Wanjiku (Suing as the next friend and mother to JM - A Minor) v Kenyatta National Hospital & 2 others (Civil Appeal E686 of 2023) [2024] KEHC 13661 (KLR) (Civ) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13661 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E686 OF 2023

TW OUYA, J

NOVEMBER 6, 2024

BETWEEN

MARGARET MAGIRI WANJIKU (SUING AS THE NEXT FRIEND AND MOTHER TO JM - A MINOR) ..... APPELLANT

AND

KENYATTA NATIONAL HOSPITAL ..... 1ST RESPONDENT

DR MARK AWORI ..... 2ND RESPONDENT

DR JAMES CHEGE MUNENE ..... 3RD RESPONDENT

(Being an appeal against the ruling and order of Honourable D.M. Kivuti, PM delivered on 2.06.2021 in Milimani CMCC No. 2791 of 2019)

RULING

Background

1. This appeal emanates from the ruling delivered on 2.06.2021 in Milimani CMCC No. 2791 of 2019 (hereafter the suit). The background facts leading up to the said ruling are that Margaret Magiri Wanjiku (hereafter the Appellant) filed the suit in the lower court in her capacity as the next friend and mother to Jacob Mwangi (the minor) and against Kenyatta National Hospital, Dr. Mark Awori and Dr. James Chege Munene (hereafter the 1st, 2nd and 3rd Respondents respectively) vide the plaint dated 18.04.2019 seeking inter alia, general and special damages arising from a claim in the nature of medical negligence.

2. The Respondents upon entering appearance, filed their joint statement of defence dated 18.07.2019 denying the key averments in the plaint and liability.

3. Subsequently, the Respondents lodged a notice of preliminary objection dated 7.07.2020, challenging the competency of the suit on the ground that it offends the provisions of Section 20 of the *Medical Practitioners and Dentists Act* (Cap 253 Laws of Kenya) and hence the lower court lacks jurisdiction to entertain it.

4. Upon hearing the parties thereon, the trial court allowed the preliminary objection and consequently dismissed the suit, thus provoking the instant appeal.

The Substratum Of The Appeal

5. The present appeal was filed through the memorandum of appeal dated 9.03.2023 containing the following grounds:

   I. That the Learned Magistrate erred in law by holding that the Court did not have jurisdiction to entertain a claim on the tort of medical negligence.

   II. That by declining jurisdiction, the Learned Magistrate narrowly interpreted and applied the law in section 20(1) and (2) of the *Medical Practitioners and Dentists Act* by ousting the ordinary jurisdiction of the Court thereby arriving at an absurd and unjust conclusion.

   III. That the Learned Magistrate misinterpreted and misapplied section 20(1) and (2) of the *Medical Practitioners and Dentists Act* by granting the Medical Practitioners and Dentists Council compensatory jurisdiction while its jurisdiction are strictly disciplinary in nature.

   IV. That the Learned Magistrate misapprehended and misconceived the contents of the Plaint dated 9.04.2019 as a complaint of professional misconduct, malpractice or any breach of standards yet the appellant's claim was seeking special damages, general damages and future medical expenses arising from the tort of medical negligence on the part of the respondents.

   V. That by the ruling dated 2.06.2021, the Learned Magistrate ousted the appellant from the judgment seat to ventilate her grievances thereby denying her constitutionally protected right to a fair trial.

6. The Appellant consequently seeks the following orders:

   I. That the ruling declining jurisdiction dated 2.06.2021 in the Chief Magistrate's Court Civil Suit No. 2791 of 2019 at the Milimani Chief Magistrate's Court be set aside in its entirety and that this Honourable Court do make its own finding.

   II. That the Respondents be ordered to pay the costs of the appeal.

Submissions On The Appeal

7. The appeal was canvassed through written submissions by the parties. The Appellant's counsel anchored his submissions on the decision in the case of Hellen Kiramana v PCEA Kikuyu Hospital [2016] KEHC 4189 (KLR) to the effect that the *Medical Practitioners and Dentists Act* Cap 253 Laws of Kenya (the Act) does not make it mandatory for a person to lodge a complaint before it, prior to filing an action before the courts. Counsel proceeded to argue that in finding that Section 20 of the Act which was referenced in the preliminary objection, is couched in mandatory terms, the trial court not only erred in law but misinterpreted and misapplied the said provision. Counsel further faulted the trial court for failing to appreciate that while Section 20 (supra) deals with disciplinary proceedings against medical practitioners, the claim before it was in the nature of medical negligence and upon which the Appellant was seeking various heads of damages as against the Respondents herein. That consequently,

the reliefs sought in the claim do not correspond with those set out under Section 20 (supra). In addition, the Appellant's counsel whilst citing the decision in OZA (Minor suing through mother and next friend), Nana Ou & Robert Ouma v David Oluoch Olunya & Kenya Hospital Association t/a Nairobi Hospital [2021] KEHC 6732 (KLR) on the subject of reliefs awardable under The Act versus those awardable by the courts, contended inter alia, that the provisions of The Act do not cater for an award of damages and that the decisions rendered by the Medical Practitioners and Dentists Board pursuant to The Act are merely disciplinary in nature and would not necessarily settle a dispute arising from alleged medical negligence or award damages resulting therefrom. Counsel therefore submitted that by interpreting the above-cited provision of The Act as it did, the trial court essentially removed the Appellant from the seat of justice. In conclusion therefore, counsel submitted that the trial court erred in finding that it lacked jurisdiction to entertain the present claim and urged the court to allow the appeal and to set aside the impugned ruling accordingly.

8. On the other part, counsel for the Respondents while defending the ruling by the trial court, anchored his submissions on the decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) where the Supreme Court enunciated the legal principle that the jurisdiction of a court flows from either *the Constitution* or legislation or both. Counsel equally borrowed from the decisions in Republic v Independent Electoral and Boundaries Commission Ex parte National Super Alliance [2017] KEHC 5907 (KLR) and Geoffrey Muthinja & Robert Banda Ngombe v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR) among others, regarding the doctrine of exhaustion. Counsel then proceeded to submit that pursuant to the provisions of Section 20 (supra) as read with Section 4A of The Act and Rules 4 (3) and (4) and 10Y(1) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules; and Rule 34(1) of the Medical Practitioners and Dentists (Inquiry and Disciplinary Proceedings) (Procedure) Rules, the forum and procedure for resolving complaints against medical practitioners is clear-cut, which procedure extends to claims arising out of alleged medical negligence. Counsel argued that the Appellant therefore ought to have firstly exhausted the mechanisms available to her under The Act and through the appropriate forums provided for therein.

9. The Respondents' counsel likewise argued that contrary to the submission made on behalf of the Appellant to the effect that the forums provided for under The Act lack the requisite compensatory jurisdiction, the court in the case of St. John of God Hospital-Tigania v Kenya Medical Practitioners and Dentists Council; Michubu (Suing on Behalf of the Estate of the Late Agnes Kawira) (Interested Party) [2023] KEHC 23793 (KLR) acknowledged that the forum provided for in The Act is clothed with compensatory jurisdiction, thus:

> " The Court Mativo J as he then was in the case of Republic v Disciplinary and Ethics Committee & another; Donald Oyatsi (Ex Parte); AGK (Interested Party) [2020] eKLR aptly summed up the mandate of the Disciplinary and Ethics Committee as follows;
>
> "70. The first Respondent is a Committee of the Council established under section 4A of the Act. Section 4A
>
> (1) provides that the mandate of the D&EC include —
>
> (b)
>
> (i) conducting inquiries into complaints submitted to it;
>
> (ii) regulating professional conduct;
>
> (iii) ensuring fitness to practice and operate;

(iv) promoting mediation and arbitration between parties; and

(v) at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed..."

10. It is on the premise of the above grounds that the court was urged to dismiss the appeal for want of merit, and to uphold the decision by the trial court.

Analysis And Determination

11. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. This being a first appeal, the Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Flowing from the above, it is trite law that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

13. Upon review of the memorandum of appeal and submissions by the respective parties, it is apparent that the appeal rides fundamentally on a single issue; namely, whether the learned trial magistrate was correct in finding that it lacked jurisdiction to entertain the suit. Consequently, the court will address the five (5) grounds of appeal contemporaneously.

14. To begin with, the question what constitutes a preliminary objection was aptly considered by the court in the renowned case of Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696 in the following manner:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

15. The above definition was further advanced by the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR when it rendered itself thus:

> " It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."

16. As earlier mentioned, the Respondents put in the preliminary objection challenging the jurisdiction of the trial court to entertain the suit on the grounds that the suit offends the provisions of Section 20 of the Act.

17. Upon hearing the parties on the preliminary objection, the learned trial magistrate rendered his decision as follows:

> " ...
>
> A closer look at the plaint dated 18th April, 2019, the Plaintiff cause of action is the victim who suffered a heart condition was negligently handled by the Defendants. The negligence pleaded is medical negligence and the claimant seek damages against the Doctor involved in the process that the context in which the defendant feels that the complain of the nature are first visited to the council pursuant to Section 20(1) and (2) of the Medical Practitioner and Dentist Act.
>
> I have read the improved statute and I am in agreement with the defendant that question of medical negligence, Doctor's misconduct in matter relating to treatment of patient and management thereof would be presented to the specific body created. The rationale for this is that the board established as a specialized body which has the mandate to hear the professional complains of technical nature.
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> Having said the above, it is my finding that the preliminary objection succeeds to the extent that the Court has no jurisdiction to entertain the claim.
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> Consequently, the suit is dismissed" (sic)

18. The legal principle is that jurisdiction is everything and without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR when it held thus:

> " Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):
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> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to

exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

These words were echoed by this Court in Equity Bank Limited v Bruce Mutie Mutuku t/ a Diani Tour Travel (2016) eKLR in the following words:-

"In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer." (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

"When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing."

