REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR. NO. 95 OF 2015

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND

PROHIBITION

AND

IN THE MATTER OF: THE MEDICAL PRACTITIONERS AND DENTISTS BOARD

AND

IN THE MATTER OF: PIC CASE NO. 05 OF 2012

(COMPLAINT BY DR. CHRISTINE OMUTO AND ANGELA AMBITHO

AGAINST DR. EDWIN OTIENO & AGA KHAN UNIVERSITY HOSPITAL)

AND

IN THE MATTER OF: THE MEDICAL PRACTITIONERS & DENTISTS ACT,

CHAPTER 253 OF THE

LAWS OF KENYA AND IN THE MATTER OF THE MEDICAL PRACTITIONERS AND

DENTISTS (DISCIPLINARY

PROCEEDINGS) (PROCEDURE) RULES

REPUBLIC …….....…….APPLICANT

VERSUS

THE MEDICAL PRACTITIONERS &

DENTISTS BOARD……..…….....……RESPONDENT

DR. CHRISTINE OMUTO AND

ANGELA AMBITHO……..…….....…….….1ST INTERESTED PARTY

DR. EDWIN OTIENO…….....…..……....2ND INTERESTED PARTY

EX-PARTE:

1. DR. MAJID TWAHIR

2. AGA KHAN HEALTH SERVICES KENYA

JUDGMENT

Introduction

1. By a Notice of Motion dated 10th April, 2015, the ex parte applicants herein, **Dr**. Majid Twahir (hereinafter referred to as "the doctor"), and **Aga Khan Health Services Kenya** (hereinafter referred to as "the Hospital"), seek the following orders:

a. That an Order of Certiorari to remove into this Honourable Court and quash the Respondent's notice dated 5th March, 2015 issued to the Ex-Parte Applicants requiring them to appear before the Preliminary Inquiry Committee in PIC Case No. 05 of 2012 (Complaint by Dr Christine Omuto and Angela Ambitho against Dr. Edwin Otieno & Aga Khan University Hospital)**.**
b. That an Order of Certiorari to remove into this Honourable Court and quash the entire proceedings and any orders and/or rulings made or that may be made against the Ex- parte Applicants herein in PIC Case No. 05 of 2012 (Complaint by Dr Christine Omuto and Angela Ambitho against Dr. Edwin Otieno & Aga Khan University Hospital)**.**
c. That an Order of Prohibition be directed at the Respondent and/or its Preliminary Inquiry Committee prohibiting it from inquiring into or determining the complaint against the Ex-parte Applicants herein, in PIC Case No. 05 of 2012 (Complaint by Dr Christine Omuto and Angela Ambitho against Dr. Edwin Otieno & Aga Khan University Hospital)**.**
d. **Costs be in the cause.**

Applicant's Case

2. The applicants' case was that the Doctor is a registered medical practitioner duly licensed by the Respondent and the Medical Director of the Hospital, which Hospital is an operating unit of the Aga Khan Health Service Kenya which is duly incorporated as a private company limited by guarantee. To the applicants, the Hospital has granted admission and treating rights to visiting consultants on an independent contract basis and under such terms that require the Aga Khan Hospital to only provide such visiting consultants with specific facilities including nursing care. The said visiting consultants are not employed by the Aga Khan University Hospital and one such visiting consultant engaged by the Aga Khan University Hospital is **Dr. Edwin Otieno**, the 2nd Interested Party herein who is duly licensed by the Respondent.
3. It was averred that the 1st Interested Party lodged a complaint with the Respondent herein, the Medical Practitioners and Dentists Board (hereinafter "the Board") on professional negligence against **Dr. Edwin Otieno** and the Hospital in respect of the treatment of a patient, the late **Mrs Margaret Josephine Orwa**. It was averred that the Board previously instituted proceedings against the Hospital's previous Medical Director, **Dr. John Tole**, in relation to PIC Case No. 5 of 2012 arising from the same complaint and **Dr Tole** was summoned to answer charges regarding alleged negligence and infamous conduct before the Preliminary Inquiry Committee. However, **Dr Tole** applied for and was granted leave to apply for judicial review orders of prohibition and

