REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 25 OF 2008

J.O.O suing throDR. J.O (His father as the next

Friend & guardian) ……....…….1ST PLAINTIFF

DR. J.O …….....……..……...…….2ND PLAINTIFF

DR. M.M.O …….....……1RD PLAINITFF

-VERSUS-

DR. PRAXADES P MANDU OKUTOYI ……..……..……..1ST DEFENDANT

DR. CHIMMY OMAMO OLENDE…….....…….2ND DEFENDANT

KENYA HOSPITAL ASSOCIATION …….....……3RD DEFENDANT

RULING

BACKGROUND

After the Plaint to claim special and general damages against the three Defendants jointly and severally was filed, the 2nd and 3rd Defendants filed two applications by way of Notice of Motion dated 21st October, 2000 and 24th November, 2009.

The two applications seek prayer to strike out the suit filed by the 1st Plaintiff or in alternative the suit filed by all the three Plaintiffs. The prayer based on the first ground of incompetence of the Plaint based under provisions of Order XXXI Rules 1 (2), 4(1) and 15 of the earlier Civil Procedure Rules was heard and determined by my ruling delivered on 13th July, 2010.

The reasons for second limb of the prayer for striking out the plaint are set forth in ground (b) (i) to (vi) of the application dated 21st October, 2009 but filed on 2nd November, 2009. This application filed by 2nd Defendant (referred hereinunder as the '1st application') is supported by Affidavit sworn by the 2nd Defendant on 21st October, 2009.

The application dated 24th November, 2009 (referred to as 2nd application) filed by the 3rd Defendant is based on similar grounds as those made in the 1st Application. The ground which needs to be dealt with, avers that the suit is scandalous, frivolous and vexatious and otherwise constitutes an abuse of the process of this court. It is supported by Affidavit of 3rd Defendant sworn on 24th November 2009.

The Plaintiff/Respondent responded to these two applications by affidavits sworn by the 2nd Plaintiff on 23rd November, 2009 and 8th March, 2010 respectively.

All the counsel filed written submissions and relied on several authorities. The issues raised were further highlighted and supplemented by oral submissions.

The facts leading to filing of the Plaint are largely undisputed or indisputable.

In short, the 1st Plaintiff, at the relevant time a young male of 17 years of age, sustained a nasal fracture in the course of a basketball match. He underwent an elective nasal surgery on 11th February, 2005 at the Day-Surgery Unit of Nairobi Hospital (3rd Defendant). The 2nd Defendant undertook the surgical procedure being a licensed medical practitioner specialized as an Ear, Nose and Throat (ENT) Surgeon. Anesthesia was administered by the 1st Defendant, also a licensed medical practitioner specialized as such. During the procedure, the 1st Plaintiff sustained a cardiac arrest resulting in brain damage by reason of a hypoxic incident.

The 3rd Defendant thereupon launched its own investigation on the said tragic incident and referred the matter to its Standard Audit and Ethics Committee (referred as 'SAEC'). SAEC started its investigations in June, 2005 and concluded the same in September, 2005. In its minutes of 9th September, 2005, (Annexure JO5 to 2nd Plaintiff's replying affidavit), on page 2 thereof, the committee concluded that the events resulted from "Anesthetic accident resulting from inadequacy of intra-operative physiological monitoring!!"

On the complaint made by the 2nd and 3rd Plaintiffs, the matter was referred to the Medical Practitioner and Dentists Board (a Statutory body established under the provisions of the Medical Practitioners and Dentists Act (Cap. 253))

The Board set up a Preliminary Inquiry Committee to investigate the matter and to prepare a Report to be submitted for the benefit of The Board so as to enable it to take appropriate measures. The Preliminary Inquiry Committee recommended an inquiry to be made in respect of the event against the three Defendants.

The Board issued the 2nd and 3rd Defendants with Notice of Inquiry dated 8th May, 2007 raising allegations of infamous and disgraceful conduct.

The Board consisting of 16 experienced medical practitioners and academics conducted inquiry and delivered a Ruling with conclusion that the 2nd Defendant/Applicant was not guilty of misconduct and held the 1st Defendant/Respondent guilty of misconduct as alleged. It was found in respect of 3rd Defendant/Applicant that facts produced were insufficient to prove the charges against the Institution.

After the aforesaid findings were delivered, the present plaint is filed and subsequently the 2nd and 3rd Defendants have filed the two applications aforementioned.

