



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO 260 OF 2013

DR ANDREW KIBET CHERUIYOT1ST PETITIONER

DR ANDREW KIARIE NDONGA 2ND PETITIONER

VERSUS

THE MEDICAL PRACTITIONERS &

DENTISTS BOARD1ST RESPONDENT

TABITHA NJERI KIHARA2ND RESPONDENT

THE NAIROBI HOSPITALINTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners filed this matter seeking orders to stop the commencement of an inquiry scheduled for Monday 20th May 2013 into the circumstances under which the 2nd respondent's husband died at the Nairobi Hospital, (hereafter '**the hospital**') the Interested Party in this matter.

2. The petitioners allege that there has been inordinate delay in holding the inquiry which vitiates any proceedings that the Board may hold as the delay would result in a violation of the petitioners' right to a fair trial. They also allege violation of Article 47(1) on fair administrative action on the basis of the alleged failure by the 1st respondent to disclose certain information to them.

3. The petitioners also claim that the proceedings before the Board are vexatious in view of the pendency of **Petition No 335 of 2011 Tabitha Njeri Kihara vs The Medical Practitioners & Dentists Board & The Minister for Medical Services** in which the 2nd respondent had sought an order declaring that it is no longer possible for there to be a fair inquiry before the Board into the circumstances under which her husband died.

4. Upon hearing the petitioners ex parte, I granted interim restraining orders and directed

that the application and the petition be served on the respondents for inter partes hearing on 29th May 2013. On that day, I gave directions with regard to the filing of responses and directed that this petition and Petition No. 335 of 2011 be heard together as they related to the same subject matter and raised the same issues.

5. There was thereafter some delay on the part of the parties in complying with the Court's direction with regard to filing replies and submissions. In the course of this period preceding the hearing, the 2nd respondent withdrew her petition no. 335 of 2011. The present petition proceeded before me on 17th, 18th and 24th February 2014.

The Petitioners' Case

6. The facts of the case as they appear from the pleadings by the petitioners are that late on the night of 4th January 2002, the 2nd respondent's deceased husband, one **Mr. Gordon Kihara Karingithi** (the patient) drove himself unaccompanied to Nairobi Hospital for treatment and was attended to by Dr. A Ruturi who was on duty at the Hospital's Accident and Emergency Department. He was examined and kept under observation and the 2nd respondent was notified of her husband's condition and invited to come to the Hospital.

7. Early on 5th January 2002, prior to going off duty, Dr Ruturi handed the care of the patient to the 2nd petitioner who was shortly after called to attend other patients in the hospital but briefed the 2nd respondent on the patient's condition over the telephone. He recommended that the patient be admitted pending further investigations into his condition. The 2nd petitioner then handed over the care of the patient to the 1st petitioner, who was then on duty, at about 2.00 a.m. The 2nd respondent arrived at the hospital at about 3.a.m, the condition of the patient was explained to her, but she declined the recommendations of the 1st petitioner that her husband should be admitted and instead insisted that he should be discharged.

8. According to the petitioners, the patient was brought back to the hospital a few hours later, unconscious and unresponsive, and despite efforts at resuscitation, he was pronounced dead soon after his arrival.

9. On 8th December 2004, nearly 3 years after the death of her husband, the 2nd respondent filed a complaint with the 1st respondent against the petitioners alleging negligence against them for having discharged the deceased from hospital instead of admitting him on the night of 4th and 5th January 2002. The 1st respondent then wrote to the 2nd respondent on the 24th of January 2005 seeking further information to enable them consider the complaint further

10. She did not, however, respond to the letter until six and a half years later when she sent her letter dated 21st June 2011 setting out in full the basis of her case against the petitioners and the hospital. The response was sent nine and a half years after the date of the incident. Upon receipt of the complaint, the 1st respondent convened a Preliminary Inquiry Committee ('PIC') meeting on 16th September 2011, nearly ten years after the incident. The PIC meeting was attended by among others, the petitioners and their Counsel, who objected to the period of time it had taken to commence the inquiry

11. The petitioners complain that they were assured by the Counsel for the 1st respondent that their Counsel's objection with regard to the delay would be taken into account in inquiring into the matter, that the sequence of the correspondence between the 1st and 2nd respondent was not disclosed to the petitioners at this PIC meeting; and further did not form part of the bundle of documentation filed by the complainant headed "Complainant's Witness Statement & Supporting Documents which was relied on and referred to by the complainant and the PIC at the meeting.

12. The petitioners further complain that Dr Francis W. Kimani, the Chairman of the Board, purportedly on behalf of the 1st respondent, announced to the press that the petitioners were guilty of failing to properly treat and manage the patient and that the patient was discharged without following proper protocol.

