REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 76 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE MEDICAL PRACTITIONERS

AND DENTISTS COUNCIL.....1ST RESPONDENT

THE DISCIPLINARY AND ETHICS COMMITTEE....2NDRESPONDENT

AND

RMN.....INTERESTED PARTY

EX PARTE APPLICANT:

MARY HELP OF THE SICK MISSION HOSPITAL

DR. LAMBERT NIYONIZIGIYE

DR. GEORGE K. KARANJA

JUDGMENT

1. The 1st *ex parte* Applicants herein is Mary Help of the Sick Mission Hospital, a duly registered hospital operating as such, while the 2nd and 3rd *ex parte* Applicants state that they are duly registered doctors employed by the 1st *ex parte* Applicant. The said *ex parte* Applicants have brought judicial review proceedings with respect to a ruling made in **PIC Case No. 31 of 2017** by the Medical Practitioners and Dentists Council, through its Disciplinary and Ethics Committee, which are sued as the 1st and 2nd Respondents herein. The said ruling was sent to the *ex parte* Applicants on 18th March 2020, and was on a complaint lodged in **PIC Case No. 31 of 2017** with the Respondents by RMN, who is joined as an Interested Party herein.

2. The *ex parte* Applicants accordingly seek the following orders in an Amended Notice of Motion application dated 3rd June 2020:

> **1. THAT the *ex parte* Applicants be granted orders of certiorari to bring to this Court and quash the proceedings and Ruling by the Respondents as delivered in PIC case no. 31 of 2017.**
>
> **2. THAT the *ex parte* Applicants be granted orders of mandamus to compel the Respondents and the Interested Party to avail to the *ex parte* Applicants: -**
>
> > **a) A copy of the video recorded by one Dr. George Jumba in conducting the laparoscopy procedure that led to the removal of a gauze from the Interested Party.**
> >
> > **b) The gauze that was removed by one Dr. George Jumba through the laparoscopy procedure from the Interested Party.**

c) A copy of the CT Scan carried out on 4th July 2017 by Dr. Bernadette Kiigu.

d) A copy of the CT Scan carried out on 15th February 2018 by Dr. Samuel Ngugi.

e) A copy of the medical records of treatment of the Interested Party in relation to the treatment and procedures that she underwent at Nazareth Hospital.

f) A copy of the medical records of treatment of the Interested Party in relation to the treatment and procedures that she underwent at Thika Nursing Home Hospital.

3. THAT the ex *parte* Applicants be granted orders of mandamus to compel the Respondents to begin the inquiry and hearing against the ex parte Applicants *de novo*.

4. THAT the *ex parte* Applicants be granted orders of mandamus to compel the Respondents to re-constitute its members when the inquiry and hearing against the ex parte Applicants commences *de novo*.

5. THAT the *ex parte* Applicants be granted orders of prohibition to prohibit the Respondents from conducting an inquiry and hearing against the *ex parte* Applicants if they fail to comply with order 2 herein above.

6. THAT the *ex parte* Applicants. be at liberty to apply to the Court for all necessary and or consequential orders that the Court may deem fit to grant.

7. THAT the costs of this Application be provided for.

3. The grounds for the application are stated in the *ex parte* Applicant's amended statutory statement dated 3rd June 2020, and a verifying affidavit sworn on the same date by Esther Wanjiru, the *ex parte* Applicants' matron.

4. The Respondents filed a replying affidavit sworn on 22nd April 2020 by Michael Onyango, the 1st Respondent's Corporation Secretary, while the Interested Party's response was in a replying affidavit she swore on 29th May 2020. The application was subsequently canvassed by way of written submissions. The parties' respective cases are summarised in the following sections.

The *ex parte* Applicants' Case

5. In summary, the *ex parte* Applicants allege that during the hearing of the Interested Party's complaint, the 2nd Respondent denied the *ex parte* Applicant the opportunity to cross-examine various witnesses, denied it access to medical evidence and medical records of treatment relied upon by the Interested Party, was biased, and wrote its ruling without according the *ex parte* Applicants a fair hearing.

6. The *ex parte* Applicants explained that the Interested Party herein lodged a complaint before the 1st Respondent in PIC Case No. 31 of 2017 on 20th July 2017, raising several allegations against the *ex parte* Applicants, and that on 25th October 2019, the 1st Respondent through the 2nd Respondent proceeded with the hearing of the complaint, after inviting both the *ex parte* Applicants and the Interested party to the hearing. The *ex parte* Applicants annexed a copy of the complaint lodged by the Interested Party.

