



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NUMBER 70 OF 2014

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

MEDICAL PRACTITIONERS AND DENTISTS BOARD.....RESPONDENT

AND

AGNES NJOKI KIHARA.....INTERESTED PARTY

(EX PARTE)

DR J. WANYOIKE KIHARA

JUDGMENT

Introduction

1. By a Notice of Motion dated 21st February, 2014, the ex parte applicant herein, **Dr J. Wanyoike Kihara**, seeks the following orders:

(a) An order of certiorari do issue to remove into this Honourable Court and quash the decision of the Medical Practitioners and Dentists Board to ratify the recommendations of its Preliminary Inquiry Committee in PIC No. 17 of 2013 and more particularly that:

i. The complaint has merit as Dr Wanyoike Gichohi should not have inserted the McDonald stitch on the patient who was 22 weeks of gestation as it induced labour. He thereafter failed to remove the stitch despite established labour which led to a posterior tear.

ii. Dr Wanyoike shall appear in person before the Preliminary Inquiry Committee for admonition on a date to be advised by the Board.

iii. Dr Wanyoike do initiate with the complainant with a view of compensation her (sic) for the loss incurred and report back to the Chairman of the Board on the progress within ninety

(90) days.

iv. **Dr Wanyoike do pay part-costs of the Committee's sittings of Kshs 250,000/= within thirty (30) days.**

(b) AN ORDER OF MANDAMUS do issue directed at the Respondent compelling it to immediately issue the Applicant with his 2014 annual practice licence and retention certificate.

(c) AN ORDER OF PROHIBITION do issue directed at the Respondent prohibiting it from acting on the recommendations of its Preliminary Inquiry Committee in PIC No. 17 of 2013 on the complaint of AGNES NJOKI KIHARA and/or instituting any fresh or similar proceedings against the Applicant based on the said recommendations and/or complaint.

(d) Costs of this application be provided for.

Applicant's Case

2. The application was based on the grounds stated in the statutory statement filed herein on 19th February, 2014 and supported by the applicant's verifying affidavit sworn on 19th February, 2014.

3. According to the ex parte applicant, he is a Medical Practitioner, a Consultant Obstetrician/Gynaecologist registered with the Medical Practitioners and Dentists Board ("the Respondent") herein. He averred that he has been applying the trade and practising as aforesaid and his registration number is MPD/A3051 and added that he is also a Senior Lecturer in the Department of Obstetrics/Gynaecology at the University of Nairobi.

4. He deposed that he paid for his 2014 annual practise licence and retention certificate on the 30th of October 2013 having fulfilled all the requirements but the said license was never issued to him as a result of which his practice suffered and he was robbed of his means of livelihood. Despite visiting the Respondent's offices personally over this issue and despite raising this concern with the Respondent's Legal Officer he never received any and/or positive response at al.

5. It was therefore his case that the Respondent's decision to not issue him with his annual practising licence was based on spurious reasons stemming from the recommendations of the Respondent's Preliminary Inquiry Committee ("PIC") which recommendations were later ratified by the Respondent's full board and which to him were illegal because the Respondent did not give any reason as to why it did not issue the Applicant with a licence.

6. According to the applicant, on the 14th of March 2001 a complaint was raised against him by one **Agnes N. Kihara** (the "interested party") (P.I.C No. 17 of 2013) on various allegations which allegations he was informed of through a letter which ref. No. K.CIV dated 20th March 2001. Subsequently on the 21st of July, 2003 he received another letter from the Board which was authored by its Executive officer **Daniel M Yumbya** which was the last communication from the Board until late last year.

7. Subsequently, according to the applicant, the interested party filed a civil suit in the Magistrate's Court at Nairobi **Agnes Njoki Kihara versus Dr. Wanyoike Gichuhi and the Registered Trustees of the Edevale Trust (T/A Jamaa Home and Maternity Hospital (R.M. Civil Case No. 1462 of 2001)** which suit was based on the same allegations as the complaints herein. The said suit was however dismissed on the 30th June 2011 for non-attendance which according to the applicant implied that the interested party had no intention of pursuing the suit which was filed in 2001 because she took no reasonable steps to prosecute the case.

8. The ex parte applicant averred that he sent a copy of the court order dismissing the civil case to the Executive Officer of the Board and attached it to a letter dated 26th August 2013. However, after the

dismissal of the said suit, the Respondent's Preliminary Inquiry Committee ("PIC") quite belatedly purported to consider the complaint lodged before the Board by the interested party together with the documents presented before it and made recommendations against him and subsequently the Respondent's Full Board ratified the said recommendations. The Board's decision ratifying the recommendations of the PIC was communicated to him through a letter dated 25th October 2013 which was signed by the Chairman a **Prof. George A. O. Magoha**, but which letter he only received on the 18th of November 2013.

9. In the applicant's view, the Board did not pay any regard to the civil case, its status and outcome. He contended that the decision of the Board is unreasonable and an abuse of the court process because the proceedings that took place before the Board after the dismissal of the Civil Suit, amounted to charging him with the same offence. It was the Applicant's case that the Board's failure to act on the said complaint for over thirteen (13) years and doing so now, amounts to unfair and unreasonable treatment towards him, because he was anxious that the process had taken too long, yet he had sent several letters to the Executive Officer of the Board inquiring about the status of the complaint, to no avail.

10. The ex parte applicant further contended that the Board did not accord him the right to information upon which the complaint was based because he was not informed about the disciplinary inquiry/hearing as the last communication from the Board was on 21st July 2003 through a letter by the Executive Officer. He was however not informed about the meeting of the Respondent's Full Board that ratified the decision of the PIC and that the dates of the PIC and Full Board meetings were not certain.

11. The ex parte applicant averred that he had a legitimate expectation that the matter before the PIC and/or the Board had been concluded and/or was to be concluded expeditiously on being filed hence the purported proceedings of the PIC and the decision of the Respondent aforesaid violated his constitutional right to fair and just administrative action and in particular within a reasonable time as guaranteed under Articles 47, 48 and 50 of the Constitution of Kenya, 2010.

12. To him, the unreasonable delay violated his rights not only because of the delay, but also because of other incidental consequences of delay such as loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents, among other pertinent considerations. The Applicant believed that one can hardly expect a fair decision after 13 years and added that the Respondent offered no explanation to the inordinate delay. He reiterated that the Board never addressed any of the complaints brought in the allegation which action he believes went against the principles of natural justice.

13. It was further contended by the applicant that the Board's decision went against the provisions of the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules*** which require that "*proceedings of the Preliminary Inquiry Committee are to be held in camera and undertaken expeditiously.*" It was therefore the ex parte applicant's view that the Board's proceedings and decision were oppressive to him and scandalous, frivolous and/or vexatious and thus an abuse of the court process because he was accorded no hearing whatsoever; he was not offered a right of appeal; he was offered no chance to defend myself, either in person or through a representative of his choice, on the charges levelled against me. It is his case that he was not granted an opportunity to adduce documentary evidence in defence or call witnesses to do so and was also denied the right to cross-examination of witnesses and/or his accuser. According to him, the Board's (Respondent's) recommendation that "*Dr. Wanyoike Gichohi shall appear in person before the Preliminary Inquiry Committee for admonition on a date to be advised by the Board*" does not amount to being provided with a fair hearing; indeed admonition amounts to "caution, warning, rebuke, reprimand, reproach and/or scolding". The Applicant contends that he was not accorded a right to have legal representation at the purported hearing/proceeding because the Respondent and/or its P.I.C. became the prosecutor, advocate and judge in the disciplinary proceedings.

14. To the ex parte applicant, the Board did not explain the rationale for the said decision and instead it went beyond its scope in the investigations because it introduced new allegations that were not in the complaint.

15. In regard to the McDonald stitch, the Applicant stated that the said procedure (cervical cerclage) is used for the treatment of cervical insufficiency during pregnancy and is usually inserted in a woman who had either suffered from one or more miscarriages in the past or is carrying multiple fetuses (more than one foetus). According to the Applicant when the Board sat to determine the complaint before it, it stated that “*the complaint has merit as Dr. Wanyoike Gichohi should not have inserted the McDonald stitch on the patient who was 22 weeks of gestation as it induced labour*”. It was however the Applicant’s case that this was not one of the allegations levelled against him and he was never accorded an opportunity to explain the procedure in issue. To him, it is a proven fact medically that the McDonald stitch can be inserted up to the 26th week of gestation. However he averred that the Board in its decision then stated that “*he failed to remove the stitch despite established induced labour which led to a posterior tear*”. In the ex parte applicant’s view, there is no medical diagnosis, condition, disease, nor medical surgical obstetrical or gynaecological injury known as posterior tear hence the Decision by the Board goes against the provisions of Section 20 (2) of the **Medical Practitioners and Dentists Act**, Cap 253 of the Laws of Kenya (“the Act”).

16. On the issue of costs, the ex parte applicant’s case was that the Board’s decision to subject him to “pay part-costs of the Committee’s sittings of Kshs. 250,000/= within thirty (30) days” was itself unlawful and illegal because the Board had no such powers. He asserted that while the **Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules, 2013** have provisions for the imposition of costs; these only came into force on the 20th December 2013 and because the Board’s decision was communicated to him through a letter dated 25th of October 2013 it therefore means that there was no provision that the Rules could apply retrospectively. Therefore in imposing costs, the Board acted *ultra vires* of its power; the action is irrational, unreasonable, procedurally improper, oppressive, malicious, discriminatory and an abuse of power. The Applicant alleged that imposition of the costs based on a retrospective application of the law is illegal and unfair, it is of questionable policy and is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law. It was the Applicant’s position that there are no express words or necessary implication in the new rules to suggest that such was the intention of the legislature to ascribe retrospective force to new laws. It was the Applicant’s view that the purported application of law retrospectively (on costs) went against the principle of certainty of law and was not justified by positive law.

17. According to the Applicant, the respondent as a public body acted unfairly and in bad faith as admonition and compensation are not provided in the old Act. The Applicant averred that throughout the pendency of the civil case, and the unfairly delayed complaint, the Board never failed to issue him with an annual License upon fulfilling the required conditions. The Applicant stated that the decision also brought the Applicant’s name into disrepute and his status in society is disparaged. He concluded that he is apprehensive that unless the Application is expeditiously heard and the orders sought granted, he would suffer irreparable damage and the Application will be rendered moot.

18. It was the Applicant’s submission that the respondent in arriving at the impugned decision acted *ultra vires* its mandate and the Constitution of Kenya. The Applicant in support of his submissions relied on **Republic vs. Chief Magistrate’s Court Nairobi & 4 others ex parte Beth Wanja Njoroge [2013] eKLR, Nairobi Civil Misc Appl. 327 of 2011 and Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

19. The Applicant argued that the Board in arriving at the impugned decision acted in blatant breach of the cardinal rules of natural justice as it acted as the accuser prosecutor and judge. Though it had a duty to act fairly, instead there is actual bias in the decision and/or a reasonable suspicion of bias. The Applicant submitted that the right to a fair hearing requires that no one should be penalized by decisions affecting their rights or legitimate expectation unless they have been given prior notice of the case, a fair opportunity to answer it and the opportunity to present their own case. It was the Applicant’s submission that natural justice allows a person to claim the right to adequate notification of the date, time, and place of hearing as well as detailed notification of the case. To him, this information allows the person adequate time to effectively prepare his or her own case and to answer the complaint against him. It was therefore

his view that lack of notice and hearing constituted a form of abuse against him and it is not enough that the he was informed of the complaint; he ought to have been told of the gist of the complaint.

20. The Applicant submitted that there is a need to maintain public confidence in the legal system and in the expectation of public bodies to act fairly. Citing the holding of Lord Denning, MR in **Metropolitan Properties Co. (F.G.C.) Ltd vs. Lannon (1969) 1QB 577**, he submitted that “*Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: “the judge was biased”*”.

21. It was the Applicant’s position that the respondent in arriving at the decision relied on retrospective provisions of the law thus making its decision illegal, null and void *ab initio* and cited **Keroche Industries Ltd vs. Kenya Revenue Authority & 5 others(2007) eKLR** to the effect that:

“Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly the Court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.”

22. According to the Applicant, there is no provision providing for admonishing in the repealed L.N. No. 157 of 1979: ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules***.

23. The Applicant submitted that the Respondent’s Full Board’s decision to subject the Applicant to “pay part-costs of the Committee’s sittings of **Kshs. 250,000/=** within thirty (30) days was itself unlawful and illegal because the Board had no powers to do so. While the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules, 2013*** has provisions for the imposition of costs, the Applicant argued that they only came into force on the 20th of December 2013 yet the Respondent’s Full Board’s decision was communicated to the Applicant through a letter dated 25th of October 2013 and as such there is no provision that the Rules will apply retrospectively. The Applicant argued that, in imposing costs, the Respondent acted *ultra vires* of its powers; the action is irrational, unreasonable, procedurally improper, oppressive, malicious, discriminatory and an abuse of power.

24. It was the Applicant’s position that the respondents impugned decision was made in bad faith and/or with utmost *mala fides* and was laced with improper motive, is irrational and unreasonable in the circumstances obtaining and relied on **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, 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 what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in **Short v Poole Corporation [1926] Ch. 66, 90, 91 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; and, in fact, all these things run into one another.”**

25. The Applicant argued that he had a legitimate expectation that the matter had been concluded and/or was to be concluded expeditiously on being filed. He contended that the purported proceedings of the PIC and the decision of the Respondent aforesaid violated the Applicant’s constitutional right to fair and just

administrative action and in particular within a reasonable time as guaranteed under Articles 47, 48 and 50 of the Constitution of Kenya, 2010. The Applicant stated that throughout the pendency of the civil case, and the unfairly delayed complaint, the Board never failed to issue the Applicant with his annual License upon his fulfilling of the required conditions. He was of the view that the unreasonable delay violated the Applicant's rights not only because of the delay, but also because of other incidental consequences of delay such as loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents, among other pertinent considerations. He relied on Article 50(1) and (2) and 25(c) of the Constitution of Kenya, 2010 and argued that the right to a fair trial is sanctified and insulated from derogation even under other provisions of the Constitution itself. In support of this submission he cited **Republic vs. Attorney General & 3 Others Ex-Parte Kamlesh Mansukhlal Damji Pattni[2013] eKLR**, **Githunguri vs. Republic (1985) KLR**; **Githunguri vs. Republic (1986) KLR 1**; **Mills vs. R, [1986] 1SCR 863**; **Republic vs. Pattni HCCC No.299 of 2003**.

26. The applicant adopted the position that he was not offered a chance to defend himself either in person or through a representative of his choice against the charges levelled against him nor was he ever asked and/or invited to defend himself. He relied on section 20(2) of the ***Medical Practitioners and Dentists Act*** Cap 253 of the Laws of Kenya as well as Legal Notice 157 of 1979 which in his view provide 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.”*

27. It was emphasised that the Respondent totally ignored previous proceedings between the parties herein namely Nairobi Resident Magistrates Court 1462 of 2001 and took inordinately long in arriving at the impugned decision contrary to Article 10 of the Constitution which enjoins any person implementing public policy to be guided by the National values and principles of governance which include transparency, accountability, integrity and rule of law. In support of this submission he relied on this Court's decision in **Republic vs. Kenya Medical Practitioners and Dentists Board & 2 Others [2013] eKLR**, where it was held:

“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.”

(See **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007.**)

28. On the need to afford parties an opportunity of being heard the ex parte applicant relied on **Ridge vs. Baldwin [1964] AC 40**; **Central Organisation of Trade Unions (Kenya) and Benjamin K Nzioka & 5 Others Civil Application No. NAI 249 of 1993**; **Juma & Others vs. Attorney General [2003] 2EA 461 at page 464**; **Onyango Oloo vs. Attorney General [1986-1989] EA 456**; **Joseph Mbui Magari V Attorney General & Another Petition No. 415 of 2008 [2011] eKLR**; **Republic vs. Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996**.

29. The Applicants finalised his submissions by stating that in section 3 of the ***Medical Practitioners & Dentists (Disciplinary Proceedings) (Procedure) Rules***, the Preliminary Inquiry Committee is mandated to make a determination whether or not a complaint warrants reference to the Board for Inquiry or not after “considering the complaint”.

The Respondent's Case

30. The Respondent's filed a replying affidavit sworn on the 28th of November 2014 by a **Dr. Nicholas Muraguri** in his capacity as the Director of Medical Services with the Ministry of Health and also as the Registrar at the Medical Practitioners and Dentists Board. The deponent averred that the Board has many functions as set out in the Act which includes the licensing and registration of medical and dental practitioners and conducting disciplinary proceedings on complaints lodged against such practitioners or medical institutions in Kenya.

31. The deponent confirmed that a complaint was lodged by the interested party on the 14th of March 2001 arising from her treatment and management by the Applicant at Jamaa Maternity Hospital. Upon receipt of the said complaint the matter was referred by the Board to the PIC which is a committee established under the Rules for purposes of undertaking inquiries as stipulated in Rule 4 of the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules***.

32. The deponent admitted that on the 20th of March 2001 the Board wrote to the Applicant seeking information, comments and full reports on the complaint to enable the PIC undertake its investigations comprehensively. According to him, the parties before the PIC at the material time submitted their respective documents and statements which enabled the PIC to undertake its investigations and make recommendations for consideration by the Full Board. The deponent added that the Applicant submitted the medical report for the complainant before the PIC vide a letter dated the 10th of April 2001 and indicated his willingness to co-operate with the Board and also attached the pleadings pertaining to civil case RMCC 1462 of 2001; Agnes Njoki Kihara vs. Dr. Wanyoike Gichuhi & Another.

33. It was the deponent's case that by a report dated the 6th April 2002 the complainant submitted a report to the Board detailing the complaint she had against the Applicant and set out the chronology of events leading to the reference of the matter to the Board.

34. It was the deponent's position that the PIC of the Board consists of practitioners and consultant in different specialities in medicine and dentistry who discussed the matter in its meeting held on the 19th July, 2001 and deferred the same pending the conclusion of the court case hence the delay in acting on the matter sooner hence the allegations that the Respondents ignored the complaint, are inaccurate. The deponent admitted that the aforesaid civil case was dismissed for non-attendance on the 30th June 2011 where after the PIC considered and re-evaluated this matter and made recommendations which were subsequently ratified by the full Board.

35. It was the deponent's case that since the filing of the civil suit, the parties engaged extensively in negotiations in an attempt to compromise the case but the Applicant failed to approve the tentative compromise.

36. In regard to the practising licence, the deponent averred that the Applicant was issued with it in compliance with the ex parte orders issued on the 19th of February, 2014 and to him, the Board has been willing to give the Applicant another opportunity to present his defence afresh so as to be fair to all parties but the Applicant rejected the proposal. It was deposed that the Applicant herein had presented his response to the complaint lodged before the Board in writing and the PIC had copies of the entire patient's file further to other documents which contained sufficient information to enable the PIC determine the complaint which led to the impugned decision. It was therefore his view that the decision of the PIC as adopted by the Full Board is consistent with the findings of an independent medical expert, Dr. Kiama Wangai whose report was submitted on the 1st of August 2003 to the Board and who found the Applicant responsible for the breach of conduct.

37. Based on section 20 of the Act the deponent averred that the Medical Practitioners and Dentists Board is allowed to regulate its own disciplinary procedure and that the Board exercises a statutory function in accordance with its statutory mandate hence the court should exercise its supervisory jurisdiction cautiously because issues relating to the health of patients are best determined by the Board due to its required expertise.

38. In regard to costs, the deponent contended that the Board has express powers to order parties to pay reasonable costs of the proceedings under Rule 4(3)(a) of the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules***.

39. It was his view that the deponent also avers that the Applicant only sought legal redress after the Respondent had performed its duties and the Act provides parties with the right to appeal vide Section 20(6) of the Act. In his view, the Board fairly considered the complaints lodged before it without

digressing to any other extraneous issues and did not contravene any constitutional or statutory rights of any of the parties herein but acted in a very professional manner and with the interest of all parties under consideration. He further contended that the Board did not apply any retrospective provisions of the law as pleaded by the Applicant but acted within the law and made a valid, legal and binding decision in the interest of all parties in the dispute.

