THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 73 OF 2019

SOUTH B HOSPITAL.....PETITIONER

-VERSUS-

MEDICAL PRACTITIONERS AND DENTIST BOARD.....1ST RESPONDENT

PETERSON KYALO (On Behalf Of The Late Stella Mutheu Kioko).....2ND RESPONDENT

JUDGMENT

1. The pleadings filed before this Court show that the late Stella Kioko Mutheu (hereafter simply referred to as the deceased), walked into South B Hospital (the Petitioner) for blood transfusion as a day patient on 14th August, 2009. The transfusion commenced at around 3.40 p.m. and she developed complications by 4.40 p.m. and was certified dead at 5.20 p.m.

2. In December, 2013 the 2nd Respondent, Peterson Kyalo, lodged a complaint on behalf of the estate of the deceased against the Petitioner before the 1st Respondent, the Medical Practitioners and Dentist Board ('Board') now known as the Kenya Medical Practitioners and Dentist Council.

3. In a decision delivered made on 11th March, 2016, the Board upheld the 2nd Respondent's complaint and issued the following directives:

> **"i. South B Hospital to undertake the mediation with the Administrator(s) of the Estate of the Late Stella Mutheu Kioko with a view to compensation. They are further directed to report the progress of the mediation to the Chairman of the Medical Practitioners and Dentists Board within a period of 120 days from the date herein.**
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> **ii. The South B Hospital is hereby directed to pay the Board a sum of Kshs. 100,000/- as part costs for the sitting of the Committee within a period of 30 days from the date herein.**
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> **iii. The Medical Practitioners and Dentists Board is hereby directed to forthwith inspect the Respondent, South B Hospital, through its Inspection and Licensing Committee, and thereafter make such further directions and recommendations as the said Board shall deem fit. Further, the inspection costs therefrom shall be borne by South B Hospital.**
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> **iv. The Medical Practitioners and Dentist Board shall be at liberty to make such further orders and directions upon receipt of the report stated in (iii) above."**

4. Through the petition amended on 27th November, 2019, the Petitioner seek orders against the respondents as follows:

> **"a) A declaration that the 1st Respondent had no jurisdiction to solely hear and determine the complaint against the Petitioner.**
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> **b) A declaration that the decision of the 1st Respondent was unconstitutional, invalid and therefore void ab initio for want of proper jurisdiction.**
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> **c) A declaration that the Petitioner's fundamental right to a fair administrative action has been violated.**

d) A declaration that the Petitioner's fundamental right to a fair hearing has been violated.

e) A declaration that the 1st Respondent contravened the provisions of Section 20(2) of the Medical Practitioners and Dentists Act Cap 253 by failing to allow the parties to be heard orally.

f) An order staying execution of the decision made on 11/3/2016 by the Preliminary Inquiry Committee of the 1st Respondent.

g) An order restraining the reliance on the decision of the Preliminary Inquiry Committee made on 11/3/2016.

h) Such other order(s) that this Honourable Court shall deem fit to grant."

5. A perusal of the pleadings and submissions brings to the fore two complaints by the Petitioner; that the Board acted *ultra vires* its jurisdiction by delving into matters involving laboratory technicians and nurses which are respectively governed by the Medical Laboratory Technicians and Technologists Act, Cap. 253A and the Nurses Act, Cap. 257; and, that the Board infringed the Petitioner's rights to a fair hearing under Article 50 and fair administrative action under Article 47 of the Constitution.

6. On the claim that the Board exceeded its statutory jurisdiction, the Petitioner's case is that the crux of the 2nd Respondent's complaint was that the deceased Stella Mutheu Kioko was transfused with wrong blood and since the blood transfusion processes ranging from blood typing, cross-matching and preparation of blood is a preserve of the laboratory technicians and technologists who are registered under the Medical Laboratory Technicians and Technologists Act, the Board should have involved the Medical Laboratory Technicians and Technologists Board established under the said Act in the determination of the complaint.