7. The *ex parte* Applicants contend that in breach of the rules of natural justice, the 2nd Respondent denied them the opportunity to complete the cross examination of one Dr. George Jumba, on whose notes and reports the complaint was based. Further, that the Respondents prevented and objected the cross-examination of Dr. S .C Patel on certain aspects of the report that he had prepared, and allowed him to deviate from the report that he had prepared and to give his own opinion on the merits of the complaint filed by the Interested Party. In addition, that the Respondents objected to Valentine Achungo being called and cross-examined on the report that he had prepared and which formed part of the documents tabled in support of the Interested Party's complaint, and that the *ex parte* Applicants were denied the opportunity to cross-examine Dr. Bernadette Kiigu and Dr. Samuel Ngugi on the CT Scans they performed on the Interested Party.

8. The *ex parte* Applicants also allege that they were denied access to medical evidence, and in particular the video recording of the laparoscopy procedure that was apparently recorded by one Dr. George Jumba on the removal of a gauze from the Interested Party, the said gauze that was apparently removed by Dr. George Jumba; the two (2) CT Scans carried out on 4th July 2017 by Dr. Bernadette Kiigu and on 15th February 2018 by Dr. Samuel Ngugi; and the medical records of treatment of the Interested Party in relation to the treatment and procedures that she underwent at Nazareth Hospital and Thika Nursing Home Hospital after being operated by the *ex parte* Applicants.

9. Subsequently, that the *ex parte* Applicants through their advocates on record wrote a letter dated 28th October, 2019 to the Chief Executive Officer of the 1st and 2nd Respondents, requesting to be supplied with a certified copy of the verbatim record and audio record of proceedings in the PIC Case No.3 I of 2017 conducted on 25th of October, 2019 and a certified copy of all other proceedings in the case. The *ex parte* Applicants claim that the Chief Executive Officer of the 1st and 2nd Respondents never responded to the said letter, nor to a reminder dated 19th March 2020. The *ex parte* Applicants annexed copies of the two letters.

10. Lastly, that the Respondents sent a copy of the ruling to the Interested Party on 17th March, 2020 via email before sending the same to the *ex parte* Applicants on 18th March, 2020, and which ruling was not dated. The *ex parte* Applicant annexed copies of email correspondence on the ruling from the Respondents, and of the 2nd Respondents ruling sent to it on 18th March 2020.

11. The *ex parte* Applicants therefore claim that the Respondents were biased, and wrote the said ruling without according them a fair hearing.

The Respondents' Case

12. The Respondents averred that the 1st Respondent is a statutory body established pursuant to section 3 of the Medical Practitioners and Dentists Act, and that its functions as set out in section 20 the Act include conducting disciplinary proceedings on complaints lodged against practitioners or medical institutions in Kenya. Further, that the 1st Respondent performs its functions through committees, which are established pursuant to section 4A of the Act and consist of its members, and in some instances co-opted members, who are specialists.

13. The Respondents stated that the Medical Practitioners and Dentists Act was amended through the Health Laws Amendment Act, 2019, which came into force on 17th May, 2019, and that by virtue of the said amendments, the Committees previously known as the Preliminary Inquiry Committee and the Professional Conduct Committee are now known as the Disciplinary and Ethics Committee, whose functions are set out in section 4A (1)(b) of the Act.

14. The Respondents' case is that the 1st Respondent is empowered to receive complaints against medical and dental practitioners or medical institutions from different sources, and pursuant thereto it received a complaint from the Interested Party on 20th July 2017 against the *ex parte* Applicants, alleging mismanagement during her care and treatment at the 1st *ex parte* Applicant hospital. The Respondents annexed a copy of the complaint, and further stated that the 1st Respondent forwarded a copy of the said complaint to the *ex parte* Applicant for its response, and also requested for statements from the medical personnel who were involved in the care and management of the Interested Party and a copy of the Interested Party's file to enable it undertake an inquiry.

15. Subsequently, that the 1st *ex parte* Applicant responded by submitting a certified copy of the Interested Party's file, and statements of the medical personnel who were involved in her treatment, which were served upon the Interested Party. In addition, that after reviewing copies of the documents received from the parties, the 1st Respondent wrote to the Aga Khan University Hospital on 15th November 2017, and requested for reports and a copy of the Interested Party's file to facilitate a fair inquiry.