40. The deponent's view was the Application herein lacks merit because the Board conducted an investigation on a complaint by a patient in exercise of its mandate under the Act; the complaint 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 the matter fell within the jurisdiction and functions of the Board; the Applicant subjected himself to the jurisdiction of the Board at all material times and he cannot attempt to challenge the acts of the Board as pleaded in the Application filed herein; the Applicant had the right to appeal to the High Court against the decision of the Board as communicated to him; the Applicant is attempting to appeal against a decision of the Board without following the right procedure; the Application herein is in bad faith; and it is in the interests of the general public in Kenya for the Board to be allowed to perform its functions as stipulated in the Act and the applicable rules.

Determination

41. I have had a chance to study the pleadings, affidavits and submissions that have been filed in this matter. The bone of contention in this matter arises out of the professional conduct or misconduct of the Applicant in his treatment and management of one **Agnes Njoki Kihara**, the interested party herein. In establishing whether judicial review orders in the nature sought herein may issue against the Respondent it is important to interrogate the mandate of the Respondent and the Preliminary Inquiry Committee (PIC) so as to determine whether the two operated and exercised their powers and authority within the scope of statute.

42. The Respondent Board is established under section 4 of the ***Medical Practitioners and Dentists Act*** Chapter 253 Laws of Kenya. Under section 20 of the Act, the Board that is established under Section 4 of the Act has the power to inquire into the professional conduct of a medical practitioner or dentist and if found to have been guilty of any infamous or disgraceful conduct in a professional respect the Board may remove the name of the said practitioner from the register or cancel his or her licence.

43. Under the Act are promulgated a subsidiary legislation known as the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979*** ("The Rules") which came into force vide Legal Notice No. 157 of 1979 and which have been amended from time to time more importantly on April, 2012 vide Legal Notice No. 21 of 2012 and later on 20th December, 2013 vide Legal Notice No. 223 of 2013.

44. In this case, the factual chronology of the events are as follows: In 1998, the interested party was attended to at Jamaa Hospital by the Applicant; on 2nd March, 2001, the interested party filed the civil suit against the Applicant being **Agnes Njoki Kihara vs. Dr. Wanyoike Gichuhi and The Registered Trustees of The Edevale Trust (T/A Jamaa Home and Maternity Hospital)** (R.M. Civil Case No. 1462 of 2001); on 14th March, 2001, a complaint was made against the Applicant before the Board by the interested party; on 20th March, 2001, the Board wrote to the Applicant seeking information, comments and full reports on the complaint to facilitate investigation by the PIC; on 10th April, 2001, the Applicant submitted the medical report of the interested party to the PIC; on 6th April, 2002, the interested party submitted her report detailing her complaint; on 19th July, 2001, the PIC deferred the inquiry made against the Applicant pending the outcome of the civil suit; on 30th June 2011, the civil suit was dismissed for non-attendance; and on 25th October 2013, the Board made its recommendations on the complaint having adopted the findings of the PIC and found the complaint against the Applicant merited.

45. Since the recommendations of the board were delivered vide a letter dated the 25th of October, 2013, before the December, 2013 amendments to the Act, it would follow that by virtue of section 28 of the ***Interpretations and General Provisions Act, Cap 2 Laws of Kenya***, the later amendments would not be

applicable to the decision under consideration. The said provision provides as follows:

Subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette.

46. It has not been contended and there is no evidence that the December, 2013 amendments were expressed to operate retrospectively.

47. Some of the amendments that were introduced vide Legal Notice Number 233 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.

48. Under the Rules as they existed prior to the December 2013 amendments vide Legal Notice Number 223 of 2013 the functions of the PIC were provided as:

(1) The functions of the Preliminary Inquiry Committee shall be to receive and review complaints against a 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 not warrant reference to the Board for inquiry, reject the complaint and so inform the Chairman; (b) if of the opinion that the complaint does warrant reference to the Board, cause it to be referred to the Professional Conduct Committee together with its findings and recommendations.

