Medical Practitioners and Dentists Act.

84. The 2nd issue of determination is whether the Board adopted the decision or findings of the Professional Conduct Committee or whether the Professional Conduct Committee made a conclusive determination of the complaint and if it did adopt, whether the PCC had any jurisdiction to entertain the complaint.

85. In the replying affidavit of John Paul Odero the 3rd interested party herein, he annexed copies of letter dated 6th February 2013 communicating the decision in Preliminary Inquiry Committee case No. 42/2011; ruling by the Professional Conduct Committee in case No. 1/2013 dated 3rd March 2016 signed by Professor Shadrack B.O.Ojwang, chairman of the Professional Conduct Committee and the minutes of the 112th full Board meeting held on 30th November 2015 at UON College of Health Sciences Boardroom Chaired by Professor George Magoha, MBS, EBS, Chairman of the Board. The minutes are confirmed signed and dated on 6th April 2016 by the Chairman and CEO, Mr Daniel M. Yumbya.

86. The question that emerges from the above documents is whether the full Board could have sat on 30th November 2015 to adopt proceedings or recommendations of Professional Conduct Committee which were made on 3rd March 2016. The answer is a resounding no. Therefore, albeit all the parties are in agreement that the decision of the Professional Conduct Committee must be adopted by the Board, there is no evidence that the Board ever adopted the decision of the PCC as its own, assuming that the PC had jurisdiction to hear and determine the complaint and refer the determination to the Board for adoption as its own.

87. The other issue is therefore whether the Professional Conduct Committee could conclusively determine the complaint assuming it had jurisdiction to do so, without sending it to the full Board for adoption. Section 20(6) of the Act contemplates that a person aggrieved by a decision of the Board under the provisions of the Section 20 may appeal within 30 days to the High Court and in any such appeal, the High Court may annul or vary the decision as it thinks fit.

88. The above provision presupposes that a decision has been made by the Board following disciplinary proceedings against a Medical Practitioner and or Dentist as stipulated under the Act. **'Board'** is defined under the Act in Section 2 of to mean **"The Medical Practitioners and Dentists Board constituted under Section 4"** Section 4 of the Act establishes and constitutes a Board to be known as **the Medical Practitioners and Dentists Board** consisting of :

- a) A chairman to be appointed by the Cabinet Secretary.
- b) The Director of Medical Services or the person for the time being acting in that post.
- c) A Deputy Director of Medical Services, to be nominated by the Cabinet Secretary.
- d) Four medical practitioners to be nominated by the Minister(CS)
- e) Five medical practitioners and two dentists who, shall be elected by the votes respectively of all medical practitioners and of all dentists at the prescribed times and in the prescribed manner.
- f) A representative of each of the universities in Kenya which share power to grant a qualification which is registrable under the Act.

89. The total number of members of the Board is 15 when fully constituted and under section 4(a) quorum of the Board is seven(7) members including the chairman at any meeting of the Board.

90. The Board is a body corporate with perpetual succession and with a common seal and is capable of suing and being sued. On the other hand Rule 4A (A) (i) of the 2013 Rules provides for composition of a Professional Conduct Committee adhoc committee comprising.

- a) A chairperson
- b) 2 persons registered in the same profession in which a medical practitioner or dentist whose conduct is being inquired is registered.
- c) One member of the Board;
- d) One person representing the general public.
- e) The Board's advocate who shall be the legal advisor and the Chief Executive Officer of the Board. The composition of Professional Conduct Committee is 7 members. The Rule 4(e) also provides that the committee may admonish a doctor or dentist or the institution and conclude the case; and
- f) Make such further recommendations as the committee deems fit.

91. It should be noted that it is the Amended Rules that introduced the Professional Conduct Committee established by the Preliminary Inquiry Committee and also introduced discipline on medical institutions and conclusion of a case by the Professional Conduct Committee, which introduction is to say the least, problematic.

92. The 2013 Rules gives power to the Professional Conduct Committee to, under Section 4A (2) (3) (a) conducts inquiries into the complaints and make final orders. However, it is my humble view that a body which enjoys delegated power cannot make final orders or decisions. Its decisions must be ratified by the Board which is the giver or donor of the delegated power.

93. In **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271**, the Court expressed stated:

“What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”

94. The above position is restated in section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; ***or acted pursuant to delegated power in contravention of any law prohibiting such delegation.***

95. Therefore, it follows that the Professional Conduct Committee could only hear the complaint and make recommendations to the Board for adoption and implementation since the Professional Conduct Committee has no independent mechanism for implementing the decisions that it reaches.

96. It is for that reason that I find and hold that the decision of Professional Conduct Committee was riddled with procedural impropriety and it is immaterial that the parties initially consented to the complaint being referred to the Professional Conduct Committee. The consent did not and could not have given the Professional Conduct Committee powers to make final orders/decisions contrary to the law and in this case, the law is that the Professional Conduct Committee is a body exercising delegated powers of the Board. It could not, therefore make final decisions without having those decisions ratified by the Board which is a body corporate and which has the power to sue and be sued in its own name, unlike the Professional Conduct Committee, which is an adhoc body or committee established for purposes of dealing with a specific complaint.

97. It is further worth noting that the complaint subject of the inquiry was lodged in 2011 on 27th May 2011 but owing to jurisdictional challenges, before the High Court, the matter was referred to the Professional Conduct Committee by consent of the parties and the inquiry proceedings were commenced on 6th August 2013 by the Professional Conduct Committee.

98. That was before the 2013 amendment Rules came into effect. The Rules (Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedures) (Amendments) Rules, 2013 came into effect vide gazette notice (special issue) Kenya Gazette Supplement 175 of 20th December, 2013. It follows that the applicable rules to the inquiry are the Medical Practitioners and Dentists (Disciplinary) Proceedings) (Procedure) Rules, 1979 being the Principal Rules that were amended by the aforesaid 2013 Amendment Rules.

99. Accordingly, this court finds and holds that the Professional Conduct Committee which was only established by the 29th December 2013 amendments is a body that had no power or jurisdiction to hear and determine the inquiry subject of the complaint lodged by the 3rd interested party.

100. The parties ought to have ensured that before they enter into a consent to transfer the matter to the Professional Conduct Committee, the latter was seized of jurisdiction to hear and determine the complaint. As at 25th July 2013 when the parties entered a consent in JR Miscellaneous Application No. 274/2013, and JR 270/2013, the Professional Conduct Committee which was established under Section/Rule 4A a(1) of the 2013 amendment Rules was not in existence. Only the Preliminary Inquiry Committee existed under the Principal Rules under Rule 4 A (1) of the 1979 Rules. It therefore inconceivable that the parties could consent to appear before a nonexistent entity as at the time of the consent.

101. Rule 5 of the 1979 Regulation stipulates the submission of complaint to the Chairman of the Board upon which the Chairman would submit the matter to the Preliminary Inquiry Committee (PIC) and the Preliminary Inquiry Committee upon receipt of the complaint would review it against the medical practitioner or dentist and determine and Report to the Board whether an inquiry should be held, pursuant to Section 20 of the Act, in respect of the medical practitioner or dentist.

102. Under the said Rule, the Preliminary Inquiry Committee after considering the complaint and making such inquiries with respect to the complaint may if the complaint does not warrant reference to the Board for inquiry reject the complaint and inform the chairman and if it warrants reference to the Board, refer to the Board together with its findings and recommendations.

103. What the above rule stipulates is that after the Preliminary Inquiry Committee has received a complaint from the Chairman of the Board as provided in Rule 5, it would carry out a Preliminary Inquiry into the complaint and establish whether the complaint discloses sufficient grounds to sustain disciplinary proceedings against the medical practitioner or dentist. It is therefore only the Board that could commence disciplinary proceedings against the offending Medical Practitioner or Dentist.

104. Therefore, unlike in the 2013 rules where the Preliminary Inquiry Committee has power to carry out an inquiry through an adhoc body the Professional Conduct Committee and take action on its own findings, the 1979 Rules do not permit the Preliminary Inquiry Committee to carry out an inquiry and the taking of action against the offending medical practitioner or dentist. (see **Republic vs Medical Practitioners and Dentists Board Exparte Dr Yamal Patel & 2 Others [2016] e KLR and Republic vs Medical Practitioners and Dentists Board & Another Exparte J. Wanyoike Kihara [2015] e KLR**).

105. It is therefore clear that the '*consent*' entered into referring the matter to Professional Conduct Committee was done *per incuriam* in the sense that the parties to the Judicial Revenue made the court to believe that the applicable Rules are the 2013 rules which establish the Professional Conduct Committee yet under the 1979 Rules, only the Preliminary Inquiry Committee could only propose to the Board to discipline the offending dentist or medical practitioner.

106. It is for those reasons that this court would intervene by invoking Article 165(6) & (7) of the Constitution to call into the High Court those proceedings conducted by an inferior body without jurisdiction and declare them a nullity, to ensure fair administration of justice. Thus, an act which is void is a nullity in law. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so (Per **Macfoy vs United Africa Company Ltd[1961] 3 ALL ER 1169 at 1172**).

107. It is also for that reason that I agree with the holding in the **Pastoli vs Kabale District Local Government Council & Others** case (supra) where it was held, inter alia that acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality.

108. The proceedings by the Professional Conduct Committee having been conducted illegally and without jurisdiction since Professional Conduct Committee was and is not a successor of Preliminary Inquiry Committee, the same are hereby declared a nullity, and void. See also **Jagdish Sonigra v Medical Practitioners and Dentists Board & 2 Others** on the functions of the Preliminary Inquiry Committee.

109. For all the above reasons, I find that the exparte applicant has demonstrated that it is entitled to the orders sought in prayer No 1 and 3 (1) of the notice of motion. Accordingly, I have no hesitation in finding and holding that the entire disciplinary proceedings against the exparte applicant were a nullity for being undertaken by a body that had no such power to conduct proceedings and or make any binding decision capable of adoption by the Board for implementation.

110. Prayer (2) seeking mandamus is not available as the Preliminary Inquiry Committee has no jurisdiction to hear and determine a complaint which was lodged prior to the 2013 Amendment Rules.

111. Accordingly, I direct that the complaint if any shall be referred to the Board for appropriate action as stipulated in the Act.

112. I order that each party shall bear their own costs of these judicial Review proceedings.

113. Having found that the new 2013 Rules are inconsistent with the Parent Act, I direct that the Deputy Registrar do effect service of this judgment upon the Attorney General, the Kenya Law Reform Commission and the Principal Secretary Ministry of Health to examine the Medical Practitioners and Dentists Act and Rules made thereunder with a view to engaging relevant stake holders for purposes of urgent review of the Act and the Rules. This is essential as many patients continue dying in the custody and care of hospitals which could otherwise have been disciplined for misconduct and ordered to make amends but the Act does not make such provision for such discipline of medical institutions. Further, the bodies which are responsible for disciplining Medical Practitioners and Dentists are established by the Rules and not the parent Act which is also a questionable issue.

Dated, signed and delivered in open court at Nairobi this 28th February, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Muiruri advocate for the exparte applicant

Mr Museve h/b for Mrs Guserwa for the 2nd interested party

N/A for the Respondents

N/A for the 1st Interested Party

N/A for the 3rd Interested Party

CA: Kombo