16. The Respondents contend that the complaint by the Interested Party was discussed by the Preliminary Inquiry Committee, as it was then known, on 21st September 2018 and thereafter a decision was made by the said Committee to invite witnesses, the inquiry was fixed hearing for 11th October 2019 and all parties were advised accordingly. That on 11th October 2019, the parties appeared for the inquiry before the 2nd Respondent, and the counsel appearing for the *ex parte* Applicants made an oral application seeking an adjournment and requesting that doctors from the Aga Khan University Hospital who were involved in the treatment and management of the Interested Party at that facility be summoned.

17. Therefore, that the inquiry was rescheduled to 25th October 2019 and the 1st Respondent proceeded to serve summons upon the concerned persons as and also received additional documents from the parties. According to the Respondents, on 25th October 2019 the parties appeared before the 2nd Respondent when the inquiry was undertaken and witnesses testified for the respective parties, and that the hearing commenced at about 9.30 am or thereabouts and proceeded for most of the day until about 4.00 pm. In addition, that the *ex parte* Applicants were represented in the inquiry by three (3) advocates, and that all of them participated in cross-examining witnesses at length.

18. The Respondents explained that in accordance with practice, the documents received from all the parties were reviewed by the members of the 2nd Respondent, who are practicing medical and dental practitioners and consultants in the applicable fields, prior and after the inquiry to the date for the inquiry. In addition, that following the amendments to the Act by virtue of the Health Laws Amendment Act which came into force on 17th May 2019, the complaints that were before the Preliminary Inquiry Committee were subsequently handled by the Disciplinary and Ethics Committee. Consequently, that after close of the hearing, both parties were given an opportunity to make oral submissions before the Disciplinary and Ethics Committee, which proceeded to deliberate the issues and evidence of parties and delivered its decision, a copy of which was annexed.

19. Lastly, the Respondents confirmed that they were aware that the *ex parte* Applicants applied for copies of the proceedings, which they stated can be availed by the 1st Respondent's secretariat upon payment of the requisite fees. Furthermore, that there is no provision in law which mandates the 1st Respondent to give parties audio recordings of proceedings by any of its Committee, and that all documents relied by the parties during the inquiry were exchanged before or during the inquiry. Therefore, that the attempts to demand documents at this stage is in bad faith.

The Interested Party's Case

20. The Interested Party confirmed that she lodged a complaint to the Medical Practitioners and Dentists Board 20th July 2017, and that a hearing of the complaint took place on 25th October 2019 where both parties were given an opportunity to be heard and call witnesses. Further, that both parties were represented by counsel, and that no party raised an objection to the conduct of the Respondents, nor sought documents or did interrogatories for matters that were not already filed before them.

21. The Interested Party explained that she was hospitalized with a pregnancy at the 1st *ex parte* Applicant hospital where she was expected to undergo delivery on 29th June 2017 and had a caesarean operation on 30th June 2017, resulting in the death of the child, and loss of her uterus. Further, that she was moved to Nazareth Hospital on 3rd July 2017, and transferred to Aga Khan Hospital on 4th July 2017, wherefrom she was discharged on 9th July 2017. The Interested Party detailed her worsening condition after discharge, leading to a CT Scan on 15th February 2018 and procedure to remove a towel from her stomach. The Interested Party also detailed the treatments and procedures she underwent at the 1st *ex parte* Applicant's facility and the subsequent treatment at the various hospitals.

22. It is the Interested Party's case that there was no procedural impropriety, and that the application t is an appeal clothed in a judicial review. Further, that the ex parte Applicants have not shown that the decision is illegal, unfair and irrational, and did not exhaust the internal mechanisms for appeal under section 20A (9) Medical Practitioners and Dentists Act, which provides that a person aggrieved by a decision of the Respondents may, within thirty days from the date of the decision, appeal to the High Court.

The Determination

On the Respondents' Jurisdiction

23. A preliminary issue that needs to be addressed by this Court arising from the Respondents pleadings is on their power and jurisdiction to hear and determine the Interested Party's complaint, and in light of the reliance on the amendments brought by the Health Laws (Amendment) Act of 2019, which now expressly empower the Respondents to regulate health institutions and to take disciplinary action for any form of misconduct by a health institution.