19. As earlier mentioned, the learned trial magistrate by way of the impugned ruling, determined that the lower court lacked jurisdiction to entertain the claim, by dint of Section 20(1) and (2) of the Act, which provide as follows:

20. Disciplinary proceedings

(1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.

(2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.

20. Sub-section 6 of the above-cited Section 20 further expresses that:

Where after an inquiry, the Council determines that a person is guilty, the Council may—

(a) issue a caution or reprimand in writing;

(b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;

(c) direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;

(d) suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;

(e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;

(f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or

(g) in addition to the penalties stipulated in paragraphs *(a)*, *(b)*, *(c)*, *(d)*, *(e)* or *(f)*, impose a fine which the Council deems appropriate in the circumstance.

21. From the court's reading and understanding of the foregoing Section, it is clear that the same sets out the procedure and manner of addressing matters touching on disciplinary action brought against medical practitioners.

22. From the court's re-examination of the Appellant's pleadings before the lower court but without delving into the merits of the case, it is apparent that the claim filed therein is premised on the tort of medical negligence. From the court's further re-examination of the said pleadings, it observed that among the reliefs sought therein are general and special damages arising from the alleged medical negligence.

23. Upon consideration of the provisions referenced hereinabove as relates to The Act, it is clear that the same become applicable in instances where a party wishes to pursue disciplinary proceedings against a medical practitioner. In the present instance; however; and contrary to the averments being brought forth by the Respondents, the Appellant's claim against the Respondents is in the nature of a tort rather than the disciplinary process applicable under Section 20(1) and (2) (supra). Moreover, the reliefs being sought in the Appellant's plaint which are in the nature of damages, do not fall within the ambit of reliefs listed and/or awardable under Section 20(6) (supra) or at all in the Act. In finding so, the court is persuaded by the court's decision in the case of OZA (Minor suing through mother and next friend), Nana Ou & Robert Ouma v David Oluoch Olunya & Kenya Hospital Association t/a Nairobi Hospital [2021] KEHC 6732 (KLR) cited on appeal by the Appellant, thus:

> " ...Therefore, the investigation and determination of the Council would not effectively settle the dispute before this court since the Plaintiffs/Respondents are seeking damages from the Defendants jointly and severally, which orders and directions the Medical Practitioners and Dentists Council cannot issue. It follows then that to transfer the dispute herein to the Medical Practitioners and Dentists Council for investigation will delay its hearing and determination before the court.
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> The provisions of Cap 253 do not establish a dispute resolution mechanism which awards damages to complainants against members of the medical profession. The mechanism established under the Act and its Rules ultimately leads to sanctions against a member who is found culpable as provided under Rule 4A (3)."

24. In any event, if it were to be that the Appellant's claim was premised on the provisions of The Act, from a clear reading of Section 20 (supra) it is apparent that the said provision is not couched in mandatory

terms, and the court has not come across any provision featuring in the said Act to indicate that the Appellant was obligated to first lodge a complaint pursuant to The Act, before seeking redress from the courts. A similar position was held by the court in the case of Hellen Kiramana v PCEA Kikuyu Hospital [2016] KEHC 4189 (KLR) cited in the Appellant's submissions on appeal, as follows:

> " ...there is no mandatory requirement under the *Medical Practitioners and Dentists Act* for the plaintiff to lodge a complaint before the Board as established under Section 4 of the Act before she could bring action in court. Consequently, that issue as framed by the defendant is superfluous. Furthermore, the defendant did not advance the said issue as being core to the determination of this case."

25. In the premises therefore, the court is of the view that the claim was properly before the lower court and consequently finds that the learned trial magistrate not only misconstrued the gist of the Appellant's pleadings but further, he misinterpreted and misapplied the provisions of Section 20 (supra) thereby arriving at an erroneous determination on the subject of jurisdiction. The court is inclined to disturb the same in the circumstances.

Disposition

26. The upshot therefore is that the appeal succeeds. Consequently, the ruling delivered by the trial court on 2.06.2021 is hereby set aside and is substituted with an order dismissing the preliminary objection dated 7.07.2020 with costs.

27. Resultantly, the Appellant's suit is hereby reinstated. In the circumstances, the Appellant shall also have the costs of the appeal.

28. Orders:

    a. The appeal is hereby allowed

    b. The Ruling delivered by the trial court on 2.06.2021 is hereby set aside.

    c. The preliminary objection dated 7.07.2020 is hereby dismissed with costs to the Appellant.

    d. Appellant's suit is hereby reinstated with costs of the appeal to the appellant.

    e. The lower court is ordered through the Deputy Registrar to list and have the matter heard on priority basis.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER, 2024

HON. T. W. OUYA

JUDGE

For Appellant..... Moses Masai

For Respondent..... Kimathi holding brief for Ambani

Court Assistant.....Martin

ROA 14 days.