**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Miscellaneous Application 269 of 2011**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF MEDICAL PRACTITIONERS AND DENTISTS ACT CAP 253**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES (ORDER 53)**

**BETWEEN**

**REPUBLIC…….....……APPLICANT**

**VERSUS**

**KENYA MEDICAL PRACTITIONERS AND DENTISTS BOARD..... RESPONDENT**

**LUV BIREN SHAH..... 1ST EX PARTE APPLICANT**

**A minor (suing through Biren A. Shah as the next friend and guardian)**

**KUSH BIREN SHAH.....2ND EX PARTE APPLICANT**

**A minor (suing through Biren A. Shah as the next friend and guardian)**

## JUDGEMENT
## INTRODUCTION

1. By their Notice of Motion dated 1st December 2011, the *ex parte* applicants herein, **Luv Biren Shah** and **Kush Biren Shah**, both minors suing through their next friend and guardian, **Biren A Shah**, seek the following orders:

**(a) That an order of certiorari do issue to remove and bring to the High Court for the purposes of quashing, the decision by Medical Services and Dentists Board issued on 23rd May, 2011 in PIC Case No. 13 of 2009 dismissing the applicants' complaint against Dr. Hooker, Prof. Wasuna and the Aga Khan Hospital.**

**(b) That an order of Mandamus do issue to compel the Respondent to proceed with the hearing of the *ex parte* applicants' case.**

**(c) That costs be provided for.**

**EX APPLICANTS' CASE**

2. The Motion is based on the grounds set out in the statutory statement filed herein on 4th November 2011 and verifying affidavit filed herein the same day and sworn by **Biren A. Shah**, the biological father of the applicants herein (hereinafter referred to as the next friend) on 3rd November 2011. 11th July 2012. According to the *ex parte* applicant, following a successful bid he had lodged for the management of a public toilet at Kenyatta Market, he was on 10th July 2009 invited to sign a management agreement with the Respondent (hereinafter referred to as the Council). According to the deponent, he instructed his advocates to lodge a complaint against the **Aga Khan Hospital**, **Dr. Heene Hooker** and **Professor Aggrey Wasuna** (hereinafter referred to as the interested parties) concerning the treatment of the applicants who were delivered prematurely on 6th July 2007 on the basis that the interested parties conducted themselves negligently thereby occasioning permanent disabilities to the applicants and the said complaints were made on 18th February 2009 to the applicants and the matter referred to the Preliminary Inquiry Committee (hereinafter referred to as the Committee) for investigations as is usually the procedure. When the matter came up for hearing on 25th May 2010 before the said Committee the same was not completed and was adjourned for hearing before the Health and Fitness Committee on an unspecified date. By that time no documents had been filed before the Respondent and none have been filed todate. By a letter dated 15th June 2010 the deponent's advocates requested for an index of documents that he required to be included in his bundle of documents and inquired into the role of the aforesaid Health and Fitness Committee and the issue of recording of the proceedings or minutes in the earlier meeting but the letter was not responded to. A further reminder and request for a tentative date was made on 5th October 2010 but similarly there was no response. There was yet another reminder on 26th January 2011 which again elicited no response. However on 28th April 2011 the respondent wrote to the deponent's advocates informing the latter that the matter was coming up for discussion before the Committee on the 5th May 2011 and that the advocates' attendance was not required. However on 23rd May 2011, the respondent wrote to the said advocates informing them that the complaint in PIC No. 13 of 2009 had been dismissed on the grounds, *inter alia*, that the same lacked merits.

3. According to the applicants, based on legal advice, the said decision was irregular having been made before investigations by the said Committee had been completed and hence a nullity. It is further contended by the deponent that the decision to bar him from the meeting of the Committee of 5th May 2011 was contrary to his constitutional right to be represented in the proceedings. Further the assertion by the Board that it made its decision after examining the evidence tendered by all the parties was erroneous and that no documents had been tendered on his behalf to the Committee hence the decision of the Committee smacks of bias having been solely premised on information obtained from doctors and Hospital Complained against. Since there are no allegations against him, the deponent's position is that the allegations that he tried to have the Hospital Bills inflated is baseless and unsubstantiated. And if the said allegations existed, there was a corresponding right on his part to respond them and by failing to give him a hearing on these allegations, the respondent breached his fundamental right to be heard as is enshrined in the Constitution of Kenya. In his view the Committee exceeded its jurisdiction by investigating his conduct while the law only authorises it to investigate the conduct of persons whom complaints have been made against hence its finding that the deponent filed the complaint with unclean hands is irrelevant and cannot form the basis of dismissing the complaint before it.

4. Save for the letter from the Committee's registry communicating the fact of the dismissal of the complaint, it is contended on behalf of the applicants that the respondent failed to give proper reasons as to why the complaint was dismissed as no proper ruling was tendered as there was no record of proceedings or minutes hence the decision was random and sporadic and ought to be quashed.

5. In his view, the conduct of the respondent throughout the proceedings breached his fundamental rights to be heard and be represented in any proceedings which conduct is in contravention of his constitutional right to fair administrative action.

**RESPONDENT'S CASE**

6. In opposition to the application, the respondent filed an affidavit sworn by **Dr. Francis M. Kimani**, the Executive Director of the Respondent herein on 28th June 2012 in which it is deposed that the statutory mandate of the respondent is to deal with any nature of disciplinary proceedings lodged against any Medical Practitioners and Dentists and that under the rules that govern the disciplinary process with regard to medical practitioners and dentists there are various stages that follow before the disciplinary matter is finally adjudicated and these are the Preliminary Inquiry Committee which receives and reviews the complaints against a medical practitioner or dentist and decides whether the complaint warrants reference to the Board of Inquiry or not. Where it does not warrant the inquiry the same is dismissed while where in its opinion it warrants inquiry the same is referred to the Professional Conduct Committee together with its findings and recommendations. The second stage, according to the deponent is the Professional Conduct Committee which conducts inquiries into the complaints submitted by the Preliminary Inquiry Committee and makes recommendations to the respondent; ensures that the necessary administrative and evidential arrangements have been met so as to facilitate the respondent to effectively undertake the inquiry; convene sittings in respective counties to determine complaints; promote arbitration between the parties and refer the matter to such an arbitrator as the parties may in writing agree.

7. In this case, it is deposed the complaint was made and referred to the Preliminary Inquiry Committee which informed the persons against whom the complaints were made to submit their reports thereto and the applicant was informed that investigations had commenced. At the various meetings of the said Committee to deliberate thereon, it is deposed the applicant was represented and vide a letter dated 16th March 2010, the applicants through their advocates submitted the documents they intended to rely on. It is the deponent's position that after carefully considering the evidence before it the Preliminary Inquiry Committee in the exercise of its mandate bestowed upon it arrived at the conclusion that the complaint before it did not warrant reference to the Board, in a decision communicated to the applicant through their Advocates on record. Since the Committee's mandate is to carry out due diligence first before considering and reviewing any complaint before it so as to verify if they warrant to be considered and that the complaint is not frivolous, vexatious or malicious, it is deposed that this mandate extends to the applicant's conduct to verify if the complaint is in good faith thus the applicants' allegations are baseless and totally unfounded.

8. In the deponent's view, the Preliminary Inquiry Committee of the Respondent acted within its legal mandate and ambit as espoused and contained in the Medical & Dentist (Disciplinary Proceedings) (Procedure) Rules as read with the ***Medical Practitioners and Dentist Act***. According to the respondent since the said Rules and the Act provide for an appeal to this Honourable Court if one is contesting the decision of the Respondent, this application is premature in light of the availability of the said alternative remedy. According to him there are records of the minutes of meetings when the committee met and deliberated on the applicants' allegations hence the applicants' allegations are untrue and aimed at misleading this Court hence the application should be dismissed with costs.

***EX PARTE* APPLICANTS' SUBMISSIONS**

9. On behalf of the *ex parte* applicants, it is submitted, while reiterating the foregoing that having premised its decision upon the evidence of the person against whom the complaint was made, the Preliminary Inquiry Committee of the Board was biased since the law on apparent bias asks whether the

ascertained relevant circumstances would lead a fair-minded and informed observer to conclude that there was real possibility that the decision-maker was biased and appearance matter hence justice must be seen to be done.