24. This is for the reason that it is not disputed that the Interested Party's complaint was lodged with the Respondents on 20th July 2017 before the enactment of the Health Laws (Amendment) Act of 2019. The Respondents' jurisdiction over health institutions in such circumstances was the subject of the holding by this Court in **Republic vs Medical Dentists and Practitioners Board; Sospeter Onyatta Miyayi (Interested Party); Aga Khan Hospital Kisumu (Ex Parte Applicant) (2020) e KLR** as follows:

> **"Therefore, jurisdiction either exists or does not ab initio, and mere acquiescence will not give jurisdiction to an authority who has no jurisdiction. Likewise, participation by a party in proceedings without jurisdiction will not vest/confer jurisdiction on the authority.**
>
> **Coming to the facts of the present case, it is not in dispute that the ex parte Applicant is a health institution. It is also notable that before the changes brought by the Health Laws (Amendment) Act of 2019, the Medical Practitioners and Dentists Act did not have any provisions on the functions of the Respondent. In addition, the provisions on licensing under the then section 13 of the said Act, and on disciplinary proceedings under the then section 20 were specific to medical practitioners and dentists. The medical practitioner was defined under the Act as a person registered under the Act as a medical practitioner, while a similar definition was provided with respect to a dental practitioner and dentist. It is necessary at this stage to clarify that the definitions referred to by the Interested Party, including of that of a health institution, were among the amendments made by the Health Laws (Amendment) Act of 2019. It is thus evident that there was no provision in the Medical Practitioners and Dentists Act before the 2019 amendments, that specifically gave the Respondent any disciplinary powers over health institutions…"**

25. It was also the holding of this Court in the said case, while citing the decision of the Supreme Court of Kenya in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR,** that the amendments brought by the Health Laws (Amendment) Act of 2019 did not retrospectively confer jurisdiction to the Respondents to hear and determine complaints against the health institutions, as there was no intention expressed in the said amendments that they would act retrospectively, and particularly since the amendments affected the substantive rights of the said institutions.

26. It is the finding of this Court that the Respondents had no jurisdiction to entertain a complaint against the 1st *ex parte* Applicant, as they had no powers to hear and determine complaints against health institutions at the time of lodging of the Interested Party's complaint. The findings made against the 1st *ex parte* Applicant in the Respondents' ruling communicated on 18th March 2020 are accordingly null and void.

27. As regards jurisdiction over the 2nd and 3rd *ex parte* Applicants, the Respondents did have powers prior to the enactment of the Health Laws (Amendment) Act of 2019 to hear complaints against medical practitioners and dentists, and section 20 of the then Act provided that if a medical practitioner, dentist or a person licensed under the Act was after inquiry found to have been guilty of any infamous or disgraceful conduct, the Board could remove his name from the register or cancel any licence granted to him. Further, the Preliminary Inquiry Committee was established as a Committee of the Medical Board under Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules for purposes of undertaking inquiries on complaints lodged before the Medical Board.

28. Given that this was the circumstance obtaining at the time of the enactment of the Health Laws (Amendment) Act of 2019, the saving provisions in section 26(3) of the Act with respect to pending legal proceedings could legally transit the proceedings as against the 2nd and 3rd *ex parte* Applicants from the Preliminary Inquiry Committee to the Respondents. Section 26 (3) in this respect provides that any legal proceedings pending in any court or tribunal by or against the Medical Practitioners and Dentists Board shall continue by or against the 1st Respondent.

29. The substantive issues arising for determination in the instant application are therefore those that affect the 2nd and 3rd *ex parte* Applicants, the Respondents and Interested Party. There are two main substantive issues for determination in this respect, being whether the Respondents acted fairly in making the decision sent to the *ex parte* Applicants on 18th March 2020, and secondly if the *ex parte* Applicants merit the relief sought.

On Whether the Respondent acted Fairly

30. This issue was urged on two fronts. First, as regards whether the Respondents afforded the *ex parte* Applicants a fair hearing, and second, whether there was bias exhibited by the said Respondents. *The ex parte* Applicants submitted that the Respondents did not act fairly and acted in breach of the rules of natural justice, and that they were denied an opportunity to complete the cross-examination of one Dr. George Jumba, and also that Dr. Samuel Ngugi was never availed for cross-examination. Moreover, the Respondents did not accord the *ex*

parte Applicants' witnesses the opportunity to explain the issues emanating from the said questions. Therefore, that the Respondents were in breach of the provisions of sections 4(3) (b) & (f) and 4(4)(b) &(c) of the Fair Administrative Action Act, 2015 which require the administrator to accord the person against whom an administrative action is being taken an opportunity to be heard, and to cross-examine persons who give adverse evidence against them.