SUBMISSIONS, OBSERVATIONS AND CONCLUSIONS:

Mr. Inamdar rightly commenced his submissions with provisions of the Medical Practitioner and Dentists Act (Cap 253) (referred to as "The Act") under which the Medical Practitioner and Dentists Board is set up. (See Sec. 4 (1) of The Act). It is not in doubt that the constitution of The Board is all encompassing

and could boast of eminent persons in the medical field as its members. Under the Act, Rules for the proceedings relating to inquiries into infamous conduct in a professional respect are made as provided under Sec. 23 of The Act.

Sec. 20 of The Act makes provisions for The Disciplinary Proceedings. Sec. 20 (1) thereof stipulates as under:-

"20. (1) If a medical practitioner or dentist registered or a person licensed under this Act is convicted of an offence under this Act or the Penal Code, whether the offence was committed before or after the coming into operation of this Act, <u>or is, after inquiry by The Board, found to have been guilty of an infamous or disgraceful conduct in an professional respect,</u> either before or after the coming into operation of this Act, The Board may, subject to subsection (9), remove his name from the register or cancel any licence granted to him." *(emphasis mine)*

I may pause here, and observe that the penalty to be imposed by The Board, either after the conviction of an offence under the Penal Code and for a medical practitioner guilty after the inquiry under The Act, is the same.

Sec. 20 (4) of The Act further empowers The Board to regulate its own procedure subject to the provisions of Sec. 20 and the Rules of the Procedure mentioned hereinbefore.

I may make following observations as regards constitution and powers of The Board i.e.

(1)It is a statutory body empowered to inquire into the complaint of infamous or disgraceful conduct in a professional respect against a medical practitioner.

(2)It is empowered under the Act to regulate its own procedure.

(3)The inquiry conducted by The Board is only in respect of infamous or disgraceful conduct in a professional respect.

(4)The penalty which may be imposed on the practitioner found guilty of such conduct is removal of his/her name from the Register or cancel any licence granted.

(5)The decision of The Board is appealable to the High Court.

(6)The penalty stipulated under the Act could only be imposed if at least ten members of The Board so decide.

It is true, as mentioned hereinbefore, The Board did not find the two Applicants guilty of infamous conduct, after the proceedings were conducted in which all the parties were represented by Advocates.

The typed proceedings of The Board stretched to 349 pages, (Annexure CO2 of the Application of the 1st Applicant)

In the findings of The Board, the following charges against the two Applicants were deliberated and determined:-

(1)The first Applicant/2nd Defendant

i) Failing to carry out a complete history and physical examination of Master O which led to inappropriate treatment resulting into the current condition of the patient.

ii) Failing to attend the patient in time. Setting in motion a chain of events that resulted into the patient's current condition,

iii) Failing, as a team leader of the surgery team, to ensure that the surgical operation was carried

out in accordance with known standards.

(2)The second Applicant/3rd Defendant

i) Having an inadequate system of work

ii) Failing to provide appropriate or appropriately maintained equipment

iii) Employing or retaining incompetent staff

iv) Failing to provide the patient reasonable postoperative care

v) Acting in contravention of the provisions of the Medical Practitioners and Dentists Rules.

In the proceedings before the Board, the complainant only called one witness Dr. J.N.O. He was led in his evidence by his advocate Ms Desma Nungo and was cross-examined by Mr. Inamder representing the first Respondent Dr. Olende, Mr. Ochieng and Mr. Opiyo representing Dr. Okutoyi and Mr. Kimani representing the third Respondent. At the close of the complainant's case the advocates for the Respondents made twin pronged submissions to the effect that no sufficient evidence had been adduced upon which the Board could find that the facts alleged had been proved and/or that the facts of which evidence had been adduced were insufficient to support a finding of infamous or disgraceful conduct in a professional respect. After evaluating the evidence tendered by Dr. O and considering the submissions made by the advocates representing the Respondents and the response by the advocate for the complainant, the Board partially upheld the submissions with the result that the Respondents were called upon to answer charges as follows:

In respect of Dr. Olende the first Applicant.

1. Failing, as team leader of the surgery team, to ensure that the surgical operation was carried out in accordance with known standards.

In respect of The Nairobi Hospital the 2nd Applicant.
1. Failing to provide the patient reasonable postoperative care.

The above passage shows that the Board did find that the 2nd defendant/1st Applicant and 3rd defendant/2nd Applicant were called upon to answer only one charge.

