REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 448 OF 2016 (JR)

IN THE MATTER OF: AN APPLICATION BY DR. DONALD OYATSI FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE MEDICAL PRACTIONERS AND DENTISTS BOARD

AND

IN THE MATTER OF: INQUIRY BY THE PRELIMINARY INQUIRY COMMITTEE CASE NO. 47 OF 2010

REPUBLIC…….....APPLICANT

AND

THE PRELIMINARY INQUIRY COMMITTEE (PIC) .....FIRST RESPONDENT

THE MEDICAL PRACTIONERS AND

DENTISTS BOARD.....SECOND RESPONDENT

EX-PARTE …….....…….....DR. DONALD OYATSI

SYLVESTER MUSYOKI KISONZO

On behalf of THE LATE NINA NGINA KISONZO.....INTERESTED PARTY

JUDGMENT

1. By a notice of motion dated 12th October, 2016 the exparte applicant **DR DONALD OYATSI** seeks from this court the following orders:

> ***a. that an order of certiorari do issue to forthwith remove to the High Court and quash and annul the decision made by the 1st Respondent a public body on its own or behalf of the 2nd Respondent convicting and/or holding the Applicant for professional negligence and directing him to enter into negotiations with the Estate of Late Nina Ngina Kisonzo with a view to compensation and thereafter update the Chairman of the Medical Practitioners and Dentists***

Board within ninety (90) days.

b. <u>THAT</u> an order of prohibition be directed to the 1st Respondent and the 2nd Respondent restraining the 1st Respondent and the 2nd Respondent from taking any action against the Applicant on the said decision.

c. <u>THAT</u> the costs of this suit be provided for

2. The application is based on the grounds set out in the Statutory Statement and the Verifying Affidavit of **DR. DONALD OYATSI** annexed thereto.

3. The exparte applicant is a medical practitioner duly registered under the provisions of the Medical Practitioners and Dentists Act Chapter 253 Laws of Kenya.

4. The 1st Respondent is a committee established under the provisions of Rule 3 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules **and its functions are to receive and review complaints against medical practitioners or dentists and to determine and report to the 2nd Respondent herein whether an inquiry should commence and be held pursuant to Section 20 in respect of the medical practitioner or dentist.**

5. The 2nd Respondent is established under the provisions of Section 4 of the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya.

6. The exparte applicant's case as per the facts and depositions contained in his verifying affidavit is that he is a medical practitioner duly registered under the provisions of the Medical Practitioners and Dentists Board; and a Consultant Pediatrician and Consultant Child Neurologist and that there are only six (6) specialists in East Africa of his kind.

7. That he graduated in 1987 from the University of Nairobi with a Bachelors Degree in Medicine & Surgery (MBChB) and subsequently pursued further studies in the same University and graduated with a Maters Decree MMed in Pediatrics in 1995. He further pursued a post graduate course in 2001 at the Institute of Neurology, University of London in Britain. And that he is a Consultant mainly in Pediatric (child) neurology in the major hospitals in Nairobi and attends patients from Kenya and the wider East Africa Region.

8. The applicant asserts that a complaint was lodged against him by a patient to the Medical Practitioners and Dentists Board. That the hearing and determination of such a complaint is regulated by the provisions of the statute, which is the Medical Practitioners and Dentists Act Chapter 253 Laws of Kenya.

9. It is averred that in terms of the said statute, there are two stages in handling such a complaint and that the first stage is to hold a preliminary inquiry by the 1st Respondent which is established under the said Act and conferred with powers to conduct such a preliminary inquiry.

10. That upon conclusion of preliminary inquiry, the 1st Respondent is required to make an opinion as to whether the inquiry merits disciplinary hearing or proceedings to be conducted by the 2nd Respondent.

11. Further, that upon conclusion of its findings, the mandate of the 1st Respondent is to submit its report to the 2nd Respondent which then determines whether proceedings against the affected medical practitioner should be commenced.

12. In the instant case, the exparte applicant claims that that the 1st Respondent received the said complaint and duly served the applicant with a Notice of the complaint upon which the exparte applicant responded to the notices and filed his pleadings or papers as requested.

13. The applicant avers that on 12th July 2016, he was surprised to receive a ruling made by the 1st Respondent in which it adjudicated on the said complaint and found the exparte applicant liable for professional negligence, as shown by a copy of the ruling which is attached and marked as exhibit **'DO1'.**

14. The applicant therefore claims that apart from forwarding the documents which the 1st Respondent requested the exparte applicant to provide for the purpose of the preliminary investigation, the exparte applicant was never invited or given an opportunity by the 1st Respondent to appear before it in order to be heard on the merits or otherwise of the said complaint.

15. The exparte applicant verily believes that it is his statutory right under the provisions of Section 20(2) of the Medical Practitioners and Dentists Act to be accorded the opportunity to be heard before he is condemned of professional negligence which is a grave matter.

16. Further, that the 1st Respondent acted arbitrarily without or in excess or jurisdiction when it made the said decision against the exparte applicant which is a function of the 2nd Respondent, and which decision could only be made after a fair hearing.

17. According to the exparte applicant, the decision of the first respondent was made without **jurisdiction** in that under the Medical Practitioners and Dentists Board Act, the 1st Respondent could not pass judgment and convict or hold liable the Applicant for professional negligence while exercising its functions in carrying out a preliminary inquiry into a complaint against the applicant.