49. Prior to the amendments rule 4A of the Rules empowered the Professional Conduct Committee, subject to prior or subsequent approval by the Board, to *inter alia* levy reasonable costs of the proceedings from parties; promote arbitration between the parties and refer matters to such arbitrator as the parties may in writing agree.

50. However from the letter addressed to the Applicant enumerating the findings and recommendations of the PIC which were ratified by the Full Board, it was indicated that the ex parte applicant was to pay part-costs of the Committee's sittings of Kshs 250,000 within thirty (30) days and that the ex parte applicant was to appear in person before the Preliminary Inquiry Committee for Admonition on a date to be advised by the Board.

51. It is therefore clear that prior to the 2013 amendments the PIC whose decision was ratified by the Board had no express powers to impose costs, admonish a doctor or a dentist or refer the parties to arbitration. While I do not doubt that costs can be levied against parties to the proceedings before the Board, it is crystal clear that the body which was mandated at the material time to impose costs was the Professional Conduct Committee. There is no material before this court from the Professional Conduct Committee indicating its findings and recommendations with regard to the costs to be levied against the Applicant and which led to the letter that emanated from the Board. Without such evidence the Court can only conclude that the PIC which is quoted as having recommended that the Applicant should pay part costs of the Committee's sittings had exceeded its mandate.

52. 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, though it is sometimes convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. It would follow that the Board's decision to ratify the PIC's decision to the extent that they were without jurisdiction must similarly collapse. See **Macfoy vs. United Africa Co Ltd [1961] 3 All ER 1169 at 1172.**

53. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

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. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

55. The position with respect to alteration of the law during the pendency of legal proceedings was succinctly decided in **Said Hemed Said vs. Emmanuel Karisa Maitha & Another Mombasa HCEP No. 1 of 1998** where it was held:

“The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some very good reason against it”.

56. In my view amendments which empower authorities to impose sanctions cannot be termed as procedural amendments since they have the effect of adversely affecting the substantive rights and liberties of the individuals. They cannot therefore operate retrospectively by implication.

57. It was contended that since the civil suit was dismissed, the implication was that the interested party had no intention of pursuing the suit which was filed in 2001 because she took no reasonable steps to prosecute the case. Whereas that may have been true, it does not necessarily bar the interested party from pursuing her complaint before the Board. The proceedings before the Board being quasi-criminal in nature, the mere fact that the complainant could have pursued civil proceedings is no longer, pursuant to section 193A of the ***Criminal Procedure Code***, a bar to criminal proceedings. That provision provides:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

58. Dealing with the said provision this Court in **Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed HashamLalji [2014] eKLR** expressed itself as follows:

“The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the Criminal Procedure Code on this issue provides: Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

59. This was the position in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was held:

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution... It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.”

60. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR**:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely a dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

61. In this case however, the applicant has not expounded on the reason why the option of civil proceedings ought to operate as a bar to the proceedings before the Board. The civil suit which was dismissed was not determined on merits so as to justify the invocation of the *res judicata* rule. See **The Tee Gee Electrics & Plastics Co. Ltd. vs. Kenya Industrial Estates Ltd. Civil Appeal No 333 of 2001.**

62. It was contended that as a result of the delay in proceeding with the case before the Board, the same amounted to violation of the applicants constitutional rights. However as was held by this Court in **George Joshua Okungu & Another vs. The Chief Magistrate’s Court Anti-Corruption Court at**

Nairobi & Another Petition No. 227 and 230 of 2009:

“.....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial.”

63. In this case the applicant contends that the unreasonable delay violated his rights not only because of the delay, but also because of other incidental consequences of delay such as loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents, among other pertinent considerations. However it was held in **Kuria & 3 Others vs. Attorney General** (supra) that:

“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution....The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”

64. In my view it is not sufficient to allege loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents. The applicant ought to show tangible evidence of these allegations since the Court ought to weigh the rights of the applicant as well as those of the complainant. In the circumstances of this case, I am not satisfied that the applicant has shown that the delay in prosecuting the case before the Board which in any case was shelved to allow the civil suit to be determined has rendered it impossible for him to get a fair hearing. This was the position in **Joseph Mbui Magari vs. Attorney General & Another Petition No. 415 of 2008 [2011] eKLR** where the Court cited **Dickey vs. Florida**, where it was held:

“It appears that this court has stated that the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice...It appears that consideration must be given to at least three basic factors in judging the reasonableness of a particular delay; the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the speedy trial clause.”