Mr. Inamdar thereupon submitted that The Board heard the evidence and relied upon the testimony of Professor Asad Raja, Chair of Surgery at Aga Khan University Hospital, who testified that the surgeon does not take part in the prior preparation of the surgery, that the hypoxia (the cause of the condition of the 1st Plaintiff) must have commenced at the beginning of, or immediately prior to, the commencement of the surgical procedure and that there was nothing during the procedure to alert the surgeon that there was something amiss.

It was also stressed that the particulars of charges before The Board and those averred in the Plaint cover the same scope of the events and there cannot be any further evidence that could be produced before this court in addition to the evidence that were offered and considered by The Board before making its findings.

As per Mr. Inamdar's submissions, the Applicants had gone through three process of inquiry and the last one was a quasi-judicial process which has considered and determined all the facts and elements of professional care involved in the tragic event. It was reiterated with emphasis that the Plaintiffs/Respondents in the pleadings before the court have not averred or elaborated any other facts or evidence which were not before The Board.

It was contended by the learned counsel for both Applicants that the Respondents have not shown how and where The Board had faulted in facts or in law. Furthermore, the testimony of Prof. Raja remained unchallenged. It was emphasised that The Board is particularly more qualified to determine the issue of responsibility for an incident which is before the court and thus the court should be very slow to reach a conclusion that The Board's decision, properly arrived at by medical experts, is unreasonable.

It was urged that from the facts and pleadings of this case, the suit should be struck out being scandalous, frivolous or vexatious which factors according to the learned counsel, tantamount to an abuse of the court process. In addition, the court has an inherent power under Sec. 3A of the Act to make any order deemed fit to prevent the abuse of its process.

Many authorities were cited to explain the spirit and purport of vexatious and scandalous proceedings including abuse of court process. I would cite a passage from English White Book 2003 vol. 1 page 80 adopted in ***Republic –vs- Kenya Revenue Authority Ex Parte Abadare Freight Service Ltd. (2004) e KLR (Misc. CA No. 946/2004)*** namely:-

"It is an abuse to bring vexatious proceedings i.e. two or more sets of proceedings in respect of the same subject matter which amount to harassment of the Defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context, it is immaterial that the proceedings are brought concurrently or serially."

It is further contended, that irrespective of the standard of proof to be applicable in the Disciplinary proceedings, there is no challenge to the findings of the Board and that no hint of challenge is even alluded to in these proceedings. It is specifically averred that the collateral attack by this suit, if proceeded with, will involve and bring in same parties, same evidence, same issue of laws and same expert opinion which have been canvassed and determined before the Board.

In short, it was stressed that the Respondents are trying to get another bite of cherry which is unfair and oppressive to the Applicants in view of the fact that the Board has put the blame only on the 1st Defendant herein.

Mr. Inamdar further raised an interesting point of law; that the issue raised to the effect that the Board is not a court. The concept of abuse of court process is not only confined to relitigation arising out of previous court litigation. Relying on the cases of ***Hunter –vs- Chief Constable of the West Midlands Police (1982) A: 529*** and ***Michanga Investments Ltd. –vs- Safaris Unlimited (Africa) Ltd. and 2 Others (Civil Appeal No. 25 of 2002),*** it was submitted that ***"concept of abuse of court process, cannot be comprehensively listed and that the same is dependent on circumstances found in each case".*** This case, if approached with broad and merited judicious considerations, should be included in the category of the abuse of court process, specially when the Respondents have not shown that they could have a *prima facie* case because of the conclusive finding of the Board. Mr. Inamdar submitted vehemently that in the circumstances of this case, the Respondents are also debarred from bringing any new evidence.

Mr. Kimani, the learned counsel of the 2nd Applicant, apart from reiterating and adopting the submissions made by Mr. Inamdar, also relied on Sec. 1A of the Civil Procedure Act which enjoins the court to facilitate just, expeditious, proportionate and affordable resolution of the Civil Disputes. He also brought to the notice of the court that the Respondents chose not to bring in an expert witness before the Board as the 2nd Plaintiff/Respondent thought that ***"the Board already had experts in the matter in issue so it will not need an expert".*** (see Page 29 of the record of the proceedings). The prayers as made, he urged, should be granted.

Mr Wekesa, the learned counsel for the Plaintiffs in opposition to the two applications, began his submissions by pointing out the differences between the Inquiry held by the Board and the present cause. The Board, though a statutory body, is mandated to inquire into disciplinary matter in respect of medical practitioners. While the present suit is before the High Court under its Civil jurisdiction to hear and determine the tortuous liability on negligence and damages under breach of contract.

It was stressed that the applications in disguise are plea of *Res Judicata* under Sec. 7 of the Civil Procedure Act. The provision of Sec. 7 thus relates to a competent court who has heard and finally decided the issue as stipulated therein. The definition of court under Civil Procedure Act is very specific and is restricted to High Court and subordinate courts acting in the exercise of its civil jurisdiction (see Sec. 2 of the Civil Procedure Act).

Mr. Wekesa also raised an interesting issue concerning the interpretation of Sec. 20 of the Act. He submitted that the mention of 'the person' in whole of the said section refers only to the person whose conduct is being inquired. The complainant is thus not covered under Sec. 20 (6) which stipulates that a person aggrieved by a decision of the Board may appeal as provided therein and further contended that the argument by the Applicants that the Plaintiffs did not appeal against the decision of the Board cannot hold water.

Although the above is an innovative argument and I do appreciate the tenacity, I would agree with the submissions made by Mr. Inamdar against this issue. The Plaintiffs were the complainants in the inquiry and denying a right of appeal to the complainant would be against the spirit of Rule of Law. On perusal of Secs 2, 11, 15 (6) and 20 of the Act together, I do not have any doubt that the right of appeal is equally available to the complainant.

However, I would also agree with the alternative submissions made by Mr. Wekesa and I also hold a considered opinion that the failure to appeal against the finding of the Board cannot and shall not act as a bar to the present suit. My observations to be made hereafter shall stand in support of my finding.

Mr. Wekesa rightly submitted in the alternative that the Plaintiffs have no objection to the Board's finding that there was no evidence to suggest infamous or disgraceful misconduct on the part of the Applicant because as per him the Board on the other hand has a right to commence such inquiry with or without a complainant.

He also reiterated that the fact, that the proceedings before the Board is an inquiry and not a trial had been also accepted and emphasized by the defendants during the inquiry. He referred to pages 71, 77 and 97 of the proceedings before the Board (Annexure CO1 to the Notice of Motion of the 1st Applicant).

What is really required of the Plaintiffs in this cause, according to Mr. Wekesa, is to prove negligence which could attract the tortuous liability. Mr. Wekesa emphasized that the Board's inquiry could be considered as quasi-criminal process and thus the standard of proof in the two causes are totally different. Several authorities were cited to support this contention namely:-

(1)Charles Munyela Kimiti –vs- CPL Joel Mwenola & 3 Others (CA No. 129 of 2004), wherein the Court of Appeal observed:-

"It does not however follow that the finding on the Inquest exonerates the Respondents from liability in tort, if negligence was established against the two police officers, they could be liable in tort notwithstanding that their action was found at the Inquest as not being criminal in nature just as a person who has been convicted for careless driving under the Traffic Act is entitled to show in subsequent civil proceedings against him for damages that the driver of the other vehicle or the victim of the accident is equally liable for contributory negligence (See Chemwolo & Another –vs- Kubende [1986] KLR 492. The burden of proof, as Miss Mwai correctly stated, is lesser in civil proceeding than in criminal proceedings or proceedings of a criminal nature."

(2)Robinson –vs) Oluoch (1971) EA CA p. 376 at 378 (letter D). the Court of Appeal reiterated the same observations, namely:-

"We are satisfied that if is quite proper for a person who has been convicted of an offence involving a negligence in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff or any other person, was also guilty of negligence which caused or contributed to the accident."

(3)In the case of <u>Queens cleaners and Dyres Ltd. –vs- East Africa Community & Others</u> (1972) EAK 229 at 230, Travelyon J. observed:-

"The decision of course, I accept. But the "degree of negligence" as counsel put it, i.e. the issue of contributory negligence, is a live one in the case. How is it to be resolved? It cannot, as I see it, be done by referring back to what happened in the other court; that has never been possible. It must be done by evidence in the instant proceedings. <u>To establish a claim in negligence simpliciter the degree thereof is immaterial for if you are negligent in the smallest degree it is enough to fix you with liability and there is no problem;</u> applying section 47A the conviction spells out negligence and that concludes the matter. But where contributory negligence is concerned, it is different for the <u>court must investigate whether one or other or both of the parties were at fault so as to apportion the damage according to the relative importance of their acts in causing the damage and</u> <u>their relative blameworthiness.</u> What s. 47A does is make it impossible to hold that the person convicted was not negligent as tall for the conviction is conclusive evidence that he was i.e. the court can find that his blameworthiness was small enough; it cannot find that he had none. With all respect I doubt this to be satisfactory but, if I have interpreted the section correctly, that is the result and so I must find."

