



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 123 OF 2015**

**REPUBLIC .....APPLICANT**

**VERSUS**

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

**AND**

**M.P. SHAH HOSPITAL.....1<sup>ST</sup> INTERESTED PARTY**

**ZEBUN NISA TALISBHUSSEIN FAZLEABBAS**

**MUFADAL TAIBHUSSEIN ADAMJI & MOEZ**

**TALIBHUSSEIN FAZLEABBAS**

as administrators of the estate of **ZAINAB TALIBHUSSEIN**

**FAZLEABBAS ("The Deceased") .....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE**

**DR. YAMAL PATEL**

**JUDGEMENT**

1. On 16<sup>th</sup> April, 2015 the ex-parte Applicant, Dr. Yamal Patel sought and obtained leave to commence these judicial review proceedings. Through the notice of motion dated 28<sup>th</sup> April, 2015 he therefore prays for orders as follows:

**“1. That an order of certiorari to remove into this Honourable Court and quash the Respondent’s decision of 27<sup>th</sup> March 2015 against the Applicant in Preliminary Inquiry Cause No. 17 of 2011. The said decision found the Applicant guilty and directed that he does the following;**

**a. Pay Ksh.150, 000/= to the Committee within 14 days from the date of the decision.**

- b. **Furnish his professional Indemnity Cover and have it filed with the Medical Board within 14 days.**
- c. **And finally initiate mediation with the Complainant with a view to reaching a settlement and report to the Committee within 90 days.**

**2. That an order of prohibition prohibiting the respondent, and/or its creature, the preliminary inquiry committee from enforcing its decision of 27<sup>th</sup> March 2015 against the Applicant as far as Preliminary Inquiry Case Number 17 of 2011 is concerned.**

**3. That costs be in the cause.”**

2. The Medical Practitioners and Dentists Board (“the Board”) is the Respondent. The M.P. Shah Hospital is the 1<sup>st</sup> Interested Party and the estate of the deceased Zainab Talibhussein Fazleabbas suing through its administrators Zebun Nisa Talibhussein Fazleabbas, Mufadal Taibhussein Adamji and Moez Talibhussein Fazleabbas is the 2<sup>nd</sup> Interested Party.

3. From the papers filed in Court by the Applicant, his case is as follows. The representatives of the estate of Zainab Talibhussein Fazleabbas made a complaint with the Board following the death of Zainab Talibhussein Fazleabbas at M.P. Shah Hospital (“the Hospital”) while undergoing a medical procedure. It is the Applicant’s case that he undertook the medical procedure with the assistance of the theatre staff provided by the Hospital.

4. Following the complaint to the Board, the Applicant and the representatives of the estate of the deceased were summoned to appear before the Board’s Preliminary Inquiry Committee where they made their representations.

5. It is the Applicant’s case that the Preliminary Inquiry Committee contrary to the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, 1979, (“the 1979 Rules”), in particular rules 3 and 4 fully determined the matter. It is the Applicant’s case that the 1979 Rules only confer jurisdiction upon the Preliminary Inquiry Committee to make inquiries and thereafter make recommendations to the Board. The Applicant avers that the Preliminary Inquiry Committee has no power to establish the guilt, professional misconduct or otherwise of a medical practitioner or medical institution.

6. Accordingly to the Applicant the Preliminary Inquiry Committee ought to have given its recommendations to the Board so that the Board could reach a decision as to whether there was professional misconduct or not. It is the Applicant’s case that the findings of the Preliminary Inquiry Committee could have been used by the Board as a basis for establishing a Professional Conduct Committee. It is the Applicant’s view that it is not the Preliminary Inquiry Committee but the Professional Conduct Committee which has the power and jurisdiction to admonish a doctor, dentist or an institution and conclude the case.

7. Another allegation by the Applicant is that the Preliminary Inquiry Committee imposed orders without consulting the Board as required by the rules governing disciplinary proceedings against medical practitioners or institutions.

8. The Respondent opposed the application through a replying affidavit sworn by the Registrar of the Board, Dr. Nicholas M. Muraguri. Dr. Muraguri averred that in a meeting held on 10<sup>th</sup> February, 2012 the Preliminary Inquiry Committee recommended that the Hospital and doctors involved in the treatment and management of the deceased be summoned to appear before it to facilitate an inquiry wherein all parties would give evidence, produce documents and also have an opportunity to cross-examine witnesses. This would assist the Committee in considering the complaint judiciously.