7. It is also the Petitioner's case that since it had established that the deceased had been managed by nurses during the process of blood transfusion up to the time of her demise, the relevant body mandated to determine whether or not the nurses were professionally negligent is the Nursing Council established under the Nurses Act and not the Board.

8. The Petitioner therefore contends that the 1st Respondent had no jurisdiction to hear and determine the complaint solely without involving the Kenya Laboratory Technicians and Technologists Board and the Nursing Council whose practitioners played a key role in the management of the deceased. The Petitioner therefore asserts that the Board's decision was *ultra vires* its jurisdiction and was therefore invalid and void *ab initio*.

9. As regards the alleged violation of Articles 50(1) and 47(1) & (2) of the Constitution, the Petitioner contends that the decision by the Preliminary Inquiry Committee ('Committee') to arrive at the conclusion that there was professional negligence based on the patient's file and other documents alone, and without an oral hearing, violated its right to a fair trial as guaranteed by Article 50(2) of the Constitution. The Petitioner specifically claims that it was not given the opportunity to cross-examine its accuser resulting in an infringement of Article 50(2)(a) and neither was it given adequate time and facilities to prepare a response under Article 50(2)(b) & (c).

10. On the alleged violation of Article 47(1) and (2), the Petitioner's case is simply stated thus:

"Denial and/or infringement on the Petitioner's right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by Article 47(1) and (2)"

11. According to the Petitioner, it only came to know of the impugned decision of the Board in 2019.

12. The Board opposed the amended petition through the further affidavit of the Board's Acting Company Secretary, Michael Onyango. Mr Onyango also relied on the replying affidavit sworn on 13th April, 2019 by the Board's Chief Executive Officer, Daniel Yumbya, in response to the original petition.

13. In brief the Board denies the allegation that it only supplied its decision to the Petitioner in 2019. Its case is that it provided the ruling to the parties through a letter dated 17th March, 2016.

14. In response to the Petitioner's claim that it was not afforded a hearing, the Board holds the view that the Committee acted within the rules in determining that there was sufficient material and information to enable it determine the complaint without calling *viva voce* evidence. Specific reference is made to Rule 4(1) as read with Rule 10P of the Medical Practitioners and Dentists (Disciplinary Proceedings) Procedure Rules (hereinafter simply referred to as the Disciplinary Proceedings Rules) as granting the Committee the power to receive and review complaints against medical or dentist practitioners or institutions and determine them without an oral hearing.

15. The Board additionally assert that the Petitioner has misinterpreted the provisions of Section 20(2) of the Medical Practitioners and Dentists Act, Cap. 253 as the Petitioner was granted an opportunity to respond to the complaint. It is also averred that the Petitioner did indeed respond to the complaint through its advocate and Article 47 of the Constitution was therefore complied with.

16. On the allegation that the Board acted outside its jurisdiction in dealing with issues touching on nurses and laboratory technicians and technologists, it is averred that Rule 12 of the Medical Practitioners and Dentists (Private Medical Institution) Rules, 2000 requires the owners and managing bodies of private medical institutions to acquaint themselves fully with the qualifications and professional conduct of all medical practitioners and dentists working in the private medical institutions and to consult the Board in case of any doubt. It is further averred that the provision states that the owners and the managing bodies of private medical institutions shall be responsible for any instance of professional misconduct occurring within their premises about which they know or reasonably ought to have known.

17. It is additionally the 1st Respondent's case that the provisions of the Nurses Act and the Medical Laboratory Technicians and Technologists Act do not apply to the Petitioner which is a medical institution duly licensed by the Board.

18. The Board contends that the Petitioner is guilty of inordinate delay and laches as Section 20(6) of the Medical Practitioners and Dentists Act grants a party dissatisfied with the decision of the Board the right to challenge the decision before the High Court.

19. On his part, the 2nd Respondent swore an affidavit on 20th January, 2020 in opposition to the Petitioner's case. He took the same position with the Board and it is therefore not necessary to state his case in this judgement.