certiorari on 17th April 2014. The matter however did not proceed as the Board withdrew the Notice of Inquiry against him and by a letter dated 5th March 2015 received by the Hospital on 13th March 2015, the Board requested the Doctor "through and on behalf of "the Aga Khan Hospital, to appear before its Preliminary Inquiry Committee (the Committee) on 27th March, 2015 for hearing of the case and to submit statements from the medical personnel who managed the patient. Based on legal advice, the applicants averred that:

a. The function of the Preliminary Inquiry Committee is simply to make a preliminary investigation into a complaint against a medical practitioner or dentist in order to recommend whether or not a complaint should be referred to the Board's Professional Conduct Committee.
b. There are no legal provisions empowering the Committee to hear and determine complaints against private medical institutions.
c. The Board's actions of summoning the Doctor to appear before the Committee are *ultra vires*, illegal and amount to an abuse of power.

4. The Doctor was therefore apprehensive that the Committee would proceed with the impugned proceedings and occasion great prejudice to him and the Hospital, hence the orders sought herein.
5. It was submitted on behalf of the applicants by their learned counsel, **Mr Amoko**, that these proceedings arise from almost invariable tendency (and almost always) well-meaning) of administrative agencies to go beyond the mandate given to them by parliament, extending their tentacles to areas in which they lack authority. It is a tendency that has attracted the attention of political scientists who have christened it bureaucratic drift. It has attracted the attention of the Courts as well, which developed the concept of *ultra vires* to reign in such rogue exercise of power. The bureaucratic drift in this case is the improper attempt by the Respondent to extend its admitted powers with respect to individual medical practitioners (such as the 2nd Interested Party) to institutions and hospitals such as the Applicant. This a cardinal principle of our Constitution – see Article 2(2)- that is of ancient vintage and finds it one of is most powerful expressions in the *locus classicus* of modern administrative law. In support of this submission the applicant relied on **Anisminic Ltd vs. Foreign Compensation Commission and Another [1969] 1 All ER 208**.
6. According to the Applicants, the Board is a statutory body established by section 4 of the ***Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya*** (hereinafter referred to as "the Act")**,** an Act which was passed as is evident from its long title "*to consolidate and amend the Law to make provision for registration of medical practitioners and dentists and for purposes connected therewith."* Under section 2 of the Act, 'dentist' (or 'dental practitioner') is defined as "*a person registered under this Act as a dentist"* while 'medical practitioner' is defined "*a person registered under this Act as medical practitioners."* Both definitions, it was submitted, refer to individual natural persons as opposed to non-juristic institutions. To the Applicants, this rather obvious conclusion is fortified by the subsequent provisions relating to registration of medical practitioners and dentists under sections 5 to 14 of the Act.
7. According to the Applicants, the Board's powers with respect to licences is set out in section 15(1) of the Act which again expressly refers to a medical practitioner or dentist and provides that:

The Board may authorise the Registrar to issue to a medical practitioner or a dentist who has applied in the prescribed form and whom the Board considers has had suitable working experience in medicine or in dentistry, as the case may be, a licence to engage in private practice on his own behalf as a private practitioner or to be employed, either whole time or part time, by a private practitioner.

8. It is with background that the Court was addressed on the Board's disciplinary powers under section 20 which are expressly restricted to determining infamous or disgraceful conduct in a professional respect, against a medical practitioner or dentist and submitted that there is no other plausible interpretation of that section whose full terms provides:

If a medical practitioner or dentist registered or a person licensed under this Act is convicted of an offence under this Act or under the Penal Code (Cap. 63),whether the offence was

committed before or after the coming into operation of this Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, subject to subsection (9), remove his name from the register or cancel any licence granted to him.

9. It was submitted that the Committee's functions as outlined in the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules*** (hereinafter "the Disciplinary rules") are to receive and review complaints against medical practitioners and dentists. The Disciplinary Rules, it was therefore contended, do not confer powers on the Committee to adjudicate such matters but only to investigate and make inquiries since by section 23 of the Act, the Minister's powers is with respect to promulgation of rules of procedure for disciplinary matters as opposed to substantive ones since section 23(b) employs the phrase- *"provide for the procedure to be followed by the Board in an inquiry under section 20."*
10. It was submitted that consistent with the jurisdiction as set out under section 20, the Disciplinary Rules are directed towards a medical practitioner or dentist. Thus, regarding complaints by members of the public in respect of a particular medical practitioner or dentist, by rule 4, such a complaint must first be revised by the Preliminary Inquiry Committee to determine if it warrants the attention of the full Board or instead to be referred to the Professional Conduct Committee. The terms of 4(1) are clear that the PIC's functions are "*to receive and review complaints against a medical practitioner or dentist...*". Thus when the PIC determined that it would summon the doctor on behalf of the Board it was acting *ultra vires* not only section 20 of the Act, but also rule 4(1).
11. It was submitted that there is no complaint against the doctor Party in his capacity as a medical practitioner or dentist and the PIC has no powers with respect to institutions since the Act and Disciplinary Rules do not confer powers on the Committee to consider a complaint against a private medical institution. The Committee in requesting the appearance of the 1st Applicant before it, it was contended, appears erroneously presupposed that the Aga Khan Hospital can be vicariously liable for the professional misconduct of a visiting consultant, who is not an employee of the Aga Khan Hospital but an independent contractor. This, to the applicant, is illegal and constitutes an abuse of power. In any event, there is no such thing as vicarious liability for infamous and disgraceful conduct in professional respect, which is an individual failing by an individual medical practitioner or dentist.
12. It was the Applicant's case that the Respondent's position when confronted by this jurisdictional challenge was, to say the least, quixotic, as it flies against the terms of the relevant provisions. The replying affidavit, it was averred pitched at a very generality that Hospital is licensed by the Board and that all doctors working with the Hospital are licensed by the Respondent and proceeded to argue that the matter was well within the jurisdiction and functions of the board by virtue of them having licensed the Board and registered the medical practitioner in question. To the Applicants, this is not only wrong but irrelevant since the only relevant question is whether the Respondent's impugned actions are within the terms of section 20 of the Act and the Disciplinary Regulations which they are not.
13. In support of their submissions on jurisdiction the applicants relied on ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd, [1989] KLR 1*** where it was held that:

"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

14. It was submitted that the function of the PIC is simply to make preliminary investigations into a complaint against a medical practitioner or dentist in order to recommend whether or not a complaint should be referred to the Respondents' Professional Conduct Committee. To the Applicants, it is trite law that a statutory tribunal such as the PIC can only do that which it is expressly or by necessary implication authorised to do by statute. In making the adverse findings it did against the Applicant, the PIC did not act within its statutory powers but n every significant respect it acted *ultra vires* its powers and in breach of its responsibilities. To the said Applicants, it

is clear that the acts of the Board go beyond what its rules provide for. In this Honourable Court's supervisory jurisdiction, administrative or quasi-judicial power is subject to judicial control to ensure that the scope and limits of the power are not exceeded. In this respect the applicants relied on **Council of Civil Service Union & Others – vs.- Minister for the Civil Service (1984) 3 All ER 935, 936** where it was stated that an administrative action is subject to control by Judicial Review under three headings viz. illegality - where the decision making authority has been guilty of an error of law e.g. by purporting to exercise a power it does not possess; irrationality - where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision; and procedural impropriety - where the decision making authority has failed in its duty to act fairly.

15. In the applicants' view, the High Court's supervisory jurisdiction is derived from Article165 (6) and (7) of the Constitution which provides as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.

(7) For the purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

16. It was submitted that the act of the Respondent to carry out a function which is not conferred on it amounts to an illegality and smacks of lack of jurisdiction and anything done without jurisdiction is a nullity. The Court was urged to find that the Board does not have the jurisdiction to determine the matter against the Ex-Parte Applicants. In support of this position the Applicants relied on **Rex vs. Electricity Commissioners (1924) 1 KB 171,**at page 205 where it was held that:

"Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writs of Judicial Review."