18. In addition, the exparte applicant asserts that the 1st Respondent's functions were and are limited to receiving and reviewing a complaint, and establishing whether in its opinion there is merit in the complaint to warrant reference to the 2nd Respondent in order for the 2nd Respondent to decide whether or not to commence disciplinary proceedings under Section 20 of the above statute.

19. It is therefore claimed by the applicant that the 1st Respondent without jurisdiction usurped the powers and jurisdiction of the 2nd Respondent and purported to hear and determine the said complaint and pass judgment against the Applicant in the impugned decision.

20. The exparte applicant also claims that the 1st respondent breached **the rules of natural justice** and the Applicant's fundamental right to a fair hearing as guaranteed under the Constitution of Kenya when it made the impugned decision, convicting or holding liable the Applicant for professional negligence without according the Applicant a hearing as guaranteed under the Constitution and the express provisions of Section 20(2) of the Medical Practitioners & Dentists Act.

21. It is further alleged that the impugned decision is such that no public authority applying itself to the relevant law and acting reasonably could have reached it hence it satisfies the **Wednesbury unreasonableness and unfairness hence it** is in the interest of justice that the orders sought in this Application be granted with costs.

The Respondents' case

22. The 1st and second respondents opposed the exparte applicant's notice of motion and filed a replying affidavit sworn by Jackson Kioko the Director of Medical Services and who is also the Registrar of the Kenya Medical Practitioners and Dentists Board on 30th November, 2016 conceding that the interested party herein through the firm of Kiama Wangai Advocates lodged a complaint with the Board with regard to the deceased **Nina Ngina Kisonzo** who had been a patient admitted at the Agha Khan University Hospital on 22nd May 2009.

23. That upon receipt of the complaint, the Board wrote to the Hospital requesting for a full report on the complaint and documents relating to the treatment and management of the deceased to enable the Preliminary Inquiry Committee of the Board undertake an inquiry on the complaint.

24. That the Hospital responded to the Board's request and furnished the Board with copies of statements of medical personnel who were involved in the treatment and management of the deceased and also provided copies of the required documents.

25. That the Preliminary Inquiry (PIC) of which the Registrar is the Chairman sits every month to discuss matters before it and it does so by relying on documents submitted where it finds them sufficient or by hearing witnesses summoned by the Board.

26. That the PIC sat and reviewed the complaint and documents received by the Board on matters herein and made its findings and recommendations as per the ruling of 12th July 2016 and that in doing so, the PIC acted within its jurisdiction and the applicant herein had the right to challenge that decision by way of an appeal.

27. The respondents further contend that the PIC consists of consultants and practitioners in different specialties in medicine and dentistry and they discuss matters before them fairly.

28. Further, that the applicant has not taken into account the various amendments to the MPD (Disciplinary Proceedings) Rules hence these proceedings are without merit.

29. It was further contended by the respondents that section 20 of the Act and Rules of 1979 sets out the process for undertaking disciplinary proceedings and inquiries on complaints lodged before the Board.

The interested Party's case

The interested party **Sylvester Musyoki Kisonzo** filed a replying affidavit sworn on 20th January, 2017 opposing the exparte 30. applicant's application. In the said affidavit, the interested party contends that the exparte applicant's application is devoid of merit and ought to be dismissed with costs.

Parties' submissions

31. The parties' advocates agreed and filed written submissions to canvass the application.

32. In the exparte applicant's submissions filed on 17th February 2017, his advocate reiterated the grounds upon which his application was predicated as well as his depositions in his verifying affidavit and the facts relied on as per his statutory statement.

33. The exparte applicant's counsel elaborated on the functions of the PIC as stipulated in the Medical PR actioners and Dentists (MPD) Act and Rules and maintained that a complaint against a medical practitioner must meet a certain threshold before disciplinary proceedings could be commenced against him, and that it is the function of the PIC to determine whether the threshold is met, as expressed in Rule 4 on the functions of the PIC which Rule stipulates as follows:

> **"Functions of Preliminary Inquiry Committee**
>
> (4)(1) The functions of the Preliminary Inquiry Committee shall be to receive and review complaints against a medical practitioner or dentist 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 medical practitioner or dentist.
>
> (2) Subject to paragraph (1), the Preliminary Inquiry Committee after considering the complaint and making such inquiries with respect thereto as it may think fit, shall –
>
> a) if of the opinion that the complaint does warrant reference to the Board for inquiry, reject the complaint and so inform the Chairman;

b) if of the opinion that the complaint does not warrant reference to the Board, cause it to be referred to the Board together with its findings and recommendations.

(3) For the purposes of enabling the Preliminary Inquiry Committee to carry out its functions under these rules, the committee may correspond with persons, including the medical practitioner or dentist to whom the complaint relates, as it thinks fit and may peruse or inspect all documents relating to the complaint."

34. It was submitted that it is only where the pic determines the complaint meets the statutory threshold that it would refer the complaint to the second respondent Board to commence disciplinary proceedings under the statute.

35. Counsel also referred to **Rule 5** on **submission of complaints** to the 1st respondent PIC which stipulates: **"submission of complaint or information**

(5) (1) whenever a complaint or information is received by the Chairman from a body or person and it appears to him that –

a) a medical practitioner or dentist has been convicted of an offence under this Act or under the Penal Code; or

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 Committee".

36. The exparte applicant maintained in his submissions that the 1st Respondent purported to exercise functions and/or powers that it does not have under the law as enacted in the above statute.