20. The parties filed and exchanged written submissions on the amended petition. Upon perusal of the pleadings and submissions the following three issues emerge for the determination of this Court:

a. The jurisdiction of the Court;

b. The jurisdiction of the Board; and

c. Violation of the Petitioner's constitutional rights.

21. As to whether the petition is properly before this Court, the Board submitted that the Petitioner's claim that it became aware of its decision on 24th January, 2019 is without merit. According to the Board, its decision dated 11th March, 2016 was communicated to the Petitioner through a letter dated 17th March, 2016. The Board asserts that it wrote another letter dated 24th November, 2016 to the Petitioner requiring it to submit a report by 30th November, 2016 confirming compliance with the decision.

22. The Board submits that although the Petitioner wrote a letter dated 10th July, 2018 inquiring whether the complaint was still pending or had been dismissed, the Petitioner all along knew of the decision as confirmed at paragraph 12 of the affidavit sworn by Leonard Munyua in support of the petition that the Petitioner's counsel had learned of the Board's decision from the 2nd Respondent's counsel on 16th November, 2017. Further, that the 2nd Respondent had exhibited a letter addressed to the Petitioner by its counsel through which the Petitioner was informed of the ruling.

23. It is the Board's submission that the Petitioner is guilty of laches and inordinate delay as the petition was filed 3½ years after the decision was made and communicated to the parties. The Court is urged to find that the Petitioner has approached this Court with unclean hands and is therefore not deserving of the exercise of the Court's discretion. The Court is also urged to enforce the principle that equity aids the vigilant, not the indolent.

24. It is additionally the Board's submission that Section 20(b) of the Medical Practitioners and Dentists Act provides that a person aggrieved by the decision of the Board may appeal to the High Court within 30 days from the date of the decision. It is the Board's submission that where a statute provides timelines within which a party ought to challenge the decision of a statutory body, the provision must be adhered to. The submission is supported by reference to the decision in **Islam Suleiman Ismail v Medical Practitioners and Dentists Board [2019] eKLR**. The Court is urged to find that this is an appeal disguised as a constitutional petition and decline to entertain the same.

25. The Board also submits that the Court should embrace the principle of constitutional avoidance and decline to determine the petition. The arguments are supported by reliance on the decisions in **C. N. M. v W. M. G. [2018] eKLR; Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR; Re Application by Bahadur [1986] LRC (Const) 297, Trinidad & Tobago;** and, **Felix Kiprono Matagei v Attorney General & 2 others; Anthony Kihara Gethi (Interested Party) [2019] eKLR.**

26. The Board submitted that by filing the witness statements and bundle of documents, the Petitioner was attempting to re-open afresh a matter it had already determined. It is the Board's contention that this Court has no jurisdiction to re-open the merits of a complaint already determined by a statutory body mandated by the law to inquire into such matters. According to the Board, the 2nd Respondent's complaint was made pursuant to the provisions of Section 20 of the Medical Practitioners and Dentists Act which provides the procedure for challenging the decision of the Board and the decision cannot therefore be challenged by filing a petition over 3 ½ years later.

27. The 2nd Respondent did not say anything on the question as to whether the Petitioner's case is properly before this Court.

28. In opposition to the Board's submission, the Petitioner asserts that it is before the proper forum. In urging the Court to proceed to determine the petition, the Petitioner contends that the Board did not make any decision appealable to the High Court. It is the Petitioner's case that Section 20(6) of the Medical Practitioners and Dentists Act only allow appeals where a person is aggrieved by the decision of the Board. It is the Petitioner's that the impugned decision was not made by the Board but by the Committee and the same was made unilaterally without consultation of the Board as required by Rule 3 of the Disciplinary Proceedings Rules.

29. The Petitioner's position is that the Committee's mandate was purely to review the complaint lodged before it and make appropriate recommendations to the Board. Further, that the ruling made by the Committee was not done in consultation with the Board and if such consultation took place, then no evidence has been adduced to confirm that fact. The decision in the case of **Republic v Preliminary Inquiry Committee (PIC) & another Ex parte Donald Oyatsi [2017] eKLR** is cited in support of the assertion that an appeal would not have been an efficacious way of challenging the irregular and illegal decision of the Committee.