13. It is the petitioners' contention that the press announcement by Dr Kimani amounts to an interference not only with the power and jurisdiction of the 1st respondent to determine the issues at hand but is also prejudicial to the proper and fair determination of the pending inquiry.

14. The petitioners state that some fourteen months after the findings of the PIC were announced, the 1st respondent formally charged the petitioners and indicated its intention to hold an inquiry into the matter on 20th May 2013. The inquiry was accordingly scheduled to be held over eleven years and three months after the date of the incident. It is at this point that they filed the present petition.

15. The petitioners allege that the delay is not only prejudicial to them but also violates their constitutional right to a fair hearing and their right to have that hearing heard and determined within a reasonable time. They therefore seek the following orders:

(a) A declaration that the Petitioners fundamental right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair guaranteed by Article 47(1) of the Constitution of Kenya has been violated.

(b) A declaration that the petitioners fundamental right to a fair hearing and a hearing within a reasonable time guaranteed by Article 50(1) of the Constitution of Kenya have been violated.

(c) An order of prohibition (or alternatively by injunction or otherwise) prohibiting the First respondent from hearing or continuing to hear this matter.

(d) An order consequential to the above declarations that it is no longer possible to get a fair investigation, hearing and determination of the complaint made by the Second respondent and accordingly the complaint be dismissed.

(e) A declaration that the petitioners are entitled to compensation for breaches of their fundamental rights as particularized above.

(f) The respondents be condemned to pay the costs of this petition.

16. In his submissions on behalf of the petitioners, Mr. Inamdar relied on the petition dated 17th May 2014, the affidavits in support sworn by the petitioners on the same day, and written submissions dated 29th October 2013.

17. Mr. Inamdar reiterated the petitioners' contention that their fundamental right to fair administrative action under Article 47(1) and right to a fair hearing under Article 50 had been violated, and they were therefore seeking orders prohibiting the 1st respondent from hearing this matter as it was no longer possible to have a fair hearing of the complaint by the 2nd respondent. He contended that the conduct of the 1st respondent makes it impossible to have a fair hearing, and that there had been inordinate, inexcusable and unexplained delay.

18. Mr. Inamdar submitted that there had been no explanation why the 1st respondent refused to deal with the issue of delay when it was raised before it as it is duty bound to deal with the issue, and the fact that it was not explained means that the 1st respondent could not exercise discretion in their favour. He submitted further that there was a failure to disclose material to the

petitioners, and that nothing was given to the petitioners to show that it was the delay by the 2nd respondent to furnish material to the 1st respondent that led to the delay.

19. Counsel also contended that the media involvement prejudiced the rights of the petitioners. He submitted that Dr Francis Kimani, a member of the 1st respondent, was reported to have made a pre-determined finding of the guilt of the petitioners. As the 1st respondent is the same Board that would be hearing the matter, the said Dr. Kimani had prejudiced both his position and that of the Board and they could not be seen as acting fairly and not making a finding of pre-determined guilty.

20. The petitioners were also unhappy with the conduct of the 2nd respondent. Mr. Inamdar submitted that there had been no explanation for the delay in her response to the 1st respondent, and that further, she keeps feeding the media on the guilt of the petitioners, both while the matter is before the Court and before the Board, which seriously prejudices the petitioners.

21. Counsel relied also on the position taken by the 2nd respondent in High Court Petition No. 335 of 2011 which had been withdrawn during the pendency of this petition. Mr. Inamdar submitted that in that petition, the 2nd respondent's argument was that the 1st respondent was biased and should be debarred from holding the inquiry. It was his submission that her actions, that on the one hand she wants the 1st respondent, which she was in petition no. 335 of 2011 accusing of inordinate delay, debarred from dealing with the matter, and in the same breath wishes it to hear the matter amount to abuse of process.

22. Mr. Inamdar also pointed out that in its averments in Petition 335 of 2011, the 1st respondent had stated that it had no basis for recommending the charging of the petitioners, yet it proceeded to do so in its PIC report of 6th February 2012. He contended that the persistence by the 1st respondent in proceeding with the inquiry while its own impartiality is being questioned violates the petitioners' rights and is against public policy.

23. Counsel submitted that the petitioners would be prejudiced at the inquiry as they cannot recollect the events of 5th January 2002; that none of the staff who were present at the hospital at the time are available as they have moved away; and that they are not sure that the medical records relied on by the 1st respondent are complete or reliable.

24. Counsel relied on the cases of **Githunguri vs Republic (1986) KLR. Julius Kamau Mbugua vs Republic Criminal Appeal No 50 of 2008 and R vs Commission of Inquiry into the Goldenberg Affairs & 2 Others Ex-parte George Saitoti[2006]eKLR**. They also called in aid the decision of the House of Lords in **Attorney General's Reference No 2 of 2001[2004]1 All ER 1049** in support of their contention that there had been inordinate delay in hearing the complaint and their right to fair hearing had been compromised.