37. Further, that the said impugned decision is null and void for want of or excess of jurisdiction, breach of rules of natural justice and that the challenged decision was so unreasonable or unfair that any public authority applying itself to the relevant law and acting reasonably could not have reached it; and that the only entity that is conferred with powers to conduct disciplinary proceedings against a medical practitioner under Section 20 of the Act is the 2nd Respondent.

38. It was submitted that the two respondents are separate entities under the Act and that therefore one cannot purport to perform the functions of the other since each of them are given separate functions.

39. On the alleged violations of the rules of natural justice, it was submitted on behalf of the exparte applicant that it is a fundamental requirement of the rules of natural justice that a person cannot be condemned unheard. It was submitted that in the instant case, this fundamental requirement is part of statutory right in Section 20(2) of the statute and Rule 5(2), (3) and (4) of the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya which provide as follows:

"<u>Section 20(2)</u>

"Upon any inquiry held by the Board under sub section (1) the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or by an advocate.

<u>And Rule 5(2), (3) and (4)</u>

(2) When the Preliminary Inquiry Committee refers the complaint to the Board under rule 4(2) (b), the Chairman shall send to the medical practitioner or dentist to whom the complaint relates a notice of inquiry which shall –

a) be in Form 1 in the Schedule and shall, unless the Board otherwise directs, require the party to whom it is addressed to furnish the Chairman and every other party a notice of all

the documents which he intends to rely on at the hearing;

b) set out, in general terms, the charge or charges of professional misconduct made against the medical practitioner or dentist; and

c) specify the date and time of and the place at which the inquiry is proposed to be held.

(3) The notice of inquiry shall be sent to the medical practitioner or dentist by registered post addressed to his last known address as notified to the Registrar or by any other means approved by the Board.

(4) In any case where there is a complaint, a copy of the notice of inquiry shall be sent to him."

40. It was further submitted that the Applicant is entitled to this right to be exercised or enjoyed in proper and valid disciplinary proceedings commenced by the 2nd Respondent under the provisions of Section 20 of the statute.

41. The applicant's counsel further submitted that the impugned decision was made, firstly, by the 1st Respondent which had no jurisdiction to conduct such disciplinary proceedings under Section 20 of the statute and secondly, the 1st Respondent made the impugned decision without according the Applicant the right to be heard in valid and proper proceedings as required by rules of natural justice and the provisions of Section 20(2) of the statute hence the decision is a nullity *ab initio.*

42. On the claim of **Unreasonableness,** it was submitted that based on the clear provisions of the above statute, the 1st Respondent's functions and powers are very clear. In the premises, any public authority such as the Respondents applying itself to the relevant law as expressly stated in Rule 4(1) of the Medical Practitioner and Dentists Disciplinary Rules and Section 20 of the said statute, and acting reasonably would **NOT** have reached the decision to:

a) to convert itself into the 2nd Respondent ;

b) purport to exercise jurisdiction of the 2nd Respondent which it does not have under the law;

c) convict and sentence the Applicant in nonexistent disciplinary proceedings without giving the Applicant the opportunity to be heard as expressly stated in Section 20(2) of the statute.

43. Consequently, it was submitted on behalf of the exparte applicant that the 1st Respondent's impugned decision was unreasonable and grossly unfair.

44. Regarding the Respondents' defence that the above rules have been changed or amended, and secondly, that the Applicant has a right to appeal to this Honourable Court against the decision of the Court, it was submitted that the said defences are unsustainable and have no merits for reasons that the Respondents do not state or indicate the amendments that they refer to, what they say, and how they affect the matters stated herein by the exparte applicant, particularly, the functions, powers and jurisdiction of the 1st Respondent.

45. Further, that in any event, there is no material placed before the Court by the 1st Respondent upon which the Court can act and establish as a fact that the amendments exist.

46. On the respondent's contention that the exparte applicant had the right of appeal to the High Court against the decision of the Board, it was submitted that whereas under Section 20(6) of the Medical Practitioners and Dentists Act, the Applicant is given the right to appeal to the High Court against the decision of the Board, the Section reads as follows:

"*A person aggrieved by a decision of the Board* ***under the provisions of this section may appeal***

within thirty days to the High Court and in any such appeal the High Court may annul or vary the decision as it thinks fit."

47. It was submitted that in that regard, the section does not apply to the facts of this case, and is no defence to the Applicant's grievance for the simple reason that:

a) the impugned decision was a decision by the Committee, (the 1st Respondent herein and not of the 2nd respondent Board as contemplated in the section 20(6) above;

b) it was not the decision of the Board, the 2nd Respondent;

c) since the 2nd Respondent did not conduct any disciplinary proceedings and or make any decision therein against the Applicant, the issue of the Applicant's right of appeal against the said decision does not and cannot arise.

48. For the above reasons, the Applicant urged the court to allow Notice of Motion dated 12th October 2016.

49. The exparte applicant's counsel also filed submissions in response to the 1st and 2nd respondents' submissions filed on 17th March, 2017 and maintained that the 1st respondent's actions are:

a) a gross violation of the Applicant's rights; and

b) an attempt to mislead this Honourable Court and pervert justice.