31. The *ex parte* Applicants further submitted that they were denied access to various documents and evidence by the Respondents in violation of section 4(3)(g) of the Fair Administrative Action Act, which requires that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision the information, materials and evidence to be relied upon in making the decision or taking the administrative action .

32. The alleged denial of cross-examination and evidence were also relied upon to submit that the Respondents where thereby biased, and reliance was placed on section 7(1)(2)(a)(iv) & (2)(n) of the Fair Administrative Action Act, which provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court or tribunal if the person who made the decision was biased or may reasonably be suspected of bias or if the administrative action or decision is unfair. The *ex parte* Applicants also cited the case of **Republic vs Cabinet Secretary, Ministry of Trade & Industry & 6 others Ex-parte Josphat Kimani Gacugu & 4 others [2020) eKLR** on the elements of bias.

33. In addition, reliance was also placed on Article 35 (1)(b) of the Constitution on the right of access to information, and Article 50 (2)(b) on the right to a fair hearing, in support of the submissions that the Respondents in refusing to provide the record of the proceedings of 25 th October 2019 to the *ex parte* Applicants within a reasonable period after the conclusion of the proceedings at a reasonable fee, breached the *ex parte* Applicants' rights to access information, and was aimed at preventing any other impartial tribunal or court from confirming that they were not accorded a fair hearing by the Respondents.

34. The Respondents on their part submitted that the rules of natural justice were adhered to during the inquiry and hearing of the complaint, and cited the case of **Ernst & Young LLP -vs- Capital Markets Authority & another, Petition No. 385 of 2016 [2017] eKLR** on the contents of the rules of natural justice. In particular, it was submitted that the rules of natural justice were adhered to for the following reasons:

a) The 1st *ex parte* Applicant applied for an adjournment on the first hearing date for valid reasons and the Committee adjourned the proceedings;

b) All the documents relied on by the parties during the inquiry were exchanged between the parties before and during the inquiry;

c) The parties were given a fair hearing, equal opportunity to present their case, to be represented by counsels, for instance, the Ex Parte Applicant had 3 Advocates representing them, and all the three (3) were all allowed to cross examine the witnesses who appeared for the inquiry;

d) All the parties were given an opportunity to call witnesses and cross examine them.

e) All parties were given an opportunity to make submissions after hearing of the evidence from witnesses and the same was in concurrent by the Advocates in attendance;

f) The copies of the proceedings of the Committee, which the *ex parte* Applicants seeks, can be provided upon payment of the requisite fees as provided under the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.

g) There is no provision in law which mandates the 1st Respondent to give parties audio recording of proceedings by any Committee of the Medical Council.

35. The Respondents submitted that the *ex parte* Applicants were not denied an opportunity to cross examine the witnesses, as alleged or at all, and neither were they denied any evidence relied on and there is no material or evidence before this Court to support such allegations. Therefore, that the *ex-parte* Applicants have failed to demonstrate or prove the manner in which the Respondents were impartial as alleged and hence the allegations should fail. The cases of **Republic vs Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party) ;National Irrigation Board ex parte JR No. 103 of 2019 [2020] eKLR** and **Nathan Obwana vs Robert Bisakaya Wanyera & 2 others, Civil Appeal 138 of 2013 [2013] eKLR** for the submission that the *ex parte* Applicants have not demonstrated or proved the allegations of bias as against the Respondents to the required threshold.

36. The Interested Party's submissions on the issue were that the Respondents heard the parties and allowed them to call witnesses, which did not offend the rules of natural justice, and was in furtherance to parties' right to fair hearing under Article 50 of the Constitution. Further, that both parties had the opportunity to be represented by counsel and Article 47(1) of the Constitution was thereby observed. In addition, that the Respondents have given a detailed and well-reasoned decision analyzing all facts, and the allegation of bias is therefore without basis. Reliance was placed on the decision in **Republic vs Cabinet Secretary, Ministry of Trade & Industry & 6 others Ex- parte Josphat Kimani Gacugu & 4 others [2020] eKLR** on what constitutes bias.