9. On 7<sup>th</sup> February, 2014 the Applicant and the Hospital were issued with notices to appear before

the Preliminary Inquiry Committee for an inquiry into the complaint. The parties who were represented by counsel subsequently appeared before the Committee.

10. Dr. Muraguri deposed that the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000 which came into effect on 1<sup>st</sup> April, 2000 sets out the regulations governing licensing and inspection of private medical institutions. He also averred that Section 20 of the Medical Practitioners and Dentists Act, Cap 253 (“the Act”) and the 1979 Rules sets out the process for undertaking disciplinary proceedings and inquiries on complaints lodged before the Board. Further, that the 1979 Rules were amended vide legal notices number 21 of 2012 and 223 of 2013 which set out, among others, the functions and powers of the Preliminary Inquiry Committee and the Professional Conduct Committee and the process for undertaking an inquiry by the Preliminary Inquiry Committee.

11. It is the Respondent’s position that all the rules were complied with by the Preliminary Inquiry Committee in arriving at the decision delivered on 27<sup>th</sup> March, 2015.

12. At paragraph 22 of his replying affidavit, Dr. Muraguri summed up the grounds of opposition to the application by averring as follows:

**“THAT I verily believe that the Application herein lacks in merit for the following;**

- i. The Board reviewed the complaint and documents received and then referred it to the PIC of the Board to undertake an investigation or inquiry in exercise of its mandate under the Act;**
- ii. The complaint as lodged at the Board related to the treatment and management of a patient under the care of a Medical Practitioner registered by the Respondent and a Hospital licensed by the Board and as such the matter was well within the jurisdiction and functions of the Board;**
- iii. The Applicant has the right to appeal to the High Court against the decision of the PIC or Board as set out in the Act;**
- iv. The application herein is in bad faith and an afterthought; and**
- v. It is the interest of the general public in Kenya for the Board to be allowed to perform its functions as stipulated in the Act and the applicable Rules, more so considering the nature of the complaint.”**

13. The Hospital did not file any reply to the application. However, through submissions dated 23<sup>rd</sup> June, 2015 and filed on 26<sup>th</sup> June, 2015 the Hospital asserted that the Applicant’s case has no merit.

14. The estate of the deceased opposed the application through a replying affidavit sworn by Nasreen Mufadal on 19<sup>th</sup> May, 2015. Nasreen averred that the Preliminary Inquiry Committee acted within its mandate and the Applicant’s application should be dismissed. She exhibited the decision delivered by the said Committee on 27<sup>th</sup> March, 2015.

15. In my view, this matter boils down to the question as to whether the Preliminary Inquiry Committee exceeded its jurisdiction. The Committee dismissed the charge against the Hospital but found one of the charges against the Applicant had “been proved satisfactorily.” The Committee then went ahead and made orders as follows:

**“The Committee having made the above findings makes the following orders as against Dr. Yamal Patel:-**

- a. Dr. Yamal Patel be admonished by the Chairman of the Medical Practitioners and Dentists Board for failing to monitor the saline bottle during the operation.**
- b. Dr. Yamal Patel be admonished for failing to instruct and direct the theatre team working with him during the procedure to keep a close watch on the fluid flow though he had noted that the endomat in use at the material time did not have a pressure cuff.**

- c. **Dr. Yamal Patel be admonished for going on with the procedure after noting that the fluid bottle had already emptied for an unspecified period of time.**
- d. **Dr. Yamal Patel do furnish the Chairman of the Medical Practitioners and Dentists Board a copy of a valid professional indemnity within a period of fourteen (14) days from the date hereof.**
- e. **Dr. Yamal Patel do initiate mediation with beneficiaries of the Estate of Zainab Talibhussein Fazleabbas (Deceased), with a view of compensation, and report the progress to the Chairman of the Medical Practitioners and Dentists Board within Ninety (90) days from the date hereof.**
- f. **Dr. Yamal Patel do pay the Medical Practitioners and Dentists Board the sum of kshs.150,000/= within a period of thirty (30) days from the date of this decision as part costs for the Committee's sitting.**

**The Committee has carefully considered the circumstances of this case and make further orders that M.P. Shah Hospital do ensure that the appropriate staff are trained on the proper use of the endomatt machine and all other equipment used at the facility and on the need to embrace team work. Thereafter, the Hospital do furnish the Chairman of the Board with a report on the compliance with regard to training within the next thirty (30) days."**

16. A perusal of the pleadings and submissions of the parties disclose that this matter simply requires an interpretation of the law. It is important to note that although the disciplinary process against the Applicant and the Hospital commenced in 2011, the charges against the Applicant were conveyed through the Board's notice dated 7<sup>th</sup> February, 2014 and the hearing took place thereafter.

17. The parties agreed that the 1979 Rules were extensively amended through the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules, 2013 ("the 2013 Amendment") issued through Legal Notice No. 223 of 2013 of 20<sup>th</sup> December, 2013. The amendments followed other amendments that had been effected through Legal Notice No. 21 of 2012.

18. Following the 2013 Amendment, Rule 4(1) now reads:

**"The functions of the Preliminary Inquiry Committee shall be to**

- a. **conduct inquiries into the complaints submitted to it under these Rules and make appropriate recommendations to the Board;**
- b. **ensure that the necessary administrative and evidential arrangements have been met so as to facilitate the Board to effectively undertake an inquiry under rule 6;**
- c. **promote mediation and arbitration between the parties and refer matters to such mediator or arbitrator as the parties may in writing agree; and**
- d. **at its own liberty record and adopt mediation agreements or compromise between the parties, on the terms agreed and thereafter inform the chairperson."**

19. The 2013 Amendment also introduced Rule 4(3) which states:

**"The Preliminary Inquiry Committee shall, in consultation with the Board, have the power to**

- a. **levy reasonable costs of the proceedings from parties;**
- b. **make an order compelling a medical practitioner or dentist to undergo continuous professional development of not more than fifty points;**
- c. **suspend the licence of a medical institution for a period of not more than six months;**
- d. **make an order for the closure of an institution pending the compliance by that institution, of a condition or requirement under the licence issued to it under the Act; and**
- e. **make such further recommendation as the committee deems fit."**

20. The 2013 Amendment changed Rule 4A(1) which had established a permanent Professional Conduct Committee. The amended rule gave the Board power to establish the Professional Conduct Committee on an ad hoc basis upon the recommendation of the Preliminary Inquiry Committee. Therefore, unlike previously where the 1979 Rules had expressly established a Professional Conduct Committee, the 2013 Amendment left the establishment of a Professional Conduct Committee at the mercy of the Board. However, the Board can only establish a Professional Conduct Committee upon the recommendation of the Preliminary Inquiry Committee.

21. Prior to changes made in 2013 the Preliminary Inquiry Committee could only conduct inquiries and make recommendations which would then be placed before the Professional Conduct Committee for action. Under the current rules the Preliminary Inquiry Committee carries out inquiries and takes action on its findings. The Professional Conduct Committee is almost redundant as its activation is entirely dependent on the Preliminary Inquiry Committee.

22. Part IIA of the 2013 Amendment provides for procedure and at Rule 10A(1) states that the provisions thereunder shall apply to proceedings conducted by the Preliminary Inquiry Committee and the Professional Conduct Committee or with necessary modifications, to an inquiry held by the Board sitting as a tribunal. Rule 10A(2) states that in the Rules the “Committee” means either the Preliminary Inquiry Committee or the Professional Conduct Committee.

23. Rule 10Y(1) gives more powers to the Preliminary Inquiry Committee by providing that:

**“After hearing the complaint, the Committee may determine or order-**

- a. **that the complaint be dismissed;**
- b. **that the member be reprimanded;**
- c. **that the member be suspended from practise for a specified period not exceeding two years;**  
**or**
- d. **make such order as the Committee consider fit.”**

24. The Applicant urged this Court to follow the decision of Odunga, J in **Republic v Kenya Medical Practitioners and Dentists Board & 2 others [2013] eKLR** and issue orders accordingly. The decision in that case is not of any assistance to the Applicant. In the cited case, the Judge granted orders after reaching the conclusion the issues had not been considered before the impugned decision was reached. The facts of this case are different as there is a written ruling giving the reasons for the decision.