50. On the 1st and 2nd Respondents reliance on the provisions of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules 2013 as the legal basis for upholding the impugned decision herein, it was submitted that this is an absurdity for the following reasons:

i) a casual glance at the impugned decision clearly proves that the complaint was lodged with the 1st Respondent in **2010**; that

ii) infact, the 1st Respondent's inquiry case number is 47 of **2010**;

iii) paragraph 2 of the ruling states as follows:

> ***"The Board served the Respondents herein with a copy of the complaint and directed them to lodge their response. The Respondents subsequently submitted their response which included a letter by Dr. Donald Oyatsi dated 26th July 2010 and attached thereto a medical report dated 23rd July, 2010. The Hospital also submitted copy of the patient's file, the post-mortem report by Dr. Andre Gachii and Dr. J Muthoni Kirimi dated 11th June 2010."*** *(emphasis added)*

51. It was submitted that all those activities took place in 2010, three (3) years before the enactment of the law that the 1st and 2nd Respondents now wished to rely upon to uphold the impugned decision. It was submitted that, that law was not enacted in 2013 to operate retrospectively so as to apply to complaints which had been lodged three (3) years earlier in 2010!

52. It was further submitted on behalf of the exparte applicant that the 1st and 2nd Respondents' attempt to uphold the impugned decision on a law which was non-existent at the material time of the complaint is a violation of the Applicant's rights to a fair determination of disputes as guaranteed under Article 50 of the Constitution of Kenya.

53. On the 1st and 2nd Respondents reliance on Regulation 10(Y) of the 2013 Regulations which provides as follows:

> **"(1) After hearing the complaint, the Committee may determine or order –**
>
> **(a) that the complaint be dismissed;**
>
> **(b) that the member be reprimanded;**
>
> **(c) that the member be suspended from practice for a specified period not exceeding two years; or**
>
> **(d) make such order as the Committee consider fit."**

54. It was submitted that, it is clear from the said Regulations that the said Regulation 10(Y) applies only where there has been a proper hearing conducted under the provisions of Regulations 10(N).

55. Further, that paragraphs 4 and 5 of the impugned decision discloses the procedure followed by the 1st Respondent in making the impugned decision against the Applicant.

56. It was submitted that the Respondents admit that the impugned decision against the Applicant was made without giving the Applicant the right to a fair hearing as provided in Rule 10(N) of the said Regulations which stipulates that:

> ***(1) "The chairperson shall, at the commencement of the hearing, explain the order of proceedings which the Committee proposes to adopt.***
>
> ***(2) The Committee shall conduct the hearing in such manner as it considers suitable for the determination of the application or the clarification of issues before it and generally for the just handling of the proceedings and shall, as far as it appears to it appropriate, avoid legal technicality and formality in its proceedings.***
>
> ***(3) The parties shall be heard in such order as the Committee shall determine, and address the Committee on both evidence and generally on the subject matter of the application.***
>
> ***(4) Evidence before the Committee may be given orally or, if the Committee so orders, by affidavit or written statement, but the Committee may at any stage of the proceedings require the personal attendance of any deponent or author of a written statement.***
>
> ***(5) The Committee may receive evidence of any fact which appears to it to be relevant to the application.***
>
> ***(6) The Committee may, during the hearing and if it satisfied that it is just and reasonable to do so, permit a party to rely on grounds not stated in his notice of application or, as the case may be, his reply and to adduce any evidence not presented to the Committee before or at the time the Committee took the disputed decision.***
>
> ***(7) The Committee may require any witness to give evidence on oath or affirmation and for that purpose it may administer an oath or affirmation in the prescribed form". (emphasis added)***

57. It was submitted that the right to be heard is expressed in mandatory terms. Therefore it would be a perversion of justice if the Respondents' said submissions are upheld.

58. The 1st and 2nd respondents filed joint submissions on 17th March, 2017 reiterating their contentions as per the replying affidavit sworn by Mr Kioko and framed three issues for determination namely:

i. Whether the 1st respondent acted in excess of its jurisdiction;

ii. Whether the exparte applicant was accorded a fair hearing and

iii. Are the prayers available to the exparte applicant?

59. On the first issue of excess of jurisdiction, the respondents' counsel submitted that the 1st respondent is established under rule 3 of the MPD (Disciplinary Proceedings) Rules, 1979 Procedure which Rules were amended in 2013 through the MPD(DC) Proceedings Amendment Rules, 2013.

60. It was submitted that Rule 4 of the Amendment Rules gives powers to the 1st respondent to conduct inquiries into the complaints submitted to it hence there should be no dispute on the jurisdiction of the 1st respondent.

61. On the exparte applicant's claim that only the 2nd respondent Board had the power to make findings or order after the preliminary inquiry, the respondents relied on Rule 10(Y)(1) of the 2013 Amendment Rules which gives power to the PIC to make a determination after hearing the complaint and make orders including dismissing the complaint; reprimanding the accused; suspension of the accused from practice for a specified period and or make any other such order the Committee considers fit.

62. It was therefore submitted that the 1st respondent acted within its powers in making the orders that it made. Reliance was placed on **R V MPDB Exparte Dr Yamal Patel &2 others (2016)eKLR w**here Hon Korir J held inter alia: that unlike the 1979 Rules, the PIC now under the 2013 Amendment Rules has power to carry out an inquiry and take action on its findings.

63. Further reliance was placed on **RV MPDB &another exparte J. Wanyoike Kihara [2015]eKLR** where Odunga J acknowledged that the 2013 amendments to the Rules gives power to the PIC in consultation with the Board to carry out an inquiry, determine and action their findings.

64. It was accordingly submitted that the 1st respondent acted within its statutory mandate hence the challenge on its jurisdiction is unfounded and a clear misapprehension of the law.