17. The Applicants therefore urged this Court to find that the Board is acting without jurisdiction and proceed to quash the Respondent's Notice as well as its entire proceedings as the Respondent lacks the jurisdiction to carry out the proceedings as well as issue a notice to the *Ex-Parte* Applicants. In this respect the Applicants relied on **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR** and **Kadamas vs. Municipality of Kisumu (1985) KLR 954**:

18. It was the Applicants' case that the Respondent has acted without its legal authority in purporting to act without power and do that which it cannot do and that acting without jurisdiction amounts to an illegality as was held in the case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 as follows:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality….."

19. The position in **Pastoli vs. Kabale District Local Government Council & Others,** it was

submitted was followed in **Republic vs. Chief Magistrates Court Nairobi Law Courts & 8 Others Ex- parte Simon Ngomonge & Another [2013] eKLR** and **Republic vs. Kenya School of Law & 2 others Ex-parte Julient Wanjiru Njoroge & 5 Others [2014] eKLR.**

20. The position adopted by the Applicants was that when the PIC determined that it would summon the doctor on behalf of the 1st Respondent it was acting *ultra vires* not only section 20 of the Act, but also rule 4(1) of the Disciplinary Rules and from the foregoing cases, this act is *ultra vires* and without jurisdiction and as such an illegality in every sense of the word.
21. The Court was therefore urged to find that the actions of the Respondent amount to acting in breach of natural justice and amount to acting without jurisdiction and that it allows this Application and grants the orders prayed for.

Respondent's Case

22. In response to the application, the Respondent Boarded contended that it is a statutory body established under the ***Medical Practitioners and Dentists Act***, Chapter 253 of the Laws of Kenya, (hereinafter referred to as 'the Act') and that the Director of Medical Services, who was the deponent to the replying affidavit (hereinafter referred to as "the Director") and is also the Registrar of the Board by virtue of the provisions of section 5 of the Act as well as the chairperson of the Preliminary Inquiry Committee of the Board, herein referred to as "the PIC". It was revealed that the Board has many functions as set out in the Act, which includes the licensing and registration of medical and dental practitioners, licensing medical institutions and conducting disciplinary proceedings on complaints lodged against practitioners or medical institutions in Kenya as set out in section 20 0f the Act, among other functions.
23. It was averred that a complaint ("the complaint") was lodged with the board by **Dr. Christian Omuto** (the 2nd complainant") on 12th August 2012 or thereabout, on behalf of the family of the late **Mrs. Margaret Orwa**, who had been a patient admitted at the ("the Hospital") between 30th January 2012 and 10th February 2012 or thereabout. On receipt of the said complaint the board wrote to the Medical Director of the Hospital requesting for a full report on the complaint and the requisite documents to enable the PIC, undertake an inquiry on the complaint. It was contended that the Hospital responded to the Board's request and furnished copies of statements of the medical personnel who were involved in the treatment and management of the patient and also provided copies of the clinical notes.
24. It was averred that the PIC, is a committee of the Board established under rule 4 of the ***Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules*** (hereinafter referred to as "the Rules"), which rules the rules are meant for purposes of undertaking inquiries, which committee sits every month to discuss matters before it, which include undertaking inquiries by way of discussing matters or through hearing witnesses summoned by the board.
25. It was disclosed that the members of the PIC received the complaint and documents received by the Board on the matter herein and thereafter recommended that the hospital and doctors involved in the treatment and management of the patient be summoned to appear before the PIC to facilitate an inquiry wherein all parties would give evidence and also have an opportunity to cross examine witnesses. Pursuant thereto, on the 7th February 2014 the Board prepared notices and subsequently served the same upon **Dr. John Tole**, in his capacity as the Medical Director of the Hospital, on behalf of the Hospital and other notice was also served upon the other medical practitioners involved in the matter and they were requested to appear before the PIC for an inquiry on the complaint. However, **Dr. John Tole** filed JR Misc. Civil Application No. 131 of 2014, wherein the main dispute was that he was cited in his personal name. Thereafter negotiations were done between the Board, through the Chief Executive Officer and the Board's advocates and as a consequence thereof the notice of inquiry dated 7th February 2014 as against **Dr. John Tole** in person was withdrawn to enable the Board prepare fresh notices against the Hospital directly. Subsequently, JR No. 131 of 2015 was withdrawn.
26. According to the Respondent, the hospital and parties involved in the complaint were summoned by the Board to appear before the PIC on 27th March 2015 for purposes of undertaking an inquiry on the complaint to which summons the parties appeared before the PIC on the said date but the proceedings were adjourned as the committee was advised of orders issued by this honourable