25. The import of the 2013 Amendment on the Preliminary Inquiry Committee was captured by Odunga, J in the case of **Republic v Medical Practitioners and Dentists Board & another Ex parte J Wanyoike Kihara [2015] eKLR** when he stated at paragraph 47 of the judgement that:

**“Some of the amendments that were introduced vide Legal Notice Number 233 (sic) of 2013 were to the effect the Preliminary Inquiry Committee was empowered, in consultation with the Board, to levy reasonable costs of the proceedings from parties; to admonish a doctor or dentist or the institution and conclude the case; to promote mediation and arbitration between the parties and refer matters to such mediator or arbitrator as the parties may in writing agree; and at its own liberty, record and adopt mediation agreements or compromise between the parties, on the terms agreed and thereafter inform the chairperson.”**

26. The 2013 Amendment therefore gave more powers to the Preliminary Inquiry Committee. It is no longer the weak organ that was created by the 1979 Rules. It now has the mandate to investigate a complaint and impose sanctions where necessary. There is therefore no merit in the Applicant’s argument that the Committee exceeded its powers by imposing sanctions on the Applicant.

27. There was a complaint by the Applicant that the Preliminary Inquiry Committee did not consult

the Board before making its orders. The Board did not respond to this allegation. There is however no evidence on record showing that the Committee consulted the Board before making some of the orders against the Applicant.

28. Rule 4(3) requires the Preliminary Inquiry Committee to make orders in consultation with the Board. However Rule 10Y(1) which gives the Preliminary Inquiry Committee more powers does not require such consultation. It is difficult to understand why the person who drafted the rules required consultation in one instance and not in the other. In my view, the rules may need fine-tuning for ease of implementation.

29. One of the orders made by the Preliminary Inquiry Committee was that the Applicant pays the sum of Kshs. 150, 000/= as part costs of the Committee. This power is granted by Rule 4(3) of the 2013 Amendment which requires consultation with the Board before the Committee can make such an order. Since the Board did not respond to the Applicant's claim that there was no consultation between the Preliminary Inquiry Committee and the Board before the orders were made, I have no option but to conclude that the Board was indeed not consulted by the Committee. Failure to consult the Board before imposing the orders provided by Rule 4(3) of the 2013 Amendment contravened the said Rule. The Preliminary Inquiry Committee therefore acted without jurisdiction in making some of the orders.

30. It must, however, be noted that the Preliminary Inquiry Committee cannot be faulted for the manner in which it conducted the inquiry. The papers filed in Court clearly show that the Committee followed the procedure in the rules before arriving at its decision. A judicial review court has no jurisdiction to delve into the merits of an impugned decision. However, the imposition of the order requiring the Applicant to pay Kshs. 150, 000/= as part of the costs of the Committee without consulting the Board was erroneous.

31. The Committee is indeed empowered by Rule 4(3) of the 2013 Amendment to make such further recommendations as it deems fit. It is however not clear whether the other orders were imposed on the strength of this authority. Upholding the other orders in such circumstances may therefore prejudice the Applicant.

32. It is not lost upon this Court that the inquiry had been pending before the Preliminary Inquiry Committee from 2011. It has been before this Court for over ten months. The parties need closure in regard to this matter. However, the Cabinet Secretary must have had good reason for providing in the Rules that the Preliminary Inquiry Committee should consult the Board before imposing certain orders.

33. The need for consultation becomes crucial when one considers that even though the members of the Preliminary Inquiry Committee are members of the Board, not all the members of the Board, including the chairperson, are members of the Preliminary Inquiry Committee.

34. In the circumstances of this case, I find that justice will be served by severing the decision made on 27<sup>th</sup> March, 2015 by the Preliminary Inquiry Committee into two parts. The portion of the decision containing the orders is called into this Court and quashed. The rest of the decision and the proceedings leading to the making of the decision are found to be valid and will therefore remain undisturbed. Consequently, any other prayer by the Applicant is dismissed.

35. The matter is remitted to the Preliminary Inquiry Committee which is directed to consult the Board before exercising the powers granted to it under Rule 4(3) of the 2013 Amendment. Where there is no requirement for consultation, the Committee is at liberty to exercise its powers as granted by the rules governing disciplinary proceedings. For avoidance of doubt, the Committee can only, depending on the outcome of the consultations with the Board as required by Rule 4(3), make the orders it had made in its ruling of 27<sup>th</sup> March, 2015.

35. Considering the outcome of this case, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered at Nairobi this 4<sup>th</sup> day of March, 2016.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**