65. **Further, that in any event, the 1st respondent's findings were adopted and approved by the 2nd respondent.**

66. On the second issue of whether the exparte applicant was accorded a fair hearing, it was submitted that the 1979 Rules and Procedures were extensively amended in 2013 vide Legal Notice No. 223 of 20th December, 2012. Reliance was placed on Rules 10 D, 10P and Rule 10Z which empower the PIC in determining complaints under the Rules to have due regard to the principles of natural Justice and that it shall not be bound by any legal technical rules of evidence applicable to proceedings before a court of law. Further, that the Committee may determine the applications or any issue arising therefrom without an oral hearing.

67. It was submitted that the PIC complied with the above procedure. Further reliance was placed on **RV Aga Khan Education Services exparte Ali Sele & 20 others [2010]** as cited in **RV MPDB & another exparte Wanyoike Kihara** (supra) where the court was clear that *it is not in every situation that the other side must be heard and that there are situations where a hearing would be unnecessary and even in some case obstructive. That each case must be weighed on the scales and that there can be no general requirements for hearing in all situations.*

68. The respondents' counsel further relied on the Court of Appeal decision in **Kenya Revenue Authority v Menginya Salim Murgani CA 108 of 2009** where the court held that *what is material is that the administrative bodies achieve the degree of fairness appropriate to their task otherwise it is for them to decide how they will proceed*.

69. Further reliance was placed on **Simon Gakuo v Kenyatta University and 2 others Misc Civil App 34 of 2009** where the court held *that the **Audi alteram partem** rule should not be interpreted to mean full adversarial hearing or anything close to it as per the court room situations otherwise it would amount to serious misdirection of the law.*

70. It was submitted that the exparte applicant was accorded a fair hearing **because he was granted a chance to respond to the complaint before the 1st respondent made a determination**. Further, that the decision was based on the information provided by the exparte applicant hence it is in bad faith for the exparte applicant to claim that he was not accorded a fair hearing since the documents supplied were sufficient to enable the 1st respondent arrive at the decision that it did.

71. On whether the prayers sought are available to the exparte applicant, it was submitted that the respondents should not be condemned for exercising discretion fairly and in line with the powers conferred upon them. Further, that no illegality, irrationality or procedural impropriety had been established against the respondents hence the application should be dismissed.

72. The interested party filed written submissions on 13th March, 2017 through his counsel Prof Kiama Wangai &co Advocates. According to the interested party, the exparte applicant was given an opportunity to be heard; that he presented all his documents and reports to the PIC as provided for in the Act and that his nonappearance in person does not negate this fact.

73. According to the interested party, the PIC after considering the complaint made recommendations to the 2nd respondent Board who considered and adopted them and that there was no finding that the exparte applicant was professionally negligent contrary to his averments in court.

74. It was further submitted on behalf of the interested party that the exparte applicant should have appealed against the decision of the Board to the High Court as stipulated in section 20(6) of the Act as opposed to filing judicial review proceedings.

75. Counsel for the interested party urged the court to find that this application is devoid of merit and dismiss it with costs to the interested party.

DETERMINATION

76. I have considered the foregoing and in my humble view, the main issues for determination are:

a) Whether the PIC had jurisdiction to consider and determine the complaint leveled against the exparte applicant by the interested party;

b) Whether the decision of the Preliminary Inquiry Committee (PIC) was adopted and or approved by the Medical Practitioners and Dentists Board;

c) Whether the 1st respondent Preliminary Inquiry Committee accorded the exparte applicant an opportunity to be heard before making a finding;

d) whether the decision of the PIC was procedurally fair or regular

e) whether the exparte applicant should have appealed to the High Court

f) What orders should this court make ;

g) Who should bear costs of these proceedings?

77. On the first issue of whether the 1st respondent had the jurisdiction to consider and determine the complaint leveled against the exparte applicant by the interested party, the exparte applicant was

categorical that the applicable law in this instance is the 1979 MPD Act and Rules.

78. On the other hand, the respondents and interested party contend that the applicable law is the 2013 Act and Rules as amended which gives the PIC power to hear and determine a complaint against Medical Practitioners and Dentists and institutions. Further, that in any event, the decision of the PIC was adopted and approved by the Board hence the claim herein is misguided and with no merit.

79. It will be noted that there is no dispute that the complaint against the exparte applicant was made by the interested party herein following the unfortunate demise of his child while in the management and treatment of the Aga Khan University Hospital and exparte applicant among others were the doctors who attended to the child.

80. However, it must also be understood clearly from the record that the alleged professional negligence occurred and the complaint was initiated in 2010 before enactment of the 2013 Rules made under the MPD Act. Therefore, albeit the alleged hearing and determination of the complaint was completed in the post 2013 period, the law that vested the PIC with Jurisdiction to deal with any complaints of medical negligence on the part of medical practitioners and dentists is the MPD Act and the 1979 Regulations made thereunder.

81. That being the case, Iam in agreement with the exparte applicant that the respondents and the interested party are misapprehending the applicable law by referring to the 2013 Rules.

82. The applicable law is Rule 5 of the 1979 Regulations which stipulate as follows:

> **"Submission of complaint or information**
>
> **(5) (1) Whenever a complaint or information is received by the Chairman from a body or person and it appears to him that –**
>
> > **c) a medical practitioner or dentist has been convicted of an offence under this Act or under the Penal Code; or**
> >
> > **d) *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*".**

83. From paragraph (d) above, it is clear that the Chairman of the Board would, upon receipt of complaints, submit them to the Preliminary Committee.