(4)In the case of <u>Atsango Chesoni –vs- David Mortons Silverstein</u> (2005) EKLR (p. 59). The High court found that in the inquiry before medical Board, the onus is to prove professional misconduct strictly and not on a balance of probability.

In view of the aforesaid observations, Mr. Wekesa relied also on the English case of ***<u>Bolitho –vs- City of Hacknery Health Authority</u> (1998) Ac 232 at 243*** wherein it was observed by the Appeal Court that:-

"But in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

Mr. Wekesa further emphasised that the Plaint avers many more particulars of negligence than those alleged before the Board. (See Paragraph 15 (i), (m), (n), (o), (p), (q), (u), (v) and (w).

Mr. Wekesa also stressed that as regards 3rd Respondent/2nd Applicant, the contractual issues concerning debt and acknowledgement pleaded in paragraphs 25, 26, 27 and 28 of the plaint are further raised which need to be heard and determined and that the first Departmental inquiry (SAEC) in its report has in any event reprimanded the defendants.

Lastly, he stressed that there has not been total exoneration of either of the Applicants by the Board. I have hereinafter cited the observations from the Board in respect of the two Applicants and the same has been pointed out by Mr. Wekesa. He further stressed that there are some unusual questions of fact as regards what occurred during the surgery which are raised by the Board and not answered. He cited some portions of the evidence of Prof. Raja, the expert witness on page 134, 135, 139 and 143. I may not put the same down herein, but the gist of the evidence shown on those pages shows that there was a problem and/or error which resulted in the present condition of 1st Plaintiff. I would also note that the Applicants'' stand before the inquiry was that there were charges of serious professional misconduct.

It was thus urged that the trial should proceed to determine the liability as per common law which has not been done.

I may pause here, and reflect on the Standard of proof in the disciplinary proceedings. I have considered several English cases like ***RE H (1996) AC 563, Re B (2008) 3 WLR 2, R (Mc Cann) –vs- Croven court at Manchester (2003) 1 AC 787 Calhem –vs- The General Medical Council (2007) EWHe 2606*** (Admin) where opinions as to standard of proof have shown to be varying amongst balance of probability, preponderance of probability and criminal standard of beyond reasonable doubt.

So far as the Act is concerned, the Procedure to be followed by The Board and Penalty that could be imposed have been laid down.

Moreover, it is also not in doubt that the injury suffered by the 1st Plaintiff and the penalty stipulated by the Act in case of verdict of guilty are very serious.
I would also like to take up the running thread from the authorities cited by the Applicants and would also note that the seriousness of allegation and gravity of the consequences to the person alleged/accused should be considered to show that issue has been heard and determined accordingly by the Tribunal. The standard of proof must accordingly be ascertained from the facts and circumstances of each case.

I would not like to determine the standard of proof at this juncture, but would like to cite the conclusive passage of the findings of the Board in respect of the 1st Applicant as well as in respect of the 2nd Applicant. The observations as regards the 1st Applicant are under:-

"In determining this charge we examine the role of oversight responsibility. To what extent should a professional interfere with another? We all know that in operations a surgeon waits for the go ahead from the anesthetic. The second issue is whether Dr. Olende was aware that Dr. Okutoyi had switched off the machine or indeed if she overheard the conversation between Mr. Mueke and the second Respondent if indeed we are to believe the former's version of the events. We give Dr. Olende the benefit of the doubt, in our view it is unlikely that she would have ignored such a conversation or continue with the operation. Thirdly, we note that the third Respondent reprimanded the first Respondent. Are we bound by that decision to find her guilty of infamous or disgraceful conduct?

In our view, we find the facts proved are insufficient to support a finding of infamous or disgraceful conduct. Dr. Olende is not guilty of the misconduct alleged in the charge." *(emphasis mine)*

The observations as regards the 2nd Applicant:

"That having been said it is our view that the facts as proved are insufficient to prove the charges as against the institution. However, under Rule 12 of the 2000 Institution Rules sub rule 2 states the owner and the managing body of a private medical institution as well as the medical practitioner or dentist concerned shall be responsible for any instance of professional misconduct occurring within the premises about which they know or ought to have reasonably to have known. In view of our findings relating to the charges against the second Respondent we find that the third Respondent cannot escape responsibility." *(emphasis mine).*

I would like to observe some of the wordings of findings by the Board specially the words such as ***"benefit of doubt", "Insufficient to prove the charges"*** and ***"shall be responsible for any instance of professional misconduct occurring within the premises".*** I shall also note that the Board used the words "professional misconduct" when it found that Institution could be responsible and not the words "infamous and disgraceful conduct", when considering the issue whether a person charged is guilty.