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***; 4thEdn. 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”.

66. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, 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.”

67. In R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002, 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 in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.”

68. In Russel vs. Duke of Norfolk [1949] 1 All ER at 118, the Court expressed itself as hereunder:

“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 have 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.”

69. As was held in Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:

“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.”

70. In Re Pergamon Press Ltd [1971] Ch. 388, the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

“It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay’s submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a *prima facie* case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very

damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind.”

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.

72. On the issue of legal representation in **Enderby Town FC Ltd vs. The Football Association [1971] 1 All ER 218**, it was held that:

“The case thus raises this important point: is a party who is charged before a domestic tribunal, entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter of discretion of the tribunal. It is master of its own procedure; and if it, in the proper exercise of its discretion declines to allow legal representation, the courts will not interfere....in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than a bad lawyer....But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: ‘We will never allow anyone to have a lawyer to appear for him.’ The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart.”

73. In this application the ex parte applicant seeks an order of certiorari do issue to remove into this Honourable Court and quash the decision of the Medical Practitioners and Dentists Board to ratify the recommendations of its Preliminary Inquiry Committee in PIC No. 17 of 2013, that the applicant should not have inserted the McDonald stitch on the patient who was 22 weeks of gestation as it induced labour and that he thereafter failed to remove the stitch despite established induced labour which led to a posterior tear. In my view that is an issue which goes to the merits of the decision. In these kinds of proceedings, the Court is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court therefore should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision. See **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**.

74. The applicant also seeks order of certiorari do issue to remove into this Honourable Court and quash the decision of the Medical Practitioners and Dentists Board to ratify the recommendations of its Preliminary Inquiry Committee in PIC No. 17 of 2013, and more particularly that the applicant shall

appear in person before the Preliminary Inquiry Committee for admonition on a date to be advised by the Board; that the applicant do initiate mediation with the complainant with a view of compensation her (sic) for the loss incurred and report back to Chairman of the Board on the progress within ninety (90) days; and that the applicant pays part-costs of the Committee's sittings of Kshs. 250,000/= within thirty (30) days. I have already found that the PIC had no jurisdiction to undertake such actions. Accordingly, the Respondents decision along those lines are hereby removed into this Court and are hereby quashed.

75. The applicant seeks an order of mandamus compelling the respondent immediately issue the applicant with his 2014 annual practice license and retention certificate. The evidence before this court indicates that the Applicant was issued with a practising certificate in compliance with the exparte orders issued on the 19th of February, 2014. However, even if the same had not been issued the Court cannot issue an order of mandamus on such terms. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In my view the only legal obligation on the Respondent is to consider an application for renewal of the licence taking into account the relevant factors but not to grant the licence.

76. The Applicant finally prays that an order of prohibition do issue directed at the respondent prohibiting it from acting on the recommendations of its preliminary inquiry committee in PIC no. 17 of 2013 on the complaint by **Agnes Njoki Kihara** and/or instituting any fresh or similar proceedings against the applicant based on the said recommendations and/or complaint. As already held hereinabove, this Court in these kinds of proceedings does not deal with the merits of the application. Accordingly, in this decision this court cannot find whether or not the applicant was guilty of professional misconduct. That is a decision which falls for determination by the Respondent. Once the decision is quashed, it is upon the Respondent to decide what course to take. It is not for the Court to direct it to proceed in a particular manner. This was the position in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** where the Court of Appeal expressed itself as follows:

“The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court’s consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law...Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari*, prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable.”

77. As the applicant has not succeeded in all his prayers, each party will bear own costs of these proceedings.

Dated at Nairobi this 24th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Ndungu for Mr Kahonge for the Applicant

Cc Patricia