court.

27. According to the Respondent, based on legal advice, the PIC consists of practitioners and consultants in different specialties in medicine and dentistry and they discuss matters before them fairly and also give parties the opportunity to give evidence and also produce documents related to the complaint before it as most complaints are on issues of the practice of medicine and dentistry. It was further averred that medical institutions, including the Aga Khan University Hospital are licenced by the Board and all doctors working within the hospital are also licenced by the Board.
28. According to the Respondent, the ***Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000***, which came into effect on 1st April 2000, set out the Rules for licensing and inspection of private medical institutions, among others. It was added that section 20 of the Act and the Disciplinary Rules, sets out the process for undertaking disciplinary proceedings and inquiries on complaints lodged before the Board. To the Respondent the complainant and the Hospital will have an opportunity to address or respond to the complaint lodged by the 1st Interested party or make representations directly or through advocates and also present its witnesses and supporting documents to enable the PIC consider the complainant fairly and judiciously.
29. The Respondent disclosed that whereas **Prof. George Magoha** is the chairman of the Board, he does not sit, participate or influence the matters before the PIC. Further, he is no longer the Vice Chancellor of the University of Nairobi.
30. The Respondent therefore asserted that the allegations made by the applicant herein are unmerited as the Hospital has previously appeared before the PIC of the board in other matters and therefore the challenges on the Board's jurisdiction is an afterthought. It averred that the application herein lacks in merit for the following reasons:

    i. The board reviewed the complaint and documents received and then referred it to the PIC to undertake an investigation or inquiry in exercise of its mandate under the Act.

    ii. The complaint 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 appear to the High Court against the decision of the board.

    v. The application herein is in bad faith and an afterthought;

    vi It is in the interest of the general public in Kenya for the board to be allowed to perform is functions as stipulated in the act and the applicable rules.

31. It was submitted on behalf of the Respondent by its learned counsel, **Mr Munge**, on the authority of **Republic vs. Kenya Medical Practitioners and Dentists Board & 2 Others [2013] KLR**, **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Kamani vs. Kenya Anticorruption Commission [2007] 1 EA 112** that:

    "The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide matters in question."

32. According to the Respondent, the major function of the Board, consistent with the preamble to the Act and being that of licensing and registration of medical practitioners, is contained in sections 5 to 9 of the Act while disciplinary proceedings, being one of the purposes connected therewith, are contained in section 20 of the Act. It was submitted that the functions are intended

to improve the practice of medicine and dentistry in Kenya and protect the general public or patients.

33. It was submitted that disciplinary powers are conferred upon the Board by section 20 of the Act as read with the Disciplinary Rules. Section 2, it was submitted defines a medical practitioner as a person registered under the Act and private practice as the practice of medicine and dentistry. In the respondent's view, all medical and dental practitioners offering medical and dental service in Kenya are registered and licensed by the Board and that section 15 of the Act related to licensing of private practice.
34. According to the Respondent, by virtue of section 23 of the Act, the Minister through legal notice no. 25 of 2000 published ***Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000***, the lacuna that was previously being abused by institutions offering medical and dental services was addressed. By virtue of the said rules institutions offering medical and dental services in Kenya are licensed by the Board, just like the Hospital. According to the Respondent, since rule 4 of the Disciplinary Rules relates to the functions of the PIC and talks numerously about institutions, this affirms that it has powers to undertake an inquiry on a complaint against an institution offering medical or dental services in Kenya. It was submitted that rule 4(3)(c) empowers PIC to suspend the licence of a medical institution while rule 4(3)(d) empowers it to order closure of an institution.
35. It was submitted that the functions of PIC are to establish whether or not a prima facie case exists to necessitate the personal appearance of a practitioner or the institution before the Board. According to the Respondent, the Board has statutory powers to undertake an inquiry on a complaint against an institution offering medical and dental services in Kenya. It was contended that the applicants acted in bad faith as it is registered and licensed by the Board to offer medical services in Kenya but seeks to avoid supervision when allegations of negligence or otherwise and lodged against it. It was the position of the Respondent that the Board was exercising its statutory obligations under section 20 of the Act which permits it to regulate its own Disciplinary Procedure. With respect to the obligation to consider the complaint placed before the Board, the Respondent relied on **Republic vs. Kenya Medical Practitioners and Dentists Bord & 2 Others [2013] eKLR** in which the case of **Onyango Oloo vs. Attorney General [1986-1989] EA 456**, was cited with approval.
36. It was submitted that under rules 12 and 13 of the ***Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000***, the institutions offering medical services have the responsibility to ensure persons working in their facility are qualified and have good conduct hence can be held liable in default. Further, in the tort the principle of vicarious liability is applicable when a medical or dental practitioner acts negligently while offering services on behalf of the Hospital which issue can only be determined after an inquiry.
37. It was submitted that the Rules cited were published within the spirit of the preamble to the Act as they are for the purposes connected with provisions of the Act more so sections 20 and 23 of the Act. To the Respondent, it is in the public interest that issues relating to the practice of medicine be handled by the Board as envisaged in law. It was the Respondent's case that the Board has been statutorily established to enable such matters, being technical in nature, to be handled in the first instance by the Respondent and that the applicant was afforded an opportunity to defend himself but declined the said opportunity. Further, the applicant has failed to exhaust the mechanism of the Respondent to address such issues hence this Court should find so and send him to the tribunal to appeal in order to avoid forum shopping.
38. It was therefore submitted that the applicants do not merit the orders sought hence the application should be dismissed with costs.

Determinations

39. I have had a chance to study the pleadings, affidavits and submissions that have been filed in this matter.
40. The first issue, in my view, is the role of the PIC and the scope and extent of its role. It is agreed that the PIC's functions as outlined in the Disciplinary Rules are to receive and review complaints against medical practitioners and dentists. To the applicant that role does not confer powers on the Committee to adjudicate such matters but only to investigate and make inquiries. How then is such

a body expected to undertake such investigations and inquiries? The general position with respect to the procedure to be adopted in disciplinary proceedings has been the subject of several legal pronouncements. **Michael Fordham** in ***Judicial Review Handbook***; 4thEdn. at page 1007 states that:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

41. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

42. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

43. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

44. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

45. However ***Halsbury's Laws of England Fourth Edition Vol. 1page 90 para 74*** states as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed

to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

46. In **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

47. It is therefore clear that, it is not the description of the body undertaking the statutory functions or the phrase given to its undertaking that dictate the manner in which its functions are to be carried out. Therefore such words as "investigations", "inquiries" and "recommendations" mean very little unless taken in the context of the power being exercised or the duty being undertaken. The

manner in which the duty is to be undertaken would for example be dictated by the repercussions or impact of the results of the findings. If for example the findings automatically lead to adverse actions being taken such as interdiction or suspension, it cannot be argued that such proceedings are mere recommendations hence the rules of natural justice do not apply.

48. It was due to the foregoing that this Court in **Republic vs. Kenya Medical Practitioners and Dentists Bord & 2 Others [2013] eKLR** was not satisfied that the Respondent, which is the same Board herein, conducted itself in a manner that met the criteria set out in Article 47 of the Constitution with respect to procedural fairness hence certiorari was issued to quash its decision.

49. Having said that the crux of the matter hearing is whether the Board has the power under the ***Medical Practitioners and Dentists Act*** to conduct disciplinary proceedings against institutions as opposed to individual medical practitioners and dentists.

50. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,**the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

51. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

52. The preamble to ***Medical Practitioners and Dentists Act*** Chapter 253 Laws of Kenya provides that it is:

An Act of Parliament to consolidate and amend the law to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto.

53. The Respondents contend that the phrase "purposes connected therewith and incidental thereto" expands the definition or description of "medical practitioners" and "dentists to include the institutions offering medical services. However the Act itself defines the said terms. "Medical practitioner" is defined to mean *a person* registered under the Act as a medical practitioner, while "dental practitioner" and "dentist" mean *a person* registered under the Act as a dentist. It may be argue that the word "person" refers both to juristic persons and individuals and therefore would include institutions offering medical services.

54. First and foremost is the principle that *the general yields to the specific.* This was the position adopted by **Emukule, J** in Miscellaneous Application Number 391 of 2006; **Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited** where he held that:

"In R-VS- DIRECTOR OF THE SERIOUS FRAUD OFFICE ex parte Smith [1993] A.C.I, 43H. -44A Lord Mustill said;-

'the principle of common sense expressed in the maxim *generalia specialibus non derogant,* (the general yields to the particular provisions) entails that the general provision of the code

(Act) yields to the particular provision of the Act in cases to which the Act applies.'"

55. Pursuant to the said principle it would follow that the words "***for purposes connected therewith and incidental thereto"*** must necessarily refer to the purposes connected and incidental to "***provisions for the registration of medical practitioners and dentists".*** In other words the words "***for purposes connected therewith and incidental thereto"*** ought not to read in a manner that expands the objects for which the Act was enacted.
56. Apart from that it is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act including the preamble are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. All the constituents' parts of a statute are to be taken together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words and phrases occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. To my mind, the above mentioned principle equally applies to different parts of the same section which must be construed as a whole whether or not one of its parts is a saving clause or a proviso and that the subsection must be read as parts of the integral whole as being interdependent, each portion throwing light if need be on the rest since it is an elementary rule that construction of a section is to be made of all the parts together. This was the position in **Jahazi vs. Cherogony [1984] KLR 814; [2008] 1 KLR 273 (EP)** where it was held that:

"In order to determine the intention and purport of legislation it is imperative to look at the legislation as a whole. Every statute must be interpreted on the basis of its own language since words derive their colour and content from the context and the object of the statute is a paramount consideration. Where rules intend certain things to be done by a petitioner alone, that is stated expressly, and where it is intended that certain acts are to be done by advocates or agents again that is stated expressly. Where the language of the Act is clear and explicit, the court must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature."

57. It follows that section 2 of the Act cannot be read in isolation to the other provisions of the Act. If the Court is to construe the word "person" in section 2 to refer to institutions offering medical services, that interpretation will have to apply to all the other provisions of the Act since he Act does not define the word "person". However one only needs to look at the subsequent provisions in particular sections 5 to 20 of the Act which deal with the registration of medical practitioners in order to realise the absurdity of interpreting the phrases "medical practitioner" and "dentists' as including Hospitals. Section 15(1) of the Act, for example provides that:

The Board may authorise the Registrar to issue to a medical practitioner or a dentist who has applied in the prescribed form and whom the Board considers has had suitable working experience in medicine or in dentistry, as the case may be, a licence to engage in private practice on his own behalf as a private practitioner or to be employed, either whole time or part time, by a private practitioner.

58. Section 20 of the Act on the other hand provides as follows:

If a medical practitioner or dentist registered or a person licensed under this Act is convicted of an offence under this Act or under the Penal Code (Cap. 63),whether the offence was committed before or after the coming into operation of this Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, subject to subsection (9), remove his name from the register or cancel any licence granted to him.

59. Clearly these provisions do not lend themselves to an interpretation other than that a "medical

practitioner" or a "dentist" must necessarily apply to an individual.

60. As was held in **Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others Civil Application No. Nai. 268 f 1999:**

"The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in there ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation."

61. It is therefore my view and I so hold that the ***Medical Practitioners and Dentists Act*** applies to individuals licenced by the Board and not to institutions. Whereas this Court does not rule out the vicarious liability of the institutions under which such individuals operate, it is my view and I so hold that liability of medical practitioners and dentists under the Act is distinct from such vicarious liability under a tort.

62. I must however make it clear that since the investigations and inquiry by the PIC may require that certain material be availed to it, there is nothing barring the PIC from summoning the administrators of a Hospital to shed some light on such investigations and even produce documents required by the PIC in furtherance of its mandate as long as it is made clear that they are not under investigations unless such administrators are the ones against whom complaints have been lodged. It is therefore my view that the decision of this Court would not bar any person injured as a result of the acts or omissions of the doctors or the Hospital from pursuing the remedies available to them against any person or institution which may be found liable or culpable.

63. It was contended by the Respondents that since the applicants had in the past applied for licensing from the Board, they are precluded from contending that the Act does not apply to the Hospital. However, as was appreciated **Simpson, J** (as he then was) in **Destro and Others vs. Attorney General [1980] KLR 77; [1976-80] 1 KLR 1590**:

"In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words no estoppel can legitimate an action, which is *ultra vires*…Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made since the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again the principle of *ultra vires* must prevail when it comes into conflict with the ordinary rule of law."

64. It follows that the mere fact that no one has in the past raised the issue of jurisdiction of an authority does not confer such jurisdiction on it if the same does not exist and whenever such an issue comes before Court, the Court must squarely deal with and pronounce itself thereon.

65. It was contended that there was a lacuna in the law which was cured by the promulgation of the ***Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000*** by the Minister. In my view, if there was a lacuna in the Act, such lacuna could only be cured by the amendment of the Act and not sneaked in by way of subsidiary legislation where there is no express power in the Act enabling such subsidiary legislation to be made.

66. As **Lord Atkin** held in **Rex vs. Electricity Commissioners (1924) 1 KB 171,**at page **205**:

"Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writs of Judicial Review."

Findings

67. Having considered he issues raised herein, it is my view and I so hold that under the Medical Practitioners and Dentists Act, the Board has no power to institute disciplinary proceedings against medical institutions as opposed to individual medical practitioners and dentists. It follows that such proceedings cannot also be instituted against the administrators of such institutions in their capacities as such administrators.

Depositions

68. In the premises I grant the following orders:

1. That an Order of Certiorari is hereby issued removing into this Court for the purposes of being quashed and quashing the Respondent's notice dated 5th March, 2015 issued to the Ex-Parte Applicants requiring them to appear before the Preliminary Inquiry Committee in PIC Case No. 05 of 2012 (Complaint by Dr Christine Omuto and Angela Ambitho against Dr. Edwin Otieno & Aga Khan University Hospital) to the extent that such proceedings are directed against the applicants.
2. An Order of Certiorari removing into this Court for the purposes of being quashed and quashing the proceedings and any orders and/or rulings made against the Ex- parte Applicants herein in PIC Case No. 05 of 2012 (Complaint by Dr Christine Omuto and Angela Ambitho against Dr. Edwin Otieno & Aga Khan University Hospital) in so far as such proceedings are directed against the applicants**.**
3. An Order of Prohibition directed at the Respondent and/or its Preliminary Inquiry Committee prohibiting it from inquiring into or determining the complaint, if any, against the Ex-parte Applicants herein, in PIC Case No. 05 of 2012 (Complaint by Dr Christine Omuto and Angela Ambitho against Dr. Edwin Otieno & Aga Khan University Hospital)**.**
4. **As there is no doubt that the Hospital's operations are courtesy of the licence issued by the Board, there will be no order as to costs.**

69. These shall be the orders of this Court.

Dated at Nairobi this 4th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Barasa for the applicant

Mr Agwara for Mr Munge for the Respondents

Cc Mwangi