84. On the part of the 1st respondent, upon receipt of the said complaint, the additional functions of the 1st Respondent would be as stipulated in Rule **(4)(1) on the functions of the Preliminary Inquiry Committee that the PIC shall receive and review complaints against a medical practitioner or dentist *and determine and report to the Board whether an inquiry should be held, pursuant to section 20 of the Act, in respect of the medical practitioner or dentist.***

> **(2) Subject to paragraph (1), the Preliminary Inquiry Committee after considering the complaint and making such inquiries with respect thereto as it may think fit, shall –**
>
> > **a) if of the opinion that the complaint does warrant reference to the Board for inquiry, reject the complaint and so inform the Chairman;**
> >
> > **b) if of the opinion that the complaint does not warrant reference to the Board, cause it to be referred to the Board together with its findings and recommendations.**
>
> **(3) For the purposes of enabling the Preliminary Inquiry Committee to carry out its functions under these rules, the committee may correspond with persons, including the medical**

practitioner or dentist to whom the complaint relates, as it thinks fit and may peruse or inspect all documents relating to the complaint".

85. In other words, the functions of the PIC upon receipt of the Complaint from the Chairman of the Board as stipulated in Rule 5 would be to carry out a preliminary inquiry into the complaint and establish whether the complaint discloses sufficient grounds to sustain disciplinary proceedings against the Medical Practitioner or dentist.

86. Where the 1st Respondent determines that the complaint meets the statutory threshold, then its function or power is to refer the complaint to the 2nd Respondent Board so that the 2nd Respondent can commence disciplinary proceedings against the offending medical practitioner or dentist. It is for that reason that Hon Korir J in **R vs MPDB Exparte Dr Yamal Patel &2 others (2016)eKLR held inter** alia: that unlike the 1979 Rules, the PIC now under the 2013 Amendment Rules has power to carry out an inquiry and take action on its findings. In other words, prior to 2013 Rules, the PIC under the 1979 Rules had no power to undertake the actual inquiry and take action against the offending medical practitioner or dentist.

87. In the same vein, Odunga J was accurate when he stated in **R vs MPDB &another exparte J. Wanyoike Kihara [2015]eKLR** acknowledging that the 2013 amendments to the Rules give power to the PIC in consultation with the Board to carry out an inquiry, determine and action their findings.

88. Both decisions by Korir J and Odunga J acknowledge that the 1979 Rules did not confer jurisdiction on the PIC to carry out an Inquiry and make a determination regarding a complaint lodged against a medical practitioner or dentist.

89. Examining the impugned decision, albeit the respondents and the interested party claim that the decision was adopted and approved by the Board, it is clear that the PIC carried out an Inquiry, found the exparte applicant culpable and made a recommendation on the punishment to be meted out to the exparte applicant. Furthermore, throughout the decision, there is no place where it is being stated that the decision was the Board's decision.

90. Although the decision is camouflaged as being a proposal having been placed before the Board for adoption and approval on 6th March, 2016, the PIC nonetheless goes ahead to concede that -

"In the premises the Committee proposed several orders and directions, as set out hereunder, that were presented to the Full Board of the Medical Practitioners and Dentists Board in its sitting of 6th March 2016 wherein the same were approved and adopted by the said Board. Consequently, the Committee makes the following orders:-

(i) The complaint against the 2nd Respondent, Dr. Pacifica Onyancha is dismissed.

(ii) The complaint against the 3rd Respondent, Dr. Rachel Kang'ethe is dismissed.

(iii) The 1st Respondent, Dr. Donald Oyatsi be and is hereby admonished for failing to conduct the lumbar puncture test in time.

(iv) Dr. Donald Oyatsi, the 1st Respondent and Aga Khan University Hospital the 4th Respondent are jointly and severally directed to enter into negotiations with the Estate of Nina Ngina Kisonzo with a view of compensation and thereafter update the Chairman of the Medical Practitioners and Dentists Board within ninety (90) days from the date hereof on the progress."

91. In my humble view, a Committee that merely proposes to a superior body[Board] cannot turn around and be the same Board that makes the final decision or orders on the merits of the decision, and that is exactly what transpired in this case. The PIC purported to present recommendations to the Board and

instead of leaving it to the Board to act on the recommendations and making a decision, the PIC proceeded to usurp powers of the Board and make orders thereby determining the complaint, acting as the prosecutor and Judge.

92. The law is clear that jurisdiction is everything without which a court of law or tribunal acts in vain and without Jurisdiction the adjudicating body must down its tools. See **OWNERS OF MOTOR VESSEL LILIAN 'S' v CALTEX (K) LTD (1989) KLR 1.**

93. This is a proper case for invocation of the provisions of Article 165(7) of the Constitution to call into the High Court those proceeding that were conducted by the subordinate body without jurisdiction and declare them a nullity, to ensure the fair administration of justice. I am fortified by the English case of **Macfoy Vs United Africa Company Ltd [1961] 3 ALL ER1169 at 1172** where 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."***

94. In **Pastoli v Kabale District Local Government Council and Others (2008) 2 EA 300 it was held-**

> "***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..."***

95. There is overwhelming evidence that the PIC was relying on the provisions of the 2013 law retrospectively which is not permitted in law hence it acted ultra vires.

96. In addition, if the Board did adopt and approve the proposals, why did the Board not make the decision? There is no minute or proceeding of the Board to demonstrate that it adopted or approved the proposals of the PIC. Accordingly, i find that there is no evidence that the Board did adopt or approve the decision of the PIC.

97. I further find and hold that it is ironical that the respondents claim that the PIC had jurisdiction to consider the complaint and determine it under the 2013 Rules yet they claim that they presented the recommendations to the Board for adoption and approval. If the PIC had such jurisdiction to hear the complaint and make the impugned decision under the Rules, then it would be superfluous for it to submit the matter to the Board for a determination. That claim in my view is an act of usurpation of power of the Board without authority. Furthermore, the decision by the PIC clearly states that the decision was that of the PIC and not that of the Board.

98. For example, the PIC at paragraph 5 of the decision states in part:-

> ***"The Preliminary Inquiry Committee notes that Rule 4(1), as read with Rule 10P, of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 gives the Board powers to receive and review or inquire into complaints against a medical or dental practitioner or an institution."***

99. That being the law that 1979 Rules only recognized the Board as the decision making body, the PIC nonetheless went ahead to determine the complaint as if it was the Board deciding the complaint.

100. In **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR [Supra] Odunga J recognized the effect of expanded powers of a quasi-judicial body vide the 2013 rules as follows:**

> ***"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."

101. in **Jagdish Sonigra V Medical Practitioners & Dentists Board & 2 Others it was held:**

"…….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."

102. Odunga, J further stated in the **Ex parte J Wanyoike Kihara [supra] case at** paragraph 47 thereof 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."

103. In this case, there is no evidence that the Chairman of the Board, other than swearing an affidavit in opposition to these proceedings, ever participated in the proceedings subject of the interested party's complaint. The person who signed the decision is Dr David Truman Kiima Ag Chairman PIC. It was not the Chairman of the Board or even someone else on behalf of the Chairman of the Board.

104. Accordingly, even if the court were to find that the applicable rules were the 2013 rules, it is apparently clear that under the said rules, it was necessary to avail minutes or proceedings to demonstrate that the PIC proceeded to conduct an inquiry into the complaint and placed before the Board recommendations for an appropriate action and determination in accordance with Rule 3(1) (a) of the 2013 Rules. There was no such material before the court. In addition, Rule 3(3) of the 2013 Rules relied on by the Respondents requires the Chairman of the Board to convene meetings of the Committee. Further, 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."

105. 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 could not have been 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.

106. In the end, I find that the PIC acted without jurisdiction and in excess of its jurisdiction when it considered the complaint as if it was the Board and in making orders which only the Board had the power to so make.

107. The above finding settles issues number 1 and 2 above.

108. On the third issue of w**hether the 1st respondent PIC accorded the exparte applicant an opportunity to be heard before making a finding, the exparte applicant categorically denied that he was ever accorded an opportunity to be heard and or to cross examine witnesses.** He further avers that although the ruling by PIC discloses the procedure that was followed to reach the determination, no hearing took place. He laments that his constitutional right to a fair hearing was violated and that the PIC breached the rules of natural justice that no person shall be condemned unheard hence the decision is amenable to being quashed by this court.

109. On the part of the respondents and the interested party, they contend that there was a hearing accorded to the exparte applicant when he was asked to submit his report and documentation on how he managed the patient and that the PIC was satisfied with the material placed before it as being sufficient to reach a fair and just decision hence there was no need of calling upon the exparte applicant for an oral hearing since the matter was not a judicial one.

110. Paragraph 4 and 5 of the ruling attached to the application as exhibit **'DO1'**, states as follows:

Paragraph 4

> ***The Preliminary Inquiry Committee ('the Committee")reviewed the complaint as lodged before the Board, the patient's file and all other documents at hand and noted that it relates to allegations of mismanagement of a patient."***

Paragraph 5 states

> ***The Preliminary Inquiry Committee notes that Rule 4(1), as read with Rule 10P, of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979 gives the Board powers to receive and review or inquire into complaints against a medical or dental practitioner or an institution. Further, the Committee has considered the information and documents before it and holds that it has sufficient information and documents to enable it determine the complaint herein without calling oral evidence." (emphasis added).***

111. From the decision of the PIC, it is an undisputed fact that the PIC found it sufficient to determine the complaint based on the documents before it without calling oral evidence. Accordingly, the exparte applicant was never summoned to appear before the PIC or Board.

112. The Respondents and interested Party make no apologies for that omission to call the exparte applicant to defend himself against the allegations leveled against him and they cited several authorities in support of their contentions.

113. Section 20(2) of the MPD Act stipulates that

> ***"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."***

114. As far as fair hearing is concerned, the Rules stipulate as follows:

Rule 10D:

> "***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***."

115. 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."

116. The above provisions echo Article 47 of the Constitution and Article 50(1) of the Constitution on the right to fair administrative action and the right to a fair hearing respectively and as implemented by the Fair Administrative Action Act, 2015.

117. In **Kaplana Rawal V Judicial Service Commission & 5 others (2016) eKLR** the supreme court held:

> "***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.***
>
> ***[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***."

118. In the **Republic v Medical Practitioners & Dentists Board & 2 others Ex-parte Majid Twahir & another (2016) eKLR** 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."[emphasis added].***

119. *This court agrees with the decision in the* **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [supra] case 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."***

120. Iam in agreement with the above decision that whereas the court must be wary of the Constitutional

imperative on the right to the highest attainable health standards and the right to consumer protection, nonetheless, those rights must be balanced with the right to a fair hearing and to a fair administrative action espoused in the same Constitution.

121. Judicial review court does not concern itself with the merits of the decision but with the decision making process. In this case, Section 20 of the Act clearly espouses the right to be heard orally and commands that ***"Upon any inquiry being 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."***

122. It therefore follows that no Regulation or rule could take away that right stipulated in the substantive law. This is because , subsidiary rules are subservient to the Substantive law and the Constitution. Accordingly, the Rules regarding the procedure at the hearing even assuming that the 2013 Rules are the ones applicable, from Regulation 10N of the 2013 Rules to Regulation 10Z thereof and more so, Regulation 10P which gives discretion to the Committee to determine the complaint or any issue arising there from without an oral hearing is inconsistent with the parent Act and the Constitution and I would not hesitate to declare it null and void to the extent of such inconsistency.

123. Furthermore, Rule 10U is categorical that the Committee shall grant to any party a reasonable opportunity to be heard, submit evidence and make representations and to cross examine witnesses to the extent necessary to ensure a fair hearing.

124. Rules 10C and 10H presuppose that before a hearing of inquiry, the respondent must be given notice of inquiry and a hearing would only proceed in his absence if he fails to respond to that notice. Failure to respond to notice of inquiry is also considered under the rule to amount to commission of an act of professional misconduct.

125. Rule 10D also mandates the Committee to have due regard to the rules of natural justice in the determination of complaints under the rules.

126. Therefore, albeit the respondents relied heavily on the pre-2010 decisions of **KRA V MENGINYA SALIM MURGANI CA 108 OF 2009;RV AGA KHAN EDUCATION SERVICE[SUPRA] and ;SIMON GAKUO V KENYATTA UNIVERSITY[SUPRA**] cases as cited in **RV MPDB and another exparte Wanyoike Kihara** [supra] to advance the proposition that it wa not necessary to hear the exparte applicant orally, nonetheless, at para 71 of the Wanyoike case, Odunga J made it clear that ***in that case, the exparte applicant was given an opportunity to present his version before the PIC and that whereas there was no evidence that he was similarly afforded an opportunity before the Board, the Board simply ratified the recommendations of the PIC and that in such circumstances the learned judge did not agree that before adopting the said recommendations, the Board was bound to hear the parties afresh***.

127. No doubt, the respondents herein were quoting the Wanyoike case out of context when they argued that there was absolutely no need for an oral hearing of the exparte applicant.

128. **In Civil Miscellaneous Application 269 of 2011 [Republic V Kenya Medical Practitioners and Dentists Board & 2 others[2013]eKLR]** 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."***

129. From the foregoing, it is clear to my mind that the exparte applicant was entitled as a matter of right to an oral hearing and as he was not accorded that opportunity to choose whether he wanted to be heard orally in person or by his advocate, the decision of the PIC cannot stand as it is tainted with procedural

impropriety and in violation of the rules of natural justice which stipulate that no person shall be condemned unheard.

130. **On the fourth issue of whether the *disciplinary proceedings were procedurally and administratively fair,* Rule 10** Y (2) is clear that the decision must show whether it was unanimous or by majority of members of the Committee present. 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 who 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 10 Y.

131. **On the question of whether an appeal was the appropriate remedy for the applicant,** although the respondents claimed that the applicant should have appealed to the High Court, in my humble view, there was no hearing and in the absence of proceedings showing how the PIC proceedings or Inquiry was conducted, an appeal would not have served as an efficacious way of challenging the irregular and illegal decision by PIC. Furthermore, there was no decision made by the Board which is the tribunal whose decision is capable of being challenged by way of an appeal to the High Court which would then reexamine the record and evidence and arrive at its own independent conclusion as stipulated section 78 of the Civil Procedure Act.

132. In this case, clearly, Section 20(6) of the Act which empowers an aggrieved party to appeal to the High Court is not available to the aggrieved party where it is clear that there was no decision of the Board capable of being appealed from since the impugned decision in all instances refers to the PIC's findings and not the findings of the Board.

133. Section 9(2) of the Fair Administrative Action Act No. 4 of 2015,the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "***shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted***.

> ***(3) The High court or a subordinate court shall, if it is not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under Subsection (1)***
>
> ***(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice…."[emphasis added].***

134. From the above provisions of the law, it is clear that even the Fair Administrative Action Act mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court. However, the onus is on the applicant to demonstrate to the court that he ought to be exempted from resorting to the available remedies; and on application.

135. In this case, no application for exemption to exhaust the alternative remedies was made by the exparte applicants However, there was in my view, no merit issue to be considered by the High Court exercising appellate jurisdiction as there were no proceedings or evidence to be revaluated or reassessed in accordance with section 78 of the Civil Procedure Act and moreso when the decision of the 1st respondent was void. 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."***

136. **On what orders this court should make**, Iam satisfied that on the material placed before me, the exparte applicant has satisfied this court that the decision of the PIC was made without jurisdiction, was null and void and was irregular, illegal and that the PIC did not accord the exparte applicant any hearing before condemning him.

137. On the above grounds i proceed and issue judicial review orders of ***certiorari to bring into this court for purposes of quashing and I hereby forthwith remove into the High Court and quash and annul the decision made by the 1st Respondent PIC a public body on its own or behalf of the 2nd Respondent convicting and/or holding the Applicant for professional negligence and directing him to enter into negotiations with the Estate of Late Nina Ngina Kisonzo with a view to compensation and thereafter update the Chairman of the Medical Practitioners and Dentists Board within ninety (90) days.***

138. I decline prohibition as there is nothing left to be prohibited once the decision of the 1st respondent is quashed.

139. Each party to bear their own costs of these proceedings

Dated, signed and delivered in open court at Nairobi this 30th Day of October, 2017.

R. E. ABURILI

JUDGE

In the presence of:

Miss Bisieri advocate h/b for Mr Kenneth Wilson for the Respondents

N/A for the exparte applicant

Prof. Wangai advocate for the interested party

CA: George