Mr. Inamdar had strenuously submitted that the Board was a Civil Tribunal. It is true that the Board has exercised powers as a quasi Judicial or even Judicial Tribunal. However, from my aforesaid observations, the scope and jurisdiction of the Board cannot be assimilated with the Industrial Tribunal or other similar Tribunals which hear and determine the Civil claims of the party. The element of penalty attached to the inquiry before the Board and the fact and circumstances of the inquiry heard and determined definitely removed the Board from the ambit of a civil tribunal, and I do find accordingly. The standard which the Board adopted was of strict responsibility or the ponderance of probability. The Applicants were charged with serious professional misconduct and would have faced very serious consequences if found guilty.

I shall now deal with Mr. Inamdar's submissions that the issue of negligence is inextricably tied up with the issue of professional misconduct.

Mr. Inamdar cited two English Authorities to persuade points that whether the words i.e ***"infamous and disgraceful"*** are synonymous with each other or had separate meaning and whether the aforesaid two terms stipulated in Sec. 20 (1) of The Act could be disjunctively construed or considered as one offence.

In the case of ***Munene –vs- Republic (1978) KLR 181,*** the court held that as per Sec. 23 (1) of the earlier Act which is equivalent to Sec. 20 of The Act the Board had no jurisdiction to consider charges of infamous or disgraceful conduct based on allegatious of facts which constituted criminal offence.

I may agree with the above holdings but I do observe that the charges of infamous or disgraceful conduct are serious misconduct as connoted by the words ***"found to have been guilty".*** This means that the Board while hearing the matter does not have to look at the other sides of statutory or common law rights of the complainant.

The other two authorities cited by Mr. Inamdar are English authorities namely ***Allinson vs. General Council of Medical Education and Registration (1894) L. J. O.B. 534 (CA)*** and ***R.V. General Medical Council; Kynaston Ex-parte (1930) 99 L. J. K. B. 217***

The words "Infamous" and "disgraceful" are obviously used disjunctively in our Sec. 20 (1) of The Act. The two English judgments cited hereinbefore dealt with the interpretation or meaning of the word "infamous".

On page 540 of the 1st authority, it is stated and I quote ***"we then come to the other matter, the infamous conduct in a professional respect".*** These words are taken from the provision of the dealing with situations similar to our Act. The definition of those words acts by professional persons reasonably regarded as disgraceful or dishonourable to the profession. That definition, it was openly admitted, not to be exhaustive.

In the second case on page 220, the use of the word "infamous" in the section was ridiculed by the court and was observed as tantamount to serious misconduct.

Be that as it may be, the Kenya Act has specifically used both the words "infamous" and "disgraceful" which cannot be just wished away at this stage. Taking any mode of interpretation, the conduct stipulated in the Act is a serious one and needs to be considered in that context.

The Board, as I have observed hereinbefore, made distinction between "infamous" and "disgraceful conduct" and "professional misconduct". Moreover, the Board reduced the charges against the Applicants as specified hereinbefore and made its conclusions accordingly. The evidence that were led could not have been considered fully in view of this fact.

The Board, having exercised quasi Criminal Jurisdiction has given its findings accordingly considering the stipulations of the provisions of the Act.

When I have observed as such, I shall stop by finding that the standard of proof before the court was different to the standard of proof which shall be determined before this court which is obviously on balance of probability.

Even if I agree with Mr. Inamdar, which I should not at this stage, that the words used namely:- "beyond reasonable doubt" was only in respect of charge three, it still leaves an open window for this court to exercise its jurisdiction according to law of negligence and standard of proof.

In view of the premises aforesaid, I am of an humble view, that the Plaint is not scandalous, vexatious or without reasonable cause of action as well as an abuse of the court process.

The court is duty bound to give breath to any case which is capable of showing a tint of life in it.

I thus reject the two applications referred hereinbefore.

Costs in the cause.

Orders accordingly.

Dated, signed and **delivered** at Nairobi this 12th day of **April, 2011**

K. H. RAWAL

JUDGE

12.04.2011