37. Further, that the *ex parte* Applicant by seeking introduction of new evidence is relitigating the case, as the hearing took place on 25th October 2019, and they requested for the recordings as an afterthought on 28th October 2019, which is an indication of hunting for new evidence. Reliance was placed on the decision in **Republic v Registrar of Societies - Kenya & 2 othesr Ex-Parte Moses Kirima & 2 others [2017] eKLR** for this position. Lastly, the Interested Party submitted that the instant application is an appeal clothed in a judicial review, and that under section 20A (9) Medical Practitioners and Dentists Act, a person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court. The Interested Party cited the case of **Republic v Public Procurement Administrative Review Board & 2 others *ex parte* Rongo University [2018] e KL**R for the

submission that judicial review does not cover appeals.

38. I have considered the arguments made by the parties herein, and I am persuaded that the natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done are now embedded in procedural fairness. The duty to act fairly relates to procedural fairness in decision making, and not the fairness in a substantive sense of a decision. There is also no fixed content to the duty to afford procedural fairness, and the answer to a question whether the threshold of fairness has been met will depend on the nature of the matters in issue, and whether there was a reasonable opportunity for parties to present their cases in the relevant circumstances.

39. Article 47 of the Constitution and the provisions of the Fair Administrative Act in this respect now import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the Constitution provides as follows in this regard:

> ***(*1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

40. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

> **"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> > **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
> >
> > **(b) an opportunity to be heard and to make representations in that regard;**
> >
> > **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
> >
> > **(d) a statement of reasons pursuant to section 6;**
> >
> > **(e) notice of the right to legal representation, where applicable;**
> >
> > **(f) notice of the right to cross-examine or where applicable; or**
> >
> > **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
>
> **(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> > **(a) attend proceedings, in person or in the company of an expert of his choice;**
> >
> > **(b) be heard;**
> >
> > **(c) cross-examine persons who give adverse evidence against him; and**
> >
> > **(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."**

41. In the present case, it is not disputed that the 1st *ex parte* Applicant was given notice of the hearing, documents relied upon, and an opportunity to be heard during the oral hearing held on 25th October 2019. The parties called witnesses to testify during the hearing, and the 1st *ex parte* Applicant specifically requested for summons for certain witnesses to be summoned. The Respondents in this respect annexed copies of the notices of the oral hearing, of the summons issued to various witnesses and of the documents availed to the 1st *ex parte* Applicant in preparation of the hearing.

42. The *ex parte* Applicants' grievance is that they were not allowed to cross-examine some of the witnesses, and were not availed the evidence relied upon by the Interested Party to reach the impugned decision. They have not provided any evidence of any requests made before or during the hearing of 25th October 2019, nor have they filed any affidavit of the counsel conducting their case attesting to these facts. This Court has also perused the ruling delivered by the Respondents and note that it is stated therein that the 1st *ex parte* Applicant's advocate cross-examined all the witnesses, and the witnesses' responses are also indicated.

43. The *ex parte* Applicants have requested this Court to consider that the Respondents have not availed to them the proceedings of the hearing held on 25th October 2019, as a demonstration that they were not accorded a fair hearing. The said proceedings were sought for on 28th October 2019, after the hearing, and any failure or refusal to provide the said proceedings cannot therefore be evidence that the Respondents did not conduct a fair hearing. Such failure or refusal may be evidence that the Respondents have breached the right to information of the *ex parte* Applicants as pleaded, but in the absence of the said proceedings, this Court is unable to make a finding on the allegations made by the *ex parte* Applicants as regards the conduct of the hearing.

44. The long and short of it is that the *ex parte* Applicants are not able at this stage to prove their allegations as regards being denied the opportunity to cross-examine witnesses and being the said proceedings. It is notable that the burden of proof in this regard is upon the Applicant to prove to the required level of a balance of probabilities the claim they make. Under Section 107(1) of the Evidence Act, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist". Once such proof is provided when the onus moves to the Respondent to show the legality of its actions.

45. It was held as follows in this regard in the Ugandan case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson At Para 95".**

46. This position was also reiterated by the Kenya Supreme Court in **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017.**

47. On the allegations by the *ex parte* Applicants that the Respondents were biased in their decision-making, it is notable that no actual bias is alleged, and the test to be applied is that of whether there is a likelihood of bias. This test was explained in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge**,[**1995-1998] 1 EA 134** by Lakha, JA as follows: -

> **"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit… There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."**

48. The applicable test therefore, is whether a fair minded person, who was informed of the circumstances in which the decision against the *ex parte* Applicants was made, and having considered the facts, would conclude that there was a possibility that the Respondents may have been biased. I find the response to the said test to be negative in the instant application for two reasons. Firstly, the *ex parte* Applicants did not bring any evidence of any type of relationship or association between the Respondents and the Interested Party that would have raised an apprehension of bias.