10. It is submitted that Article 47 of the Constitution of Kenya, 2010 grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It is further submitted that Article 10 of the Constitution 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. Based on **Ridge vs. Baldwin [1964] AC 40**, it is submitted that the body with the power cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case. By not affording the applicants the documents that were to be produced by the *ex parte* applicant and proceeding to make a decision based on the evidence of the persons against whom the complaint was made, it is submitted that this was an apparent sign of bias and on the decision of **Central Organisation of Trade Unions (Kenya) and Benjamin K Nzioka & 5 Others Civil Application No. NAI 249 of 1993**, it is submitted that the tribunal should not base its decision only on hearing one side but should grant equal opportunity to both parties to present their case or divergent viewpoints and, in doing so, should hold the scales fairly and evenly between them.

11. According to the applicants since the lodged by them was against a doctor as opposed to one made by a doctor against another doctor, there was justification for referring the matter to the Health and Fitness Committee but only to the Preliminary Inquiry Committee. It is contended that apart from the letter from the Respondent dated 23rd May 2011 informing the *ex parte* applicants that their complaints had no merits, there is no other documentation showing that the PIC in actual sense sat and deliberated upon the complaint before arriving at the said conclusion hence the decision was arbitrary and flawed. According to the applicants the finding of the PIC should be based on the evidence against a doctor and not vice versa hence the issue of inflated bills was irrelevant and that in any case the issue could only be brought by the Hospital. Basing its decision on inflated hospital bills was, according to the *ex parte* applicants misdirected and misconceived and ought to be quashed. Citing **Republic vs. Chairman, Electoral Commission of Kenya *ex parte* Welamondi [2008] 2 KLR (EP) 393 at 402**, it is submitted that mandamus is the appropriate remedy for compelling a person to perform a duty imposed by statute, which duty he has refused to perform.

**RESPONDENTS' SUBMISSIONS**

12. On the part of the Respondents it is reiterated that the stages in which a complaint against a medical practitioner of a dentist goes through are the Preliminary Inquiry Committee and the Professional Conduct Committee and that in this case due process was followed. It is submitted that it is clear that the applicants were heard, their case deliberated upon and eventually a decision was rendered and the minutes attached show that the allegations made by the *ex parte* applicants are untrue.

13. It is submitted that although the applicants challenged both the process and the decision, the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substituted by law the decision in the matter in question. Therefore, the court will not, on a judicial review application act as a Court of Appeal from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court, it is submitted, is to see that lawfully authority is not abused by unfair treatment. Reliance is placed on **John Fitzgerald Kennedy Omanga Vs. The Postmaster General Posta Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003** and **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] KLR 203 at 204.**

14. With respect to the prayer for mandamus, it is submitted, based on the decision of **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** that an order of mandamus cannot be issued because the Respondent acted within its legal mandate, jurisdiction and ambit as espoused and contained in the Medical Practitioners &

Dentist (Disciplinary Proceedings) (Procedure) Rules as read with the ***Medical Practitioners and Dentists Act***. It is submitted further that the remedy of certiorari is a tool which the Court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal and are meant to keep the public authorities in check to prevent then from abusing their statutory powers or subjecting citizens to unfair treatment and the case of **Captain Geoffrey Kujoga Murungi vs Attorney General Misc Civil Application No. 293 of 1993 is cited in support.**

15. Since the impugned decision had been made within the respondent's statutory mandate and the rules of natural justice were followed, it is submitted that the court cannot order certiorari hence the application ought to b dismissed with costs.

**DETERMINATION**

16. I have considered the foregoing. According to ***The Supreme Court Practice 1997 vol 53/1-14/6:***

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

15. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

**"Judicial review 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 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."**

16. in **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112:**

**"The remedy of judicial review is concerned with the reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question.... The mandate of the Court is to ascertain if the implied duty to act fairly has not been discharged and if the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that [the authority] can make it again in accordance with the law. The Court cannot, however substitute its own decision and impose its own conditions, as this would be a usurpation by the Court of the power clearly vested in [the authority]. Similarly, [the authority's] decision and conditions can be attacked on being unreasonable or that irrelevant considerations taken into account or relevant considerations having been ignored."**

17. However, as was held in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] KLR 203 at 204**, "under the Wednesbury principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial

review proceedings where the Court concludes that the decision is such that no such person or body directing itself on the relevant law and acting reasonably could have reached the decision".

18. The scope of the remedy of certiorari was considered in **Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996** in which the Court of Appeal held:

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

19. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

20. The *ex parte* applicants contend that the matter was purportedly determined before they were given an opportunity of being heard. Whereas it is not disputed by the applicants that the Preliminary Inquiry Committee had the powers to conduct the inquiry into the allegations, it is however, contended that the Health and Fitness Committee had no role to play in the complaint. I have perused the replying affidavit and it seems that the only Committee meetings which were held were done by the Health and Fitness Committee. That Committee, according to the minutes of the meeting held on 17th August 2010 (exhibit FM-8), is an arbitration committee. Whereas the Respondents have clearly justified the reference of a dispute to the Preliminary Inquiry Committee and the Professional Conduct Committee, no attempt howsoever has been made to justify the reference of a complaint to the Health and Fitness Committee. Therefore if the decision to dismiss the complaint was solely based on the recommendation of the Health and Fitness Committee, the decision would not stand as it was arrived at by a body not mandated by the law to make such a decision. Any recommendation made by such a body may only be used by the Respondent as a guide but that would not absolve the Respondent from its duty to consider the complaint.

21. In section 3 of the Medical Practitioners & Dentists (Disciplinary Proceedings) (Procedure) Rules, the Preliminary Inquiry Committee is mandated to make a determination whether or nor a complaint warrants reference to the Board for Inquiry or not after "considering the complaint". In **Onyango Oloo vs. Attorney General [1986-1989] EA 456,** it was held that "to consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the

opinion and that "Consider" implies looking at the whole matter before reaching a conclusion. The Court in that case held that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at and that it is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided. The Court was of the view that the word "consider" conveys the idea of taking into account the different aspects of a problem and that it would be absurd to hold that to take into account one side of the problem would be "consideration" of it since that would only be half consideration.

22. In this case, it is contended by the Respondent that the complaint was deliberated and upon and a decision rendered. In support of this contention, the Respondent relies on the copies of the Minutes exhibited. However, there are no minutes of any Committee apart from the Health and Fitness Committee exhibited. This in my view is what the Court in **Onyango Oloo vs. Attorney General** (supra) meant when it held that it is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided. Without the minutes of the Preliminary Inquiry Committee the Court is unable to say what if any matters persuaded the said Committee and by extension the Respondent to arrive at the decision it arrived at.

23. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 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. See **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007**.

24. Therefore if the decision was arrived at based on the alleged inflation of the bills which was not the subject of investigation, it would follow that the Respondent also took into account extraneous matters in arriving at its decision with regard to the merits of the applicants' complaint.

25. As was held by **Platt, JA** in **Onyango Oloo vs. Attorney General** (supra):

**"Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair.**

26. Accordingly, I am not satisfied that the Respondent conducted itself in a manner that met the criteria set out in Article 47 of the Constitution with respect to procedural fairness hence certiorari ought to issue to quash its decision.

17. With respect to the order of mandamus in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

**"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is**

**an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. 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."**

27. It is alleged that there is an alternative remedy available by way of an appeal. In my view, if the decision in question was that of the Health and Fitness Committee and that the Respondent's role was simply limited to rubberstamping the same, it would not strictly speaking be a decision of the Respondent hence the remedy of an appeal cannot, in my view be said to be convenient, beneficial and effectual. Therefore in order to remedy the defects of justice and to ensure the ends of justice are attained, justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right mandamus ought to issue.

**ORDER**

28. In the foregoing premises I make the following orders:

**1 An order of certiorari is hereby issued removing the decision by the Medical Services and Dentists Board issued on 23rd May 2011 in PIC Case No. 13 of 2009 dismissing the applicants' complaint against Dr. Hooker, Prof. Wasuna and the Aga Khan Hospital to this Court and is hereby quashed.**

**2 An order of mandamus is hereby issued compelling the Respondent to proceed with the hearing of the *ex parte* applicants' case in accordance with the law.**

**3 The costs of this application are awarded to the *ex parte* applicants.**

***G V ODUNGA***
***JUDGE***
**Dated at Nairobi this day 22nd of April 2013**
***W K KORIR***
***JUDGE***