30. On the claim that it is guilty of laches, the Petitioner submits that since there was no decision of the Board capable of being appealed, it was not guilty of delay in any way. The decision in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR** is cited in support of the proposition that it is only unreasonable delay which is prejudicial to the defendant that should lead to the dismissal of a claim.

It is the Petitioner's assertion that the Board has not established any prejudice it will suffer as a result of the alleged delay in filing the petition.

31. In response to the Board's claim that the Petitioner is seeking the re-opening and re-hearing of the complaint by this Court, the Petitioner contends that by introducing the witness statements and the supporting documents, it is only seeking to show this Court the evidence it would have adduced had it been granted an opportunity to be heard.

32. The issue raised by the Board as to whether this matter is properly before this Court is not a petty one. It is not disputed that Section 20(6) of the Medical Practitioners and Dentists Act clearly provides that a person aggrieved by the decision of the Board under the provisions of the Section may appeal to the High Court within thirty days.

33. The Petitioner's position is that there was no appealable decision rendered by the Board hence the right of appeal provided by Section 20(6) could not be exercised. One of the reasons given by the Petitioner as to why there was no appealable decision is that the case was heard before the wrong body (the Committee) instead of the Board.

34. I have read and re-read the amended petition dated 27th November, 2019 and the original petition dated 26th February, 2019 and nowhere is it alleged that the impugned decision was not made by the Board. It is only in the submissions that the Petitioner claims that there was no decision made by the Board which could be appealed to the High Court. There is therefore no averment in support of the Petitioner's submission that the impugned decision was made by the Committee and not the Board. It therefore follows that there is no merit in the Petitioner's claim that an appeal to the High Court could not arise from the impugned ruling. In any case, it is the appellate court that would have determined whether or not the impugned ruling was indeed the decision of the Board.

35. It is also observed that the Board has owned the decision and no evidence was adduced by the Petitioner to show that the Board was not consulted by the Committee before arriving at the decision. In the circumstances I find and hold that the impugned decision was made by the Board.

36. In urging this Court to find that it has no jurisdiction in respect of this petition, the Board asked this Court to invoke the principles of exhaustion of alternative dispute resolution mechanisms and constitutional avoidance. Both principles were pronounced by the Court of Appeal in the case of **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** as follows:

> **"Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation… Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.**
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> **A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done."**

Several other authorities have affirmed these principles.

37. In the case before this Court the Petitioner avoided a clear statutory appellate mechanism and opted for a constitutional petition. The Petitioner may indeed have valid complaints in the manner in which the complaint of the 2nd Respondent was handled by the Board. The issues raised by the Petitioner may indeed have a nexus with the Bill of Rights. Nevertheless, nearly all cases have connection to constitutional provisions. The danger in entertaining the strategy adopted by the Petitioner is that all parties aggrieved by the decisions of subordinate courts and tribunals will avoid the review and appellate mechanisms and try their luck through constitutional petitions resulting in chaos in the manner in which law is practised in this country.

38. The respondents have indeed successfully established that the Petitioner was aware of the decision of the Board by 16th November, 2017 and did nothing up to early 2019. The Petitioner could have moved the High Court for leave to appeal out of time but it did not do so. It would amount to an abuse of the court process to entertain this matter as a constitutional petition considering that the Petitioner intentionally failed to exercise the right of appeal.

39. In the circumstances of this case I agree with the Board that this is not a matter to be addressed through a constitutional petition. The petition should therefore be dismissed at this stage.

40. Nevertheless, I will address the issue of the alleged lack of jurisdiction by the Board to entertain the 2nd Respondent's complaint against the Petitioner. This is necessary because if the Board indeed lacked jurisdiction as alleged by the Petitioner then the ruling it delivered amounts to nothing.

41. That jurisdiction is everything has been stated and restated in a plethora of cases in this country. In that regard I only need to cite the decision of W. Karanja, JA in **Lemita Ole Lemein v Attorney General & 2 others [2020] eKLR** that:

> **"49. In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of**

jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can *suo motu* determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal."

42. The Petitioner submitted that the findings of the Committee against the nurses and laboratory technicians, who handled the blood that the deceased was transfused with, are in excess of its powers as they subvert the roles of the Nursing Council and the Laboratory Technicians and Technologists Board.

43. The Petitioner's case is that the Board established under Section 26 of the Medical Laboratory Technicians and Technologists Act whose mandate is provided under sections 27 and 28 of the Act is the body mandated to discipline lab technicians in the event of any professional misconduct or negligence. The Petitioner additionally contend that Section 18B of the Nurses Act mandates the Nursing Council established under Section 3 to conduct disciplinary proceedings against nurses.

44. The Petitioner urged that laboratory technicians and nurses are independent practitioners from medical doctors and dentists and have their own disciplinary mechanisms provided by the statutes under which they are registered. According to the Petitioner, the Board acted *ultra vires* its jurisdiction since it did not consult the Laboratory Technicians and Technologists Board nor the Nursing Council before arriving at its decision.

45. The Board's response is that the issue of jurisdiction should not be entertained by this Court as the same was not raised before the Board and was only introduced in the amended petition. In my view, the answer to this objection lies in the decision in **Lemita Ole Lemein (supra).** The issue of jurisdiction can be raised at any stage of the proceedings and even on appeal. I therefore find that the Petitioner is entitled to raise the issue of the Board's jurisdiction in this petition.

46. Turning to the substance on the issue of jurisdiction, the Board submitted that it is clothed with jurisdiction as provided by the Medical Practitioners and Dentists Act and the rules made thereunder to inquire into, hear and determine complaints made against medical and dental practitioners as well as private medical institutions such as the Petitioner. Various provisions of the law and the rules are cited in support of this argument.

47. I have reviewed the submissions of the parties on this issue. It is clear that Section 4 of the Medical Practitioners and Dentists Act establishes the Board whose mandate includes the licensing and registration of medical and dental practitioners, licencing health institutions, licencing of medical training institutions and conducting inquiries on complaints lodged against medical and dental practitioners and medical institutions. Rule 4(1) as read with Rule 10P of the Disciplinary Proceedings Rules gives the Committee powers to receive and review complaints against medical or dentist practitioners of a medical institution.

48. The 2nd Respondent's complaint was against the Petitioner and not a particular doctor, dentist, nurse or laboratory technician working for the Petitioner. The deceased had gone to seek medical services from the Petitioner and not from a specific practitioner. The 2nd Respondent was therefore entitled to complain against the Petitioner to its licensing authority being the Board. The Board is expressly mandated by Section 4(k) to register and license health institutions. Section 4(m) mandates the Board to regulate health institutions and take disciplinary action for any form of misconduct by a health institution. This is what the Board did in the circumstances of this case and it is not correct to say that it had no jurisdiction to conduct disciplinary proceedings against the Petitioner. If the Petitioner was of the view that it was let down by its nurses and laboratory technicians, then it ought to have taken up the issue with their licensing bodies.

49. I have found that the Board acted within its jurisdiction in determining the 2nd Respondent's complaint against the Petitioner. Any other grievance the Petitioner may have had in respect to the decision are issues that ought to have been taken up through an appeal.

50. The claim by the Petitioner that the right to be heard was violated is an issue that ought to have been raised on appeal before the High Court. Nevertheless, for the comfort of the Petitioner, I will only state that the right to be heard, in matters similar to the case that was facing it before the Board, is fulfilled through oral hearing or written arguments-see **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR.** The Board was entitled to consider the material placed before it and arrive at its decision without necessarily asking the parties to physically appear before it.

51. The summary of it all is that this petition is without merit. In the circumstances the petition is dismissed with costs to the respondents.

Dated, signed and delivered virtually at Nairobi this 11th day of February, 2021.

W. Korir,

Judge of the High Court