49. Secondly, the Respondents' duty and requirement to make a decision one way or another is set by law, and the fact that its decision is faulted for being erroneous or unreasonable is not on its own evidence that the Respondent is biased, in the absence of other evidence of circumstances leading to an apprehension of bias. I thus find that there was no apparent bias on the part of the Respondents for these reasons.

50. The above findings notwithstanding, I note that there was no specific complaint made against the 2nd and 3rd *ex parte* Applicants by the Interested Party. It is notable in this regard that the copy of the complaint by the Interested Party that was annexed by the *ex parte* Applicants was titled and referenced as a complaint against "Mary Help of the Sick Hospital Doctors and Staff", and the same details were given in the Interested Party's application to make a complaint that was lodged with the 1st Respondent. The said doctors and staff are not named, and in particular the 2nd and 3rd *ex parte* Applicants were neither named in the said complaint nor specific allegations made against them.

51. In addition, while the 1st *ex parte* Applicant was served with the Interested Party's complaint, there is no evidence of service of the same on the 2nd and 3rd *ex parte* Applicants. There was also no demonstration of notification of the issues and evidence relied upon on the 2nd and 3rd *ex parte* Applicants. In effect, the entire proceedings by the Respondents were conducted as a hearing of a complaint solely against the 1st *ex parte* Applicant, with the 2nd and 3rd *ex parte* Applicants being called as witnesses, as shown in the 1st *ex parte* Applicant's list of witnesses which was produced in evidence.

52. The 2nd and 3rd *ex parte* Applicants were therefore effectively condemned and penalised by the Respondents without being given any notice or an effective opportunity to be heard on the charges, if any, made against them. Given that the adverse decision made by the Respondents carried with it findings of misconduct against the 2nd and 3rd *ex parte* Applicants, a high standard of procedural protections and fairness was required before any such decision was made. The procedure adopted against the 2nd and 3rd *ex parte* Applicants is accordingly found not to have been fair for these reasons.

On the Relief Sought

53. The Applicant in his prayers seeks an order of certiorari, mandamus and prohibition. An order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. An order of certiorari on the other hand nullifies an unlawful decision or enactment. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the orders of prohibition and certiorari can issue as

follows: -

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

54. An order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of Appeal in the above cited decision held as follows on the applicable principles for an order of mandamus to issue:-

> **"The next issue we must deal with is this: What is the scope and efficacy of an <u>ORDER OF MANDAMUS</u>? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**
>
> **"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 and 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."**
>
> **At paragraph 90 headed "the mandate" it is stated:**
>
> **"The order must command no more than the party against whom the application is made 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."**
>
> **What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed…."**

55. This Court has found that the Respondents had no jurisdiction and powers to hear and determine the Interested Party's complaint as against the 1st *ex parte* Applicant as at the date the said complaint was lodged and filed with them. In addition, that the decision made against the 2nd and 3rd *ex parte* Applicants was procedurally unfair. The *ex parte* Applicants therefore merit the order of certiorari to quash the Respondents' decisions against the *ex parte* Applicants.

56. On the orders of mandamus sought**,** it was held in **<u>Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants</u> [2007] 2 EA 441,** that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

57. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel a Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exists, it will however not compel its performance or the exercise of its discretion in a particular manner.

58. In the present case, there is an available remedy of certiorari to address the *ex parte* Applicants' grievances. In addition, from the findings in the foregoing, it is evident that no legal duty arises on the part of the Respondents to hear the Interested Party's complaint as currently framed, for want of jurisdiction and the non-joinder and failure to implead the 2nd and 3rd *ex parte* Applicants.

59. Lastly, on the order of prohibition sought, the same was hinged on a finding that the Respondents were under a duty to act in a particular manner, which the Court has refuted. The remedy of prohibition is accordingly also not available.

60. In the premises, I find that the *ex parte* Applicants' Amended Notice of Motion application dated 3rd June 2020 is merited only to the extent of the following orders.

> **I. An order of certiorari be and is hereby issued to bring to this Court and to quash the ruling by the Respondents as delivered in PIC case No. 31 of 2017.**

II. Each party shall bear their costs of the Amended Notice of Motion dated 3rd June 2020.

61. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this judgment was delivered electronically by transmission to the email addresses of the *ex parte* Applicants', Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE