REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION JR NO. 220 OF 2016

IN THE MATTER OF: PRELIMINARY INQUIRY COMMITTEE CASE NO. 51 OF 2015

IN THE MATTER OF: MEDICAL PRACTIONERS AND DENTISTS ACT, CHAPTER 253 LAWS OF KENYA AND THE RULES THERE UNDER

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA AND 53 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: RULING OF THE PRELIMINARY INQUIRY COMMITTEE CASE NO. 51 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

MEDICAL PRACTIONERS AND DENTISTS BOARD.....RESPONDENT

CAROLINE GICHERO

(On behalf of the late Esther Gathoni (Deceased).....INTERESTED PARTY

EX PARTE:

KENYATTA NATIONAL HOSPITAL BOARD

JUDGMENT

1. By a Notice of Motion dated 26th May 2016 brought under the provisions of Sections 8(2) and 9 of the Law Reform, Act, Order 53 rules 3 and 4 of the Civil Procedure Rules, Cap 26 Laws of Kenya and all enabling provisions of Laws, the exparte applicant **KENYATTA NATIONAL HOSPITAL BOARD** seeks from this court judicial review orders for:

> **a. AN ORDER OF CERTIORARI** to remove to this honourable court and quash the decision of the Respondent-**MEDICAL PRACTIONERS AND DENTISTS BOARD** dated 21st day of April 2016 against the Applicant by the Preliminary Inquiry Committee to the effect that:

i. Kenyatta National Hospital Board be and is hereby reprimanded for holding a patient, Esther Gathoni Ngatia, within the Hospital between 23rd March 2015 and 1st April 2015 or thereabout, without offering adequate treatment and for failing to refer the said patient to another institution under the public private arrangement or otherwise. The medical practitioners working with the said Hospital are directed to uphold the Hippocratic Oath while treating and managing patients at the said Hospital.

ii. Kenyatta National Hospital Board is directed to enter into negotiations with the family and/or Estate of Esther Gathoni Ngatia with a view to compensating the Estate and thereafter update the Chairman of the Medical Practitioners and Dentists Board on the progress within the next Ninety (90) days.

iii. The Director of Kenyatta National Hospital Board is directed to furnish the Board with evidence of improvements being made at its Accident & Emergency Unit in terms of patient management and public relations within the next Thirty (30) days.

b. **AN ORDER OF PROHIBITION** to prohibit the Respondent- **MEDICAL PRACTIONERS AND DENTISTS BOARD (KMPDB)** from implementing the Decision dated 21st day of April 2016 against the Kenyatta National Hospital Board by the Preliminary Inquiry Committee.

a. **THAT** costs of this application be provided for.

2. The Notice of Motion i**s** supported by the **STATEMENT** and **VERIFYING AFFIDAVIT OF CALVIN NYACHOTI** and or further grounds set out as follows:

i. T**HAT** the Respondent proceeded with the Preliminary Inquiry on the basis of a complaint by a stranger unknown to the Hospital or the Respondent and lacking ***locus standi*** before the Tribunal;

ii. **THAT** the process adopted by the Respondent was tainted with procedural impropriety and fell short of a fair administrative action and right to be heard as provided for in the Constitution;

iii. **THAT** the decision by the Respondent was unreasonable and biased against the Applicant;

iv. **THAT** the Applicant was not accorded an opportunity to be heard either through its representative or its advocate before the adverse orders were issued against it contrary to Section 20(2) of the Medical Practitioners and Dentists Act, (hereinafter the Act);

v. **THAT** the proceedings by the Respondent against the Applicant did not afford the Respondent its right to a fair hearing;

vi. **THAT the** Preliminary Inquiry Committee was unlawful and improperly constituted and convened contrary to Rule 3 of the Medical Practitioners and Dentists (Disciplinary Proceedings (Procedures) Rules, 1979 as amended by Legal Notice 223/2013 r.6;

vii. **THAT** the Preliminary Inquiry Committee's decision was *ultra vires*, irregular, unconstitutional and was issued without jurisdiction; and

viii. **THAT** that the interest of justice would be served by the grant of the orders sought herein.

3. The exparte applicant's case as stated in the facts contained in the statutory statement and verifying affidavit sworn by **CALVIN NYACHOTI,** the applicant's Corporation Secretary and Senior Assistant Director, Legal Services of the Applicant **-KENYATTA NATIONAL HOSPITAL BOARD** is that vide a letter dated **28th July 2015 the** Respondent Board (KMPDB) notified the Applicant of a complaint against them by the interested party **CAROLINE GICHERO (on behalf of the late Esther Gathoni (Deceased)** and further required the Hospital's Board to supply it with comprehensive report, certified copy of the patient's file, statements of medical personnel who treated the deceased and other relevant

information.

4. That vide a letter dated 4th August 2015 the Applicant responded to the letter dated 28th July 2016 by the Respondent, as shown by annexture

5. That through an email dated 4th May 2016 from Caroline Gichero the interested party /complainant herein to the Respondent, the interested party informed and supplied a purported copy of a decision by the Respondent, which hitherto was never served on the Applicant contrary to **Rule 10Y of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules,** 1979 as amended by Legal Notice 157/1979, 21/212, and 223/2013 .

6. That the decision of the KMPDB was contrary to rules of natural justice and Article 50(b), (f) and (k) of the Constitution which are the right to a fair hearing for the reason that the Applicant was tried in absentia, was never afforded an opportunity to adduce and challenge evidence before the Respondent and as provided for under Rules 10D, 10N (3),(4) and 10U of the Rules.

7. that from the complaint which is the same document filed with the respondent, the complainant did not have the legal capacity to represent the estate of the deceased and therefore lacked ***locus standi*** in the absence of grant of letters of administration.

8. that under rule 3 of the rules, the preliminary inquiry committee of the respondent is convened by the chairman who is the director of medical services or his deputy.

9. that the proceedings or meeting leading up to the decision of the Respondent against the Applicant was convened by neither the Director of Medical Services nor his Deputy and neither of them participated nor were in any way involved in the proceedings.

10. that the decision of the Respondent neither indicates the quorum of the Preliminary Inquiry Committee nor whether the decision was a unanimous decision or majority decision as required under Rule 10Y(2) of the Rules.

11. that in addition, the decision by the respondent herein was made without jurisdiction for the reason that the jurisdiction of the Respondent under Section 20 of the Medical Practitioners and Dentist Act, Cap 253 (hereinafter referred to as the Act) applies to Medical Practitioners rather than institutions such as the Applicant.

12. that further the decision of the Respondent dated 21st April 2016 is unreasonable for having referred to alien arrangements by the name ***"Public Private Arrangement"*** which is unknown in the sector or in law.

13. that the Respondent in its decision dated 21st April 2016 is irrational and unreasonable considering blood collection and transfusion in Kenya is exclusively co-ordinated by the Kenya National Blood Transfusion Services and that the availability of blood for transfusion is a factor of many considerations including the efforts of the family of the patient affected.

14. that also, the Respondent's decision dated 21st April 2016 is unreasonable and irrational and that this is evident in the fact that it failed to consider that the Applicant is at the apex of the Kenya Health Sector Referral Strategy referral structure and there is no system in place for the Applicant to refer its patients or patients referred to it to private health care providers.

15. that in any event the arrangement for referral can only exist if and where the Applicant meets the costs of treatment of such referrals.

16. that further the Respondent's decision was unreasonable and irrational for the reason that the Respondent failed to consider that in the absence of a bed in the Applicant's Intensive Care Unit (ICU) or

the High Dependency Unit (HDU), there is very little the Applicant could do.

17. that it is in the interest of justice that the orders sought are issued for justice to be done and seen to be done to the Applicant.

18. The Respondent **MEDICAL PRACTIONERS AND DENTISTS BOARD** filed a replying affidavit sworn by **DR. DAVID TRUMAN KIIMA** the Deputy Director of Medical Services with the Ministry of Health and that at the material time he was the Chairman of the Preliminary Inquiry Committee of the MPDB when the said Committee undertook an inquiry on the complaint leading to these judicial review proceedings.

19. the respondent's defence is that the Board is a Statutory body established under the Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya, hereinafter referred to as "**the Act**", and that the Board exercises most of its statutory duties through Committees consisting of Board members.

20. that the Board has many functions as set out in the Act, which includes the licensing and registration of medical and dental practitioners, licensing medical institutions, and conducting disciplinary proceedings on complaints lodged against practitioners or medical institutions in Kenya as set out in Section 20 of the Act and the applicable Rules, among other functions.

21. that in this case, a complaint was lodged with the Board by Caroline Gichero ("**the complainant**") interested party herein against Kenyatta National Hospital ("***the Hospital***") following the death of Esther Gathoni (**"the Patient"**) who was at the material time a patient at the said Hospital.

22. that that upon receipt of the said complaint, the Board wrote and served the Hospital with a copy of the complaint and requested for statements and a copy of the patient's file among other documents.

23. that the Hospital responded to the Board's request by submitting the case summary, a statement of the medical personnel who were involved in the treatment and management of the patient together with copies of the patient's file, medical reports and other documents.

24. that as was the practice, the documents received from the Hospital were reviewed by one of the members of the PIC, who is also a practicing medical practitioner and a consultant in the applicable medical field, and thereafter a report was submitted to the Preliminary Inquiry Committee ("***PIC"***).

25. that the Preliminary Inquiry Committee is a Committee of the Board established under the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules ("*the Disciplinary Rules*") for purposes of undertaking inquiries, as stipulated in Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.

26. that pursuant to Rule 4 (1) of the Disciplinary Rules, as read with Rule 10P of the said Rules, the Board has powers to receive and review documents and statements relating to any complaint lodged against a medical or dental practitioner or an institution.

27. that in the event the PIC confirms that the documents and statements submitted to the Board are sufficient to ***enable it undertake the inquiry conclusively without calling for oral evidence it has the powers to proceed with the inquiry as the issues are in most cases of medical nature***.

28. that pursuant to Rule 10N of the Medical Practitioners and Dentists (Disciplinary Proceedings) Rules, the PIC has the powers to conduct hearing 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 Board.

29. that the members of the PIC reviewed the documents presented before the Board and noted that the Patient was presented at the Hospital after a referral from Metropolitan Hospital where she had been taken after a road accident within Nairobi.

30. that the preliminary Inquiry Committee of the Board consists of practitioners and consultants in different specialties in medicine and dentistry and they discuss matters before them fairly and **where necessary they also give parties the opportunity to give evidence and also produce documents relating to the complaint before it, as most complaints are on i**ssues or allegations relating to the practice of medicine and dentistry and management of patients.

31. that section 20 of the Medical Practitioners and Dentists Act and the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979, set out the process for undertaking disciplinary proceedings and inquiries on complaints lodged before the Board.

32. that the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979, were amended vide Legal Notice No. 21 of 2012 and No. 223 of 2013, which set out, among others, the following; -

The Functions and power of the PIC and the Professional Conduct Committee;

The process for undertaking an inquiry by the PIC.

33. that at the allegations made by the Applicant herein are unmerited as the Hospital has a right in law to challenge the decision of the PIC or the Board in the High Court as stipulated in the Act.

34. that the Application herein lacks in merit for the following;

i. The Board reviewed the complaint and documents received and then referred it to the PIC of the Board to undertake an investigation or inquiry in exercise of its mandate under the Act;

ii. The complaint as lodged at the Board related to the treatment and management of a patient under the care of a Medical Practitioner registered by the Respondent and a Hospital licensed by the Board and as such the matter was well within the jurisdiction and functions of the Board;

iii. The Applicant has the right to appeal to the High Court against the decision of the PIC or Board as set out in the Act;

iv. The Board and the PIC followed the process in undertaking the inquiry that consequently resulted to the decision of 21st April 2016.

v. The Respondent has the jurisdiction to undertake disciplinary proceedings and make the orders as those in its decision of 21st April 2016.

vi. The PIC is a committee of the Board and the said Committee was convened by the Board in compliance with the Rules.

vii. There is no evidence of bias as alleged or at all and the allegations as pleaded are in bad faith and an afterthought, and

viii. It is in the interest of the general public in Kenya that the Board and its Committee be allowed to perform their functions as stipulated in the Act and the applicable Rules, more so considering the nature of the complaint and the general interest of the public in Kenya.

ix. The issues under inquiry by the Board at the material time were on medical issues and the documents and patient's file before the Committee had clear evidence to support the findings in the decision of 21st April 2016.

x. The suit herein is founded on a misinterpretation of the Act and the applicable Rules. The respondent urged the court to dismiss the applicant's notice of motion.

SUBMISSIONS

35. The parties filed written submissions to canvass the notice of motion. The exparte applicant's counsel filed submissions dated 10th August 2016 relying on its pleadings filed in court and the documents attached to its verifying affidavit and sought for the court's determination on the following framed issues:

On whether the Preliminary Inquiry had the jurisdiction to hear matters against the Applicat institution? It was the Applicant's contention that the Respondent's jurisdiction as provided under the Medical Practitioners and Dentists Act Cap 253(hereinafter the Act) is limited to Medical Practitioners and Dentists as individuals as opposed to institutions. reliance was placed on the case **of Republic v Medical Practitioners & Dentists Board & 2 others Ex-parte Majid Twahir & another (2016) eKLR** where the court was confronted with the same question of jurisdiction of the Respondent on matters concerning medical institutions. The court held as follows:

> ***55. Pursuant to the said principle it would follow that the words "for purposes connected therewith and incidental thereto" must necessarily refer to the purposes connected and incidental to "provisions for the registration of medical practitioners and dentists."In other words the words "for purposes connected therewith and incidental thereto" ought not to be read in a manner that expands the objects for which the Act was enacted.***
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> ***56. Apart from that it is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act including the preamble are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. All the constituents' parts of a statute are to be taken together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words and phrases occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. To my mind, the above mentioned principle equally applies to different parts of the same section which must be construed as a whole whether or not one of its parts is a saving clause or a proviso and that the subsection must be read as parts of the integral whole as being interdependent, each portion throwing light if need be on the rest since it is an elementary rule that construction of a section is to be made of all the parts together. This was the position in Jahazi vs. Cherogony [1984] KLR 814; [2008] 1 KLR 273 (EP) where it was held that:***
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> ***"In order to determine the intention and purport of legislation it is imperative to look at the legislation as a whole. Every statute must be interpreted on the basis of its own language since words derive their colour and content from the context and the object of the statute is a paramount consideration. Where rules intend certain things to be done by a petitioner alone, that is stated expressly, and where it is intended that certain acts are to be done by advocates or agents again that is stated expressly. Where the language of the Act is clear and explicit, the court must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature."***
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> ***57. 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.

58. 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.

59. 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.

60. As was held in Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others Civil Application No. Nai. 268 of 1999:

"The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in there ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation."

61. 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.

62. I must however make it clear that since the investigations and inquiry by the PIC may require that certain material be availed to it, there is nothing barring the PIC from summoning the administrators of a Hospital to shed some light on such investigations and even produce documents required by the PIC in furtherance of its mandate as long as it is made clear that they are not under investigations unless such administrators are the ones against whom complaints have been lodged. It is therefore my view that the decision of this Court would not bar any person injured as a result of the acts or omissions of the doctors or the Hospital from pursuing the remedies available to them against any person or institution which may be found liable or culpable.

63. It was contended by the Respondents that since the applicants had in the past applied for licensing from the Board, they are precluded from contending that the Act does not apply to the Hospital. However, as was appreciated Simpson, J (as he then was) in Destro and Others vs. Attorney General [1980] KLR 77; [1976-80] 1 KLR 1590:

"In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words no estoppel can legitimate an action, which is ultra vires…Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from

it. But no rigid distinction need be made since the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again the principle of ultra vires must prevail when it comes into conflict with the ordinary rule of law."

64. It follows that the mere fact that no one has in the past raised the issue of jurisdiction of an authority does not confer such jurisdiction on it if the same does not exist and whenever such an issue comes before Court, the Court must squarely deal with and pronounce itself thereon.

65. It was contended that there was a lacuna in the law which was cured by the promulgation of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000 by the Minister. In my view, if there was a lacuna in the Act, such lacuna could only be cured by the amendment of the Act and not sneaked in by way of subsidiary legislation where there is no express power in the Act enabling such subsidiary legislation to be made.

66. As Lord Atkin held in Rex vs. Electricity Commissioners (1924) 1 KB 171,at page 205:

"Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writs of Judicial Review."

Findings

67. 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. It follows that such proceedings cannot also be instituted against the administrators of such institutions in their capacities as such administrators.

36. Further reliance was placed on the case of **Republic v Medical Practitioners and Dentists Board & another Ex Parte J. Wanyoike Kihara (2015) eKLR** , at paragraph 52 where the court held;

"If the PIC had no powers to take the aforesaid actions, then the said decisions were either without jurisdiction or in excess thereof. It is however trite that an action taken without jurisdiction is void ab initio and if an act is void, then it is in law a nullity and it is not only bad, but incurably bad. It is automatically null and void without more ado..."

37. It was submitted that the issue raised in the **Majid Twa**hir matter was on all fours with this case and therefore the court was urged to uphold it.

38. the applicant further relied on **Republic vs Kenya Medical Practitioners and Dentists Board & 2 others (2013) eKLR** where the court at paragraph 16 the decision held citing the Supreme Court Practice 1997 Vol 53/1-14/6 that:

"***The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process iself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute by law the decision in the matter in question... The Court will not ... on judicial review application act as a court of Appeal from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has***

been conferred on that body, unless it has been exercised in a way which was not within that body's jurisdiction."

39. In the same decision, the court quoted at paragraph 19 the decision in **Pastoli v Kabale District Local Government Council and Others (2008) 2 EA 300:**

> "***In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..."*** emphasis ours

On whether the PIC was properly convened and constituted?

40. The applicant averred that the PIC which purportedly considered the complaint against the Applicant acted contrary to Section 3 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 as amended by legal notices which rule 3(3) stipulates: "***The Chairman of the Preliminary Inquiry Committee shall convene the meetings of the committee as and when necessary."***

41. It was submitted that even though the Applicant raised the issue of convening and constituting of the PIC the Respondent's response at **paragraph 21(vi) of the Respondent's replying affidavit** was lacking in depth and facts. that apart from averring in its Replying Affidavit that the PIC was convened by the Board in compliance with the rules, the response does not give details of how such compliance was undertaken such as ***interalia*** when the same was undertaken and who were the members present.

42. **Further, it was submitted that i**n any event, by the Respondent's own averments in its replying affidavit at **paragraph 21(vi),** it is clear that the PIC was not convened by the Director of Medical Services or his Deputy but by the Board which is contrary to Rule 3(3) of the Rules.

43. It was further submitted that the Replying affidavit was sworn by the Deputy Director of Medical Services who has the powers to convene the PIC meeting in accordance with Rule 3(3) but he has not averred that he convened the meeting which undertook the review of the complaint against the Applicant.

44. Further, that by the Respondent's own averments it clear that the review of the documents presented to the Board by the complainant was done by a single member of the PIC who is not named and who presented a report to the PIC. It was submitted that it is curious and very telling that minutes of the meeting where the presentation and adoption of the report was done were not attached, contrary to Rule 3(1) which provides: ***There is hereby established a committee to be known as the Preliminary Inquiry Committee which shall consist of seven Members elected from among the members of the Board.***

45. **That the convening of the PIC was also contrary to** Rule 4 (1) which provides that the functions of the PIC shall be to inter alia conduct inquiries into the complaints submitted to it under the rules and make appropriate recommendations to the Board.

46. It was submitted that the review is supposed to be conducted by the PIC as a whole and not by one member of the PIC, as the jurisdiction of the PIC entails the whole committee not an individual member.

47. From the foregoing, it was submitted that if there was a meeting of the PIC on the complaint before the court, the same was convened by a body or person without authority to do so and therefore the same can only be void and a nullity.

Whether the Applicant was afforded an opportunity to be heard

48. the applicant relied on several provisions of the Act among them;

i. Section 20(2) of the Act which provides: "***Upon any inquiry held by the Board under subsection (1) the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or by an advocate."***

ii. Rule 10D of the Rules provides: "***In determination of complaints under these Rules, the Committee shall have due regard to the principles of natural justice and shall not be bound by any legal or technical rules of evidence applicable to proceedings before a court of law***."

iii. Rule 10U of the Rules provides that: *"The Committee shall grant to any party a reasonable opportunity-*

a. To be heard, submit evidence and make representations and;

b. To cross examine witnesses to the extent necessary to ensure fair hearing."

49. it was submitted that the Respondent vide a letter dated 28th July 2015 notified the Applicant of a complaint against it by the 1st interested party and consequently required that it supplies the Respondent with a comprehensive report, certified copy of the patient's file, statements of medical personnel who treated the deceased and other relevant information.

50. That the requirements were thereafter submitted by the Respondent to the Applicant with the legitimate **expectation that it would be invited to a hearing and be afforded an opportunity to be heard through an advocate and at the very least cross examining its accusers and witnesses.**

51. It was therefore submitted that Section 20(2) of the Act is very clear that the person being inquired into should be afforded an opportunity of being heard either in person or through an advocate.

52. That Since the Applicant is an institution it is trite that it can only be heard through a representative who in this case would be an advocate.

53. on the contention by the Respondent that the PIC has the powers under Rule 10N of the Rules to conduct its proceedings in a manner it considers suitable for the proper, fair and expeditious determination of any complaint in fulfilment of its objectives and that of the Board; and the further contention by the respondent that the PIC has the powers to hear and determine a complaint without hearing oral evidence under Rule 10P of the Rules; the applicant's counsel submitted that- **first** the two rules are contrary to the provisions of statute and therefore cannot stand as it is trite that where a provision of the subsidiary legislation is contrary to statute the provisions of the statute prevails.

54. reliance was placed on ***Kalpana Rawal V Judicial Service Commission & 5 others (2016) eKLR*** where the supreme court held as follows;

> "***Section 31 (c) of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya) provides that no subsidiary legislation shall be inconsistent with the provisions of an Act. Taking all the forgoing into account, I am of the view that the Rules cannot be said to be superior to the Supreme Court Act. The Supreme Court Rules must be taken to complement and not substitute or outrank the Supreme Court Act. Consequently, both the Act and the Rules must be read in conformity with the Constitution and not contradict or detract from it.***
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> ***[40] Further, the Supreme Court Rules, being subsidiary legislation must be read in a manner consistent with the Supreme Court Act. Similarly, powers conferred by subsidiary legislation must be exercised in a manner that does not contravene an Act of Parliament and if the relevant provisions are irreconcilable the statutory provisions trump the provisions of the subsidiary legislation***." Emphasis ours

55. And **second,** that Rule 10P is explicitly applicable only to applications, by its unequivocal wording,

and not the substantive complaint.

56. it was submitted that in the ***Majid Twahir*** case the court while considering the principles of natural justice in relation to the right to be heard at paragraph 47 held;

> "***It is therefore clear, that it is not the description of the body undertaking the statutory functions or the phrase given to its undertaking that dictate the manner in which its functions are to be carried out. Therefore such words as "investigations", "inquiries" and "recommendations" means very little unless taken in the context of the power being exercised or the duty being undertaken. The manner in which the duty is to be undertaken would for example the findings automatically lead to adverse actions being taken such as interdiction or suspension, it cannot be argued such proceedings are mere recommendations hence the rules of natural justice do not apply. It was due to the foregoing that this court in Republic vs Kenya Medical Practitioners and Dentists Board & 2 others (2013) eKLR was not satisfied that the Respondent, which is the same Board herein, conducted itself in a manner that met the criteria set out in Article 47 of the Constitution with respect to procedural fairness hence certiorari was issued to quash its decision."***

57. It was submitted that it is quite clear how adverse the orders issued by the Respondent were for example it was ordered that the Applicant enter into negotiations with the deceased family with a view of compensating them. That in this case, an opportunity to be heard orally and by cross examining witnesses ought to have been afforded to the Applicant. Further, that the decision issued by the Respondent on 21st April 2016 was null and void for failure to adhere to the principles of natural justice specifically the right to be heard.

Whether the Complaint was initiated by a person with locus standi?

58. **Counsel for the exparte applicant submitted that u**nder Section 2 of the Law Reform Act and Section 4 of the Fatal Accidents Act, the person who is entitled to bring a cause of action in respect of the estate of a deceased person is a personal representative or an executor or administrator respectively of the estate of the deceased person. In that case such a person ought to first obtain appropriate grant so as to have the necessary ***locus standi***. Reliance was placed on **Julian Adoyo Ongunga & another vs Francis Kiberenge Bondeva & another (2016) eKLR**.

59. It was submitted that in the present case the person (Caroline Gachero) who filed the complaint before the PIC purported to do the same on behalf of the deceased person. That it is not clear in what capacity or under what authorisation she purported to do so. In the applicant's view, the requirement that one filing a complaint or a suit must make it clear in what capacity they are doing the same since this would prevent busy bodies from abusing the process of justice and taking advantage of the system to benefit themselves at the expense of those entitled to. Reliance was placed on the case of **Julian Adoyo** where the court at paragraph 29 held:

> "***In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.***"

60. Further reliance was placed on **Registered Trustees of Ruiru Sports Club vs Isaac Karuri Nyongo & 16 Others** where it was held:

> "***In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act."***

61. It was therefore submitted that the complaint was null and void being instituted by a person who

lacked the *locus standi* to institute in the first place.

Whether the decision of the Respondent was irregular and issued through a flawed process?

62. It was submitted on behalf of the applicant that Under Rule 10Y (2) of the Rules, PIC is required to record in its decision whether it was unanimous or taken by a majority of the members present. In this case, it was submitted that looking at the decision dated 21st April 2016 it does not indicate whether it was a unanimous decision or majority decision. In addition that Rule 10Y(6) requires that a copy of the decision by the Committee is sent to each party upon entry of the decision. In this case, it was submitted that the Respondent did not sent or notify the Applicant of the decision, and that in fact the Applicant became aware of such a decision through an email from the 1st interested party**. It** was therefore submitted that the decision by the Respondent was irregular and the process through which it was issued was flawed.

63. In Conclusion it was submitted that from the foregoing the Applicant had demonstrated that it deserves the orders sought in its Notice of Motion herein. **They therefore urged** the court to issue the orders as sought with costs to the Applicant.

64. The interested parties jointly filed their submissions relying on the 2nd Interested Party's Replying affidavit and (3) listed Authorities as filed. They framed the following issues for determination:

> ***a. Does the Respondent have jurisdiction over institutions as opposed to private medical practitioners?***
>
> ***b. Did the 1st Interested Party have locus standi to lodge the complaint?***
>
> ***c. Were the disciplinary proceedings procedural and administratively fair?***
>
> ***d. Was the decision unreasonable and biased as against the Applicant?***
>
> ***e. Was the PIC properly constituted?***
>
> ***f. Are the remedies sought available to the Applicant?***

65. On whether the Respondent had jurisdiction over institutions? it was submitted that the Respondent's jurisdiction has since been expanded to address itself to institutions as well and that in direct contradistinction to the decision in**JR. No. 94 OF 2015**[**Republic v Medical Practitioners & Dentist Board & 2 Others Ex-Parte Majid Twahir& Another (2016) eKLR]** which was solely and extensively relied on by the Applicant, the interested parties submitted as follows:

> a. The preamble to the Act provides *viz, "An Act of* ***Parliament to consolidate an amend the law to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto," [Emphasis supplied].***

66. It was submitted that the crux of the question of jurisdiction rests upon the interpretation of the phrase **"***and for purposes connected therewith and incidental thereto*. That the High Court opined in the following broad terms on the interpretation of what constitutes "connected and incidental purposes":

> ***"Consequently, it is my finding and decision that the Board's [Medical Practitioners and Dentists Board] actions were not ultra vires the provisions of the Act. I am fortified in this finding by the statements of the court in*** **Re Matter of an Application by Ali Sele, Benson Wairagu& Joseph Ng'ethe Gitau [2008]** ***eKLR***. In this case, the learned judge accepted as good law the citation in ***De Smith's Judicial Review of Administrative Action (3rd Edition)***in which the author states:

"The House of Lords has laid down the principle that "whatever may fairly be regarded as incidental to, or contingent upon those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires."

67. further reliance was placed o**n Miscellaneous Application 280 of 2007 [Republic V Minister For Health & Another Ex-Parte Avenue Healthcare Limited[2012]eKLR], where the court** in addressing itself to the expanded mandate of the Board [which is the Respondent herein], the Court was of the opinion that:

"A reading of the MPDA discloses that the Act not only deals with medical practitioners and dentists but also purposes connected therewith and incidental thereto. Apart from dealing with registration of medical practitioners and dentist, section 15 of the Act empowers the Board to licence private practitioners……

68. That the Court in that very case also contextualized the approach to be adopted in interpreting the Rules promulgated under section 23 of the Act which *inter alia* includes the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000 and that the court provided further that:

"It is instructive to note that section 15(5) of the MPDA specifically empowers the Board to authorise premises for private practise. It is in this respect that the rules promulgated under section 23 of the Act must be read. I therefore agree with Mr Ligunya that licensing of practitioners must of necessity permit the Board to authorise premises for private practitioners and any regulations to this effect are incidental to the licensing of private medical practitioners. It may well turn out that premises "habitually used" by private practitioners are private hospitals or nursing homes and thus fall within the purview of the MPDA. In summary, it is not ultra vires for MPDB to authorise private institutions by way of licences.

On the whole, I am satisfied that the Board has the authority to licence, regulate and charge fees upon private hospitals, nursing homes and health institutions in so far as the regulations relate to licensing of private practitioners and authorising premises for private practitioners and in the circumstances the Medical Practitioner and Dentists (Private Practice) Rules are intra vires the PHA and the MPDA"

69. It was submitted that the Disciplinary Rules (1979)as extensively amended through the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules, 2013 ("the 2013 Amendment") issued through Legal Notice No. 223 of 2013 of 20th December, 2013 is a beneficiary of this inclusive and broad approach to interpretation and the court was urged to so find that the amendments followed other amendments that had been effected through Legal Notice No. 21 of 2012. That this *ipso facto* means that institutions licensed by the Respondent can effectively be taken to task over their failure to adhere to their licensing conditions as is the present case.

70. That Following the 2013 Amendment, Rule 4(1) now reads:

"The functions of the Preliminary Inquiry Committee shall be to:

a. conduct inquiries into the complaints submitted to it under these Rules and make appropriate recommendations to the Board;

b. ensure that the necessary administrative and evidential arrangements have been met so as to facilitate the Board to effectively undertake an inquiry under rule 6;

c. promote mediation and arbitration between the parties and refer matters to such mediator or arbitrator as the parties may in writing agree; and

d. at its own liberty record and adopt mediation agreements or compromise between the parties, on the terms agreed and thereafter inform the chairperson."

71. It was submitted that the import of the above section of 2013 Amendment on the Preliminary Inquiry Committee was aptly elucidated by Odunga, J in the case of Judicial Review **Miscellaneous Application Number 70 OF 2014 [Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR]**at paragraph 47 thereof where the learned Judge stated:

> ***"Some of the amendments that were introduced vide Legal Notice Number 233 (sic) of 2013 were to the effect the Preliminary Inquiry Committee was empowered, in consultation with the Board, to levy reasonable costs of the proceedings from parties; to admonish a doctor or dentist or the institution and conclude the case; to promote mediation and arbitration between the parties and refer matters to such mediator or arbitrator as the parties may in writing agree; and at its own liberty, record and adopt mediation agreements or compromise between the parties, on the terms agreed and thereafter inform the chairperson."***

72. It was further submitted that the 2013 Amendment also introduced Rule 4(3) which states:

> ***"The Preliminary Inquiry Committee shall, in consultation with the Board, have the power to –***
>
> **a. levy reasonable costs of the proceedings from parties;**
>
> **b. make an order compelling a medical practitioner or dentist to undergo continuous professional development of not more than fifty points;**
>
> ***c. suspend the licence of a medical institution for a period of not more than six months;***
>
> **d.** ***make an order for the closure of an institution pending the compliance by that institution, of a condition or requirement under the licence issued to it under the Act; and***
>
> **e. make such further recommendation as the committee deems fit."**

73. That the above provisions of the rules as amended finally put to rest the pre-existing *lacunae* in regulatory framework over institutions offering medical and dental services and where medical practitioners and dentists operated. That the Applicant conveniently relied on the Act and the Rules as previously enacted but avoided the explicit amended provisions of the very legislation.

74. It was further submitted that the Applicant cannot have it both ways. it was submitted that the court in **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR [Supra] recognised the effect of expanded powers of a quasi-judicial body *viz*:**

> ***"54.Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions 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."***

75. That it is settled and trite that institutions are by law under the purview of the Respondent and Courts have so held as was the case in **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR [Supra]where the Court expressed itself in the following terms:**

> ***"40. Whereas the object of the Act does not expressly state the regulations of clinical laboratories, and for that matter laboratories under private hospitals, it would be incongruous to conclude that the same were exempted from the operation of the Act. Indeed I would consider the want of express inclusion of the regulatory function in the objections of the Act as a product of poor drafting and not lack of intent by Parliament to have all facilities whether public or private which offer medical laboratory services regulated and more so by one body. While I recognize that it is not within court's jurisdiction in the present application adjudge the merits of the decisions being challenged before me, I find that a contrary interpretation of the Act would lead to the undesired result that persons seeking medical laboratory services from private institutions would be left exposed to the perils of an unregulated practice and service delivery. That would not only be discriminatory but go against the public interest and make nonsense of the principle that law should serve the public interest.(See Francois Bennion(supra")*.**

76. Further, it was submitted that the jurisdiction of the Respondent over the Applicant is exemplified in the case of **Industrial Cause 24 of 2013[Kenya Plantation And Agricultural Workers Union V James Finlay (K) Limited [2013]eKLR]**where it is stated:

> ***"As submitted for the respondent, a hospital is a special and highly regulated business….. Section 42 of the Interpretation and General Provisions Act, Cap. 2 provides, "42. Where a written law confers a power or imposes a duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises." Under paragraph 12 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000, it is the responsibility of the owner and the managing body of a private medical institution to acquaint themselves fully with the qualifications and the professional conduct of all medical practitioners and dentists working at the private medical institution and shall consult the Board in case of any doubt. Further, the owner or the managing body of a private medical institution and the medical practitioner or dentist concerned, shall be responsible for any instance of professional misconduct occurring within the premises about which they know or ought to reasonably to have known."***

77. It was therefore submitted that an exclusionist reading of the Act together with the attendant Rules in place as amended, as purported by the Applicant, flies in the face of the public interest for which the Act was enacted.

78. From the foregoing, it was submitted on behalf of the interested parties that the existence and in essence the jurisdictional basis upon which the Respondent conducted inquiries into the official complaint of the 1st Interested Party and thereafter rendered its sanctions was acceptable in law.

79. **On whether the 1st Interested Party had *locus standi* to lodge the complaint?** It was submitted that the services of practitioners in the medical and dental professions are germane to the general public as enshrined under Article 43(1) (a) of the Constitution of Kenya; being a fundamental human right. That Protection of professional standards in treatment and maintenance of patients is clearly in the public interest. it was submitted that what amounts to "public interest" is defined in ***Black's Law Dictionary,*** 9th Edition (page 1350) as:

> ***"The general welfare of the public that warrants recognition and protection"* or *"something in which the public as a whole has a stake, especially an interest that justifies governmental regulation."***

80. *It was submitted that the import of the foregoing was well captured in* **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR[Supra]where it was stated:**

> ***"23. Although not argued on a constitutional pedestal, I am acutely aware that the matters before me touch on two key constitutional rights. One is the right to the highest attainable standard of health care services (Article 43 (i) (a)) and the other the right to consumer protection including the right to goods and services of reasonable quality (Article 46 (i) (a)).The purpose of the regulation under scrutiny in the present case is undoubtedly to protect the public from sub-standard medical or health services that would negate their right to health espoused in the Constitution. The court is therefore duty bound to interpret the law in a manner that upholds the constitutional rights aforestated."***

81. *It was therefore submitted that the Respondent acts to protect the public interest in this regard as was* considered in the opinion of the High Court in **Miscellaneous Application No. 667 of 2007 [Jagdish Sonigra V Medical Practitioners & Dentists Board & 2 Others [2008] eKLR]**that:-

> ***"Lastly, is the HCC 367/03 a bar to these [Preliminary Inquiry Committee] proceedings? I say no. The case in the civil courts is in a totally different jurisdiction from the matter before the Board. ……. The matter before the Board is an inquiry into the conduct of the petitioner and it is the Board which will take the necessary steps against the Petitioner if the allegations against him for the injury to Irene. The Inquiry by the PIC will seek to protect the public unlike the suit filed by the 2nd respondent (HCC 367/03) which is a private law issue personal to Irene.***

82. It was submitted that the 1st interested Party is as a public-*spirited person acting bona fide in seeking to uphold the standards of medical services which are a public interest matter. this was guided by the position taken in* **Civil Application No. 29 of 2014 [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR]** where the Supreme Court held:

> ***"In order to avoid frivolous suits, Courts in cases such as John Wekesa Khaoya v. Attorney-General, High Ct. Pet. No. 60 of 2012 have set out parameters to guide the filing of causes in the public interest. These include (paragraphs 18 to 20): (i) the intended suit must be brought in good faith, and must be in the public interest; and (ii) the suit should not be aimed at giving any personal gain to the applicant."***

83. In this case it was submitted that the formal complaint was filed in conformity within the entire above set criterion.

84. In further augmenting the existence of *locus standi* in favour of the 1st Interested Party, the interested parties sought to rely on Article 22 and 258 of the Constitution which expanded the realm of *locus standi*. In **Constitutional Petition Number 2 of 2014 [John Mining Temoi& Another Vs. Governor Of County Of Bungoma& 17 Others[2014] eKLR],** the court in Bungoma, while construing Articles 22 and 258 aforesaid said –

> ***"I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms.***
>
> ***A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom."***

85. It was submitted that the 1st Interested Party acted in part on behalf of the family of the deceased – having been so authorized by family members and having been personally involved during the course of the deceased's admission to the Hospital and subsequent demise-to enforce the rights of the deceased in the form of acting in the interest of the estate of the Deceased. More importantly however, that all her actions were premised on her right as a person to enforce a public interest; being the protection of the public from sub-standard medical or health services that would negate their right to health.

86. It was submitted that the current application before this court clearly affects the interest of the estate of the Deceased, and that it is for this reason that the 2nd Interested Party who is the administrator and the legal representative by virtue of a Limited Grant of Administration Ad Litem of the estate of the late **E**sther **Gathoni Ngatia** came on record.

87. it was further submitted that in the present case, the provisions of section 2 of the Law Reform Act and section 4 of the Fatal Accidents Act are inapplicable for the reason that the formal complaint was lodged in the public interest and for the enforcement of medical professional standards. That it was not lodged in the interest of the estate of the Deceased. And that the Applicant has misconstrued and misapplied the prevailing law in this instance.

88. It was further submitted that the Respondent is by law obligated to receive and take appropriate and necessary action -independent from the complainant- to every complaint directed at it by any person, pursuant to section 20 of the Act and Part II of the Disciplinary Rules among other enabling provisions. That such necessary action may include (1) investigating further on the complaint or (2) even dismissing the complaint with reasons afforded to the complainant. Further, Rule 5(1) of the Disciplinary Rules clearly provides that:-

> ***"5 (1) Whenever a complaint or information is received by the Chairman from a body or person and it appears to him that—***
>
> ***(a)….***
>
> ***(b) that a question arises whether the conduct of a medical practitioner or dentist constitutes serious professional misconduct, the Chairman shall submit the matter to the Preliminary Inquiry Committee and Professional Conduct Committee."***

89. It was submitted that no parameters have been set as to who a complainant is. That any person, whether natural or juristic indeed can lodge a complaint. Further, that Indeed, the position that anybody, including relatives of a medical patient, has *locus standi* before the Respondent was appreciated by the Court of Appeal in **Civil Application No. Nai 189 of 2001 [David Morton Silverstein v Atsango Chesoni [2002] eKLR**] where it was stated:

> ***"The respondent is the daughter of the late Chief Justice Chesoni. Her complaints to the Board against the applicant were (……)***
>
> ***Upon receipt of these complaints, the Board acted with perfect propriety and did what the Act requires of it, namely that it referred the complaints to the Preliminary Inquiry Committee created under Rule 3 in Part II of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.***
>
> ***That Committee received and reviewed the complaints and determined and reported to the Board that an inquiry ought to be held pursuant to Section 20 of the Act. In doing this the Preliminary Inquiry Committee was strictly complying with the provisions of Rule 4"***

90. It was submitted that the 1st Interested Party herein, Caroline Gichero, is a niece of the Deceased and the fact of this consanguine relation was clearly articulated to the Respondent as evidenced from the letter of complaint dated 29th April 2015. Further, that in any event, as correctly put in **Jagdish Sonigra V Medical Practitioners& Dentists Board & 2 Others (Supra)**, proceedings before the PIC of the Respondent is an inquiry into the conduct of the Applicant to take necessary actions against the Applicant. That the Proceedings are in no way instituted for the benefit of the estate of the Deceased but for the benefit of the larger public interest. That the complainant was, therefore, not a stranger.

91. ***On whether the disciplinary proceedings were procedurally and administratively fair?*** It was submitted that Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Reliance was placed on **Civil**

Miscellaneous Application 269 of 2011 [Republic V Kenya Medical Practitioners and Dentists Board & 2 others[2013]eKLR] where it was held *inter alia*:

> ***"…..In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on other issues which were not the subject of investigation by the Tribunal unless the charges are amended and a proper opportunity given to the party charged to respond thereto."***

92. It was submitted that the process undertaken and reasons attendant thereto were properly communicated to the Applicant. On the procedure to be followed by the Respondent under Section 20 of the Act, reliance was placed in **Jagdish Sonigra V Medical Practitioners & Dentists Board & 2 Others [Supra]:**

> ***"…….Complaints of misconduct received by the 1st Respondent are referred to the Preliminary Inquiry Committee (PIC) which is set up under Rule 3 of the Medical Practitioners and Dentists (Disciplinary Proceedings) Procedure Rules. Rule 4 prescribes the functions of the PIC to be; to receive and review complaints against Medical Practitioners and Dentists, and to determine and report to the Board whether an inquiry should be held, pursuant to Section 20 of the Act, in respect of the subject.***
>
> ***The PIC after considering the complaint may reject the complaint if it has no merit and inform the claimant of that decision forthwith, or if the PIC is of the opinion that the complaint warrants reference to the Board, it will refer it to the Board with its findings and recommendations."***

93. In this case, it was submitted that at no point did the Respondent herein depart from the foregoing procedure in handling the complaint filed by the 1st Interested Party herein for the reasons that:

a. A formal complaint was sent to the Respondent *vide* the letter dated 29th April 2015;

b. the Respondent informed the Applicant about the complaint against it vide its letter dated 28th July 2015 and requested from the Applicant the following pursuant to Rule 4(1) as read Rule 10P of the Disciplinary Rules: (1) a comprehensive report addressing the allegation raised in the complaint letter; certified copy of the patient's file; (3) statements from the medical personnel who treated the deceased during her admission in ward 6-D and ward 10-B; and (4) any other relevant information which will assist the Board in its investigations. The Applicant duly complied with this request but only limited to submitting the original patient file and submitting a case summary. The Applicant elected not to submit statements from concerned medical personnel.

c. The Respondent reviewed the complaint and documents received and then referred it to the PIC for purposes of undertaking an investigation or inquiry under the Act;

d. The PIC was properly convened by the Respondent in full compliance with the Act and the Rules.

e. The PIC being comprised of members of the medical profession found the documentary evidence supplied to it by the Applicant under (b) above as being clear and cogent evidence to enable it undertake the inquiry conclusively and thus did not find it necessary to seek the attendance of the Applicant at the disciplinary hearing in keeping with Rule 10N of the Disciplinary Rules.

f. The Respondent *vide* its PIC after having considered the allegations contained in the formal letter *vis-à-vis* the documents referred to in (b) above rendered its decision the Ruling dated 21st April 2016.

94. That the Applicant upon receipt of the decision of the Respondent was at liberty and indeed had an automatic right of appeal but that they elected not to pursue this avenue and instead, prematurely filed the present judicial review proceedings.

95. On the allegations that the Applicant was not afforded fair administrative action and that the Applicant was not heard either through its representatives or its advocates, it was submitted that such contention is a misconceived and cannot subsist in the face of the reasons set hereunder:

a. That as above stated, the right to fair administrative action is constitutionally enshrined at article 47. Based on ***Ridge vs. Baldwin [1964] AC 40****, an administrative body with the power cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case. The Respondent was fully alive to this.*

b. That the personal attendance of the Applicant was lawfully dispensed with as it was deemed unnecessary in the circumstances. that such powers are vested in the PIC hence denying the Applicant of this avenue of lamentation. that Rule 10N of the Disciplinary Rules provides for the procedure for the PIC and that of note is Rule 10N (2) thereof which gives the PIC the discretion to determine the manner of conducting the hearing as it considers suitable and appropriate in the circumstance. that Rule 10N (4) allows for evidence to be tendered in written form in addition to or instead of being orally made. That in any event, Rule 10P clearly allows for determination of applications before it without an oral hearing.

c. That it is trite that the PIC of the Respondent has discretion over its procedure and it is in keeping with this that it dispensed with the need for an oral hearing.

d. That in ***Civil Appeal No. 108 of 2009 [Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR]****, the Court of appeal delivered itself as follows*:

> ***"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."***

96. It was submitted that failure to require for an oral hearing is not by any chance a novel exercise of such discretion and courts are indeed alive to such broad interpretation of rules of natural justice as herein below demonstrated. Reliance was placed on **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR [Supra]the Court stated:**

> ***"65. It was further contended that the applicant ought to have been given a hearing and that this encompass the right to be availed the complaint against him, to examine the witnesses and adduce his evidence. However as is stated by Michael Fordham in Judicial Review Handbook; 4th Edn.at page 1007:***
>
> ***"Procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case."***

97. Also in **High Court Misc. Application No. 12 of 2002 [R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others]**, it was held inter alia as follows:

> ***"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each scale must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for***

expedition indecision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.*"*

98. Further reliance was placed on **Russel vs. Duke of Norfork [1949] 1 All ER at 118, where** the Court expressed itself as follows**:**

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which has been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

99. The respondent also relied on **Misc. Civil Application No. 34 of 2009 Simon Gakuo vs. Kenyatta University and 2 Others** where the court stated *:*

"The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

100. And that in **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [Supra] where the court expressed itself as hereunder:**

"71. In this case, the applicant was given an opportunity to present his version before the PIC. Whereas there is no evidence that he was similarly afforded an opportunity before the Board, the Board simply ratified the recommendations of the PIC. In such circumstances I do not agree that before adopting the said recommendations, the Board was bound to hear the parties afresh".

101. In the premise of the foregoing, it was submitted that the Applicant's claim that it was not afforded a right to be represented by an advocate or such other representatives is not a plausible contention. The above cited authorities are indicative of the discretion allowed to tribunals such as the Respondent's to make a determination as to whether such audience is necessary.

102. The interested parties maintained that the Applicant was afforded a fair hearing before the decision of the Respondent was rendered. that the Respondent in its letter to the Applicant dated 28th July 2015 among other documents specifically requested for; (1) a comprehensive report addressing the allegations raised in the complaint letter; and (2) statements from the medical personnel who treated the deceased during her admission in Ward 6-D and Ward 10-B. These two sets of documentation were clearly the Applicant's presentation of their case and submitted specifically for purposes of conclusive investigation. No limit was placed on the amount of supporting documentation to be supplied to the Respondent in addition to those specifically called for.

103. That it was therefore the 1st and 2nd Interested Parties' humble submission that in the above premise, the Applicant was afforded a fair hearing requisite of fair administrative action as required under Article 47 of the Constitution of Kenya. That representation by an advocate was not deemed necessary and that the Applicant had a further right of appeal to the High Court which forms an additional forum for being heard.

104. **On whether the decision unreasonable and biased as against the Applicant?** It was submitted that Unreasonableness and irrationality of an administrative decision was well captured In **Associated Provincial Pictures Ltd v Wednesbury Corporation [1948] 1 KB 223** where irrationality was defined thus:

> ***"In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may be said, and often is said, to be acting 'unreasonably'. Similarly, you may leave something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head."***

105. **Further, that the court in Petition No. 415 OF 2015Kokebe Kevin Odhiambo &12; others v Council of Legal Education & 4 others [2016] eKLR]**was of the considered view that:

> ***"The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. As was appreciated by Professor Wade in a passage in his treatise on Administrative Law, 5th Edition at page 362 and approved by in the case of the Boundary Commission [1983] 2 WLR 458, 475:***
>
> ***"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."***

106. It was submitted that it had not been shown by the applicant as to which relevant factors were not taken into account by the PIC in arriving at the decision so impugned. That the Respondent in arriving at its decision only took into account the relevant considerations and did not delve into irrelevant considerations. That this is because all the PIC needed to conduct an inquiry and arrive at an appropriate determination was placed before it. Further, that the terms of the Ruling are so clear as to demonstrate that the Respondent indeed considered all the evidence tabled before it in addition to applying its professional expertise in assessing the facts and circumstances surrounding the complaint *vis-à-vis* the conduct of the Applicant. that reasons for arriving at the decision were also graciously supplied by the Respondent.

107. It was submitted that the allegation of bias has not been proven at all by the Applicant whether in its pleadings or in its submissions. That the Respondent clearly considered the formal complaint as well as the representations and documentary evidence tendered by the Applicant in arriving at its decision. That the allegation of bias is therefore misplaced and an afterthought.

108. **On whether the Decision was irregular and *ultra vires*? it was** submitted that the PIC was properly constituted as envisioned under Rule 3 of the Disciplinary Rules. That in the Replying Affidavit

of Dr. David Truman Kiima filed on behalf of Respondent at paragraph 14, the said deponent who was in fact the Chairman of the PIC of the Respondent attests to the fact that the PIC was properly constituted in full compliance with section 3 of the Disciplinary Rules and that it carried out its mandate above board.

109. That since the allegation of improper constitution of the PIC has already been controverted by the party best able to address the court on this issue, who is the Respondent, the Applicant cannot find merit in law to shift the burden of proving their allegation away from themselves.

110. It was submitted that it is well settled under **Sections 107, 108 & 109 of the Evidence Act Cap 80**as well as under common law that whoever alleges must so prove, and that this is a burden the Applicant has fallen short of discharging. That the attempts of the Applicant in casting aspersions upon the composition of the PIC without cogent proof are a mere fishing expedition.

111. That contrary to the Applicant's assertions, paragraph 21(iv) of the Respondent's replying Affidavit is no admission of improper convening of the PIC. That instead, it is in fact testament of the due procedure followed by both the Respondent and its PIC.

112. **On the question of whether the decision was irregular,** it was submitted that the Respondent in its Replying Affidavit is manifestly clear that the composition of the PIC was regular and in full compliance with the law. That the Respondent further averred that at all stages; the conduct of the PIC in determination of the complaint was above Board.

113. That all references to the PIC mean and are to be read as the properly constituted PIC as confirmed by the Respondent, which is the party best able to attest to this issue, unless proof to the contrary is supplied by the Applicant. Once again, the Applicants are caught flat-footed on a fishing expedition.

114. That in any event, the Applicant avers that they are aware of facts relating to irregularity in composition of the PIC and intricate details of the proceedings they in fact did not attend physically, yet No evidence of such knowledge and facts or how they came about them has been furnished at all.

115. **On the issue of service of the Order upon the Applicant**, it was submitted that Rule 10Y (6) of the Disciplinary Rules does require the Respondent to furnish the Applicant a copy of the decision within reasonable time. That having already been served with the Order by the complainant on 4th May 2016 the Appellant as at that date became well notified of the existence and contents thereof. That the applicant was only served with a copy of the decision on 3rd May 2016 and that subsequent service of the very same order by the Respondent, though required, would be superfluous to say the least. it was submitted that no prejudice whatsoever has been alleged as having been visited upon the Applicant as a result of the omission to serve them with the decision of the KMPDB.

116. on whether **the remedies sought available or** whether any solid grounds have been raised to necessitate the granting of the orders sought in the Notice of Motion application., it was submitted that the decision in **Pastoli v Kabale District Local Government Council and Others (2008) 2 EA 300** set out the requisites for judicial review orders thus:

> "***In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety….. Illegality is when the decision making authority commits an error of law in the process of taking or making the act, subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…."***

117. Further, that the scope of the remedies of certiorari and prohibition was considered in **Civil Appeal No. 266 of 1996**[**Republic vs. Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others]**in which the Court of Appeal held:

> ***"The remedies of certiorari and prohibition are tools that this court uses to supervise***

public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated; "Certiorari deals with decisions already made ….Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice..."

118. That from the foregoing, the Applicant has not demonstrated to the satisfaction of the tests set out in the above decisions grounds deserving of an Order for either certiorari or prohibition.

119. It was also submitted that the decision by the Respondent cannot be successfully impeached by the Applicant and that to do so would amount to unduly interfering with the discretion statutorily given to the Respondent and its respective committees to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations.

120. In the above premise, the court was beseeched not to grant the Order of Prohibition and Certiorari as sought in the Notice of Motion application as the application is without merit and unfounded in law. That the Respondent adhered to all requirements of due process and fair administrative action in arriving at the decision it made on 21st April 2015. Hence, the court was urged to uphold the said decision as proper and lawful and that the application by the applicant be dismissed with costs to the 1st and 2nd Interested Parties.

DETERMINATION

121. I have considered the exparte applicant's case as supported by the statutory statement, grounds and verifying affidavit. i have also considered the respondent's as well as the interested parties' cases and the respective parties' advocates useful detailed written submissions which were fully adopted canvassing the notice of motion herein.

122. In my humble view, there is an agreement as to the issues for determination as framed by the exparte applicant's counsel, and reiterated by the interested parties' advocates and which this court wholly adopts as the main issues for determination with some ancillary questions to be answered. the issues are:

i. ***Whether the Respondent Medical Practitioners and Dentists Board had jurisdiction to hear and determine complaints against medical institutions as was in this case?***

ii. ***Was the PIC properly constituted?***

iii. ***Did the 1st Interested Party have locus standi to lodge the complaint?***

iv. ***Were the disciplinary proceedings procedurally and administratively fair?***

v. ***Was the decision unreasonable and biased as against the Applicant?***

vi. ***Are the remedies sought available to the Applicant?***

123. Commencing with the first issue, the court notes that according to the exparte applicant, the Medical practitioners and Dentists Act only allows complaints to be lodged to the Board against Medical Practitioners and Dentists and not against institutions. On the other hand, the interested parties and respondent contend that the statute has to be interpreted purposively by reading in to include institutions, and that the amended rules permit the Board to deal with, matters involving medical institutions as well and not just individuals.

124. Each party has attempted to interpret the long title of the Act ***where it states" and for connected purposes,"quite persuasively and urged the court to find for their argument.***

125. Before delving into the jurisdictional issue in view of the use of the word "and for connected purposes" in the long title, as a legislative drafter myself, what both parties have called upon me to do is to explain what purpose the long title in a bill or Act of Parliament serves.

126. Every Bill or Act has a short and long title. The long title is set out at the beginning of the Act and consists of a single 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.

127. 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.

128. The long title in any legislative enactment serves to inform Parliament and the end users of the legislation, what the Act sets out to do. However, since it is enacted and subject to amendment, courts treat it as an intrinsic explanatory and interpretative aid. The long title also provides a guide to the scope of an Act when there is ambiguity as to the meaning of its provisions.

129. It is therefore not correct to say that the policy objectives underlying the bill 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. Thus, long titles only set out the purposes of legislation in this limited sense of stating the ways in which the amendments will affect the existing law.

130. It is for that reason that i disagree with the interested party's interpretation of the function of the long title, however persuasive it may appear.

131. Further, the court notes that the interested party claims that the amended regulations included institutions among those the respondent is mandated to regulate. That may be so. however, in the absence of a substantive provision in the parent Act clearly stipulating that the Act applies to institutions, a regulation cannot amend the parent Act, and this is an established principle of law as was reiterated in the case of **Republic v Medical Practitioners & Dentists Board & 2 others Ex-parte Majid Twahir & another [supra] where Odunga J correctly held that:**

> ***"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"***

132. This court on the whole is unable to find any ambiguity in the Act capable of being filled by the subsequent amended rules. In other words, i have no hesitation in finding that Rules do not fill gaps in a statute. Accordingly, I decline to find that the disciplinary action towards the individual practitioners applies to institutions as well. Albeit it was contended that there was a lacuna in the law which was cured by the promulgation of the ***Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000*** by the Minister, in my view, if there was a lacuna in the Act, such lacuna could only be cured by the amendment of the Act and not sneaked in by way of subsidiary legislation where there is no express power in the Act enabling such subsidiary legislation to be made.[see Majid Twahir case] supra.

133. **On the issue of whether the PIC was properly constituted,** this court finds that it was not as there was no minute or proceeding to show the membership of the Committee. This was contrary to Rule 3(3) of the Rules which require the Chairman of the Board to convene meetings of the Committee. In addition, Rule 3(1) provides:

There is hereby established a committee to be known as the Preliminary Inquiry Committee which shall consist of seven Members elected from among the members of the Board.

134. In the absence of any minutes or proceedings and or attendance list for the PIC Committee, to show its composition at the time of the alleged hearing, this court finds that the PIC was not properly constituted and therefore the decision must have been left to one individual to merely review the documents supplied and determine the culpability of the applicant, which is irregular and illegal and contrary to Rule 3(1) made under the Act which provides: ***There is hereby established a committee to be known as the Preliminary Inquiry Committee which shall consist of seven Members elected from among the members of the Board.***

135. **On whether the 1st interested party had locus standi to lodge the complaint to the PIC** Iam in agreement with the interested parties that they were not seeking for a benefit but to enforce the highest standards of medical care to their deceased relative and in any event, this was not a case for damages as stipulated under the Fatal Accidents Act hence a grant of letters of administration was not mandatory for them to lodge the complaint to the PIC. i therefore find that the interested parties had locus to lodge a complaint for an inquiry to be conducted to establish circumstances under which their relative met her death.

136. ***On whether the disciplinary proceedings were procedurally and administratively fair?*** **Rule 10** Y is clear that the decision must show whether it was unanimous or by majority of members of the Committee. In this case, it is clear that the Committee was never constituted for purposes of conducting the inquiry and that is the reason why there are no proceedings showing how the decision was arrived at and by whom hence the procedure adopted by the PIC was not only irregular but illegal. Furthermore, the decision was never send to all the affected parties as required by Rule 107 Y.

137. On whether ***the decision unreasonable and biased as against the Applicant?*** I reiterate that there was no evidence of convening of the Committee and or the summoning of the applicant for a hearing. Convening a meeting of the PIC for hearing of the complaint against the applicant was a must and not optional as the interested party persuasively wished this court to believe. Article 47 of the Constitution and the Fair Administrative action Act mandates the administrative bodies to hear the parties orally and permit them where applicable to be represented by advocates of their choice. The right to an oral hearing in a complaint as opposed to an appeal where the record will speak for itself cannot be compromised by some precedents some running to 1949! Submitted by the interested party. The right to a fair hearing is a constitutional imperative very well-articulated in Article 50(1) of the Constitution. In this case, and from the confessions by the respondent and interested party, it is safe to conclude that there was absolutely no hearing or at all.

138. Furthermore, it is the interested parties who are insisting that the applicants were heard. The respondent has not asserted that it ever heard the applicant. Asking for detailed statements from the doctors who attended to the patient and being supplied with those statements by the applicant herein is not the same as conducting a hearing whether the matter involved practice in medicine or not. A right to a fair hearing cannot be limited. In this case, the interested party had conceded that there was no hearing yet insists that the applicant was heard. It cannot be both ways. It is either there was a hearing or no hearing or if there was a hearing, where are the minutes or proceedings of the PIC? And who were the members of the said PIC? Rule 3(1) of the rules under the Act is clear that : ***There is hereby established a committee to be known as the Preliminary Inquiry Committee which shall consist of seven Members elected from among the members of the Board.***

139. With utmost respect to the decision in **High Court Misc. Application No. 12 of 2002 [R vs. Aga Khan Education Services ex parte Ali Sele & 20 others]**, that decision giving discretion to the administrative body to hear or not to hear a party has long been overtaken by Article 47 of the Constitution and the Fair Administrative Action Act which implements Article 47 and which mandates that a person must be heard. Equally, all decisions or laws that tend to water down the principle of according a party an opportunity to be heard have been overtaken by Article 47 of the Constitution and the Fair Administrative Action Act.

140. In my humble view, the decision of the PIC was a nullity *ab initio* and therefore the issue of bias does not arise especially where there was no hearing conducted and therefore i need not waste judicial time analysing what bias is and whether there was bias or not in the non decision.

141. Although the interested parties claimed that the applicants should have appealed to the High Court, in my humble view, there was no hearing and in the absence of proceedings and evidence adduced by each of the parties, an appeal would not have served as an efficacious way of challenging the irregular and illegal decision by PIC. There was in my view, no merit issue to be considered by the appellate court as there were no proceedings or evidence to be revaluated or reassessed in accordance with section 78 of the Civil Procedure Act. in the English case of **Macfoy Vs United Africa Company Ltd [1961] 3 ALL ER1169 at 1172** the court held that:

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

142. In the end, Iam satisfied that the applicant has made out a case for judicial review remedies sought and i hereby allow the Notice of motion dated 26th May 2016 as prayed. I order each party to bear their own costs of these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 28th day of March, 2017.

R.E.ABURILI

JUDGE

In the presence of:

CA: George

Miss Chelangat h/b for Mr Nyasimi for the applicant

Mr Nyaribo for the Interested Parties

Mr Cohen h/b for Mr Kenneth Wilson for the Respondent