25. On their claim for an order of prohibition, Mr. Inamdar submitted that the petitioners were entitled to the order, and the Court has a duty to ensure fair treatment, where there is a likelihood that the decision is likely to have results which are perverse. They relied in this regard on the decision of the Court in **Peter Okech Kadamvas vs Municipal Council of Kisumu Civil Appeal No 109 of 1984[1985]KLR 954**.

26. To the 1st respondent's contention that this court has no jurisdiction to deal with this matter and that the petitioners should have appealed under section 20 of the Medical Practitioners and Dentists Act, Counsel submitted that such an appeal lies where one has gone through an inquiry, and one cannot appeal the decision of the PIC to the High Court. It was his contention also that the petitioners' participation in the inquiry, meaning that they had submitted to the process, does not deprive them of the right to come to this Court.

27. Counsel took the view that the public interest lay, not as submitted by the 1st respondent, in its hearing the complaint, and the 2nd respondent being heard, but in the inquiry not proceeding; and that the delay meant that the right of the 1st respondent to hear the matter and that of the 2nd respondent to be heard were lost.

The Case for the 1st Respondent

28. In opposing the petition, the 1st respondent relied on an affidavit sworn by **Dr Francis W. Kimani** and submissions dated 29th November 2013.

29. The contentions of the 1st respondent are that this matter, relating as it does to matters of professional discipline, should be handled by persons of the same profession who understand the profession. This would accord with section 20 of the Medical Practitioners and Dentists Act which deals with disciplinary issues of medical professionals which ought to be handled by way of peer review.

30. Learned Counsel for the respondents, Mr. Munge, pointed out that the Court is a product of the Constitution, Article 159(2) of which sets out the guiding principles for the exercise of judicial authority; that Article 159(2)(b) and (e) require the Court to strike a balance in a matter such as this which relates to professionals and their legislation.

31. According to the 1st respondent, medical professionals are regulated under the provisions of the Act; that section 4 provides for the establishment of the Board which is made up of professionals; and that sections 5-9 set out the functions of the Board relating to licensing and registration while section 20 deals with disciplinary issues. The 1st respondent contends that the matters in issue in this petition are peculiar in nature and can only be handled by peers in the medical profession. Mr. Munge relied in this regard on the case of **Atsango Chesoni vs David Martin Silverstein (2009)eKLR**.

32. It was the 1st respondent's case that section 20 of the Act vested in the Board power to regulate its own disciplinary proceedings and it cannot be faulted on the procedure it followed, and further that its rules of procedure, are set out in the **Medical Practitioners and Dentists (Disciplinary) Rules**.

33. According to the 1st respondent, Rule 3 of the Disciplinary Rules sets up the Preliminary Inquiry Committee (PIC) made up of 7 members, all of whom are senior medical professionals. The PIC's functions are set out at Rule 4 as being to review and investigate complaints against medical professionals and if no merit is found, to reject it. If however the complaint is found to be merited, the PIC is required to make recommendation to the Board, and the matter then goes to the Tribunal or full Board.

34. The 1st respondent argues that it has taken a non-partisan position in this matter in the interests of the public and health institutions. As a consequence of its position, it has been attacked by all sides to the dispute. Mr. Munge submitted that this matter calls for a lot of caution as it involves the practice of medicine and dentists and how patients are treated. He urged that any medical professional who rushes to Court to stop the 1st respondent from exercising its mandate and raises technical issues on time should be treated with caution.

35. According to the 1st respondent, the 2nd respondent lodged a complaint because her husband, Gordon Kihara Karigithu, went to the Nairobi Hospital and died while he was under the care of the two petitioners. On the evidence of the petitioners before the PIC, the PIC found that there was merit to refer the case to the Board. He submitted that the petitioners were represented by their present Counsel before the Board; that they cross examined the 2nd respondent, and the Board found that there was merit in the complaint.

36. Thereafter, notices of inquiry were drawn and served on the petitioners, and they were given dates for the inquiry. The 1st respondent contends that the petitioners did not raise the issues they are now raising before the PIC; that this petition was not precipitated by the issues raised in the petition regarding delay and alleged violation of constitutional rights but because the petitioners were denied an adjournment by the 1st respondent.

37. To the petitioners' complaints with regard to the conduct of the PIC and the allegation that they would not get a fair hearing, it was the 1st respondent's case that the issue was being raised because the petitioners did not get an adjournment. The 1st respondent submitted that the petitioners should have made their allegation before the PIC before submitting themselves to the process before it. Mr. Munge submitted that the petitioners were, on the principle of estoppel by conduct, estopped from seeking relief on the issue of time. Counsel relied in this regard on the case of **Julius Kamau Mbugua vs Republic Criminal Appeal No. 50 of 2008**.

38. In response to the petitioners' contentions with regard to the media, Counsel submitted that the issue had been adequately explained in Dr Kimani's affidavit; that the proceedings were in camera and that he did not meet any media; that he signed the letter from the Board as the Chairman of the PIC in accordance with Rule 3(2); and that he cannot be faulted if the media got hold of the letter. Counsel argued further that in any event, the full Board consists of many members and its decisions are not made by one member.

39. The 1st respondent termed the contention by the petitioners that they would suffer prejudice as there would be no witnesses to rely on at the hearing before it as an afterthought as the issue had not been raised before the PIC.

40. Counsel submitted that while the impugned decision was alleged to be a decision of the PIC, it was a decision of the Board as the report of the PIC went to the full Board and was adopted. It contended that the petitioners' recourse, if dissatisfied with the decision of the Board, was to move on appeal to the High Court under section 20(6). He termed the present petition as incompetent and one that does not disclose any violation of the petitioners' constitutional rights. Counsel further urged the Court to balance the rights of the petitioners against those of the 2nd respondent, who lost her husband at a young age, as well as those of the public, and dismiss the petition.

The 2nd Respondent's Case

41. Through her Learned Counsel, Mr. Kiama Wangai, the 2nd respondent opposed the petition and relied on her affidavit sworn on 18th July 2013 and submissions dated 29th November 2013.

42. While associating himself with the submissions of Counsel for the 1st respondent on the law, Counsel for the 2nd respondent submitted that she was involved in this matter as she was being stopped from proceeding with her complaint from the PIC to the Board. Mr. Wangai contended that there was no objection by the petitioners before the PIC, and that what they were now seeking to do is stop the matter from proceeding from the PIC to the Tribunal.

43. The 2nd respondent contended that she has no role in the working of the 1st respondent; that there is no contest between her and the petitioners; and that what was going on is a peer review of the petitioners by their peers.

44. To the petitioners' contention that there had been inordinate delay, Counsel submitted that the proceedings before the Board were quasi-criminal in nature, and in criminal matters, there is no time limitation.

45. In explaining the delay in the matter, the 2nd respondent submitted that when her husband

died in January 2002, she filed High Court Civil Case No 698 of 2003. She then lodged her complaint before the 1st respondent in 2004. Mr Wangai submitted that as the time limit in cases of negligence is 3 years, there was no delay on her part as she was not privy to the proceedings before the Board.

46. Mr. Wangai submitted further that the petitioners were aware in February 2012 of the findings of the PIC, but they only complained one year later. Counsel relied on the letter from the petitioners' Counsel dated 29th April 2013 seeking an adjournment of the proceedings before the Board. He agreed with the submissions of Counsel for the 1st respondent that the petitioners filed the present petition because they were denied an adjournment, not because their rights were violated. In support of this submission, he observed that in the letter dated 13th May 2013, the petitioners' Counsel had threatened to go to Court if they were not granted an adjournment. The 2nd respondent termed the present petition an abuse of the Court process that should be dismissed so that the truth can be known.

The Interested Party's Case

47. The Interested Party, Nairobi Hospital, supported the petitioners' case and associated itself with the submissions made on behalf of the petitioners. It also relied on its written submissions dated 29th November 2013.

48. Ms. Mathai, Learned Counsel for the hospital, submitted that a majority of the proceedings before the PIC are disciplinary in nature and ought to be dealt with expeditiously; that to conduct an inquiry 11 years after the incident giving rise to the complaint and 8 years after the complaint raises serious doubt as to whether the process will lead to any just result. It was Counsel's view that the position would have been different if the delay was caused by the petitioners or the Interested Party, but there was no evidence that this was the case. Counsel pointed out that the 2nd respondent had tried to stop the inquiry before the Board by filing Petition, No 335 of 2011 which she later withdrew after this petition was filed.

49. To the respondents' contention that the issue of delay had not been raised before the PIC, Ms. Mathai submitted that on the contrary it had been but was dismissed offhand by the PIC in its decision dated 6th February 2012.

50. With regard to the submission by the 1st respondent that estoppel by conduct applied in relation to the petitioners as they had submitted themselves to the process before the PIC, Ms. Mathai argued that from the PIC decision and section 4(1) of the Medical Practitioners and Dentists (Disciplinary) Rules, the PIC merely recommended referral of the matter to the Board. There was no way of determining whether the Board would take up the matter; and the proper time to move the Court was after receipt of the notice by the respondents to appear before the Board for an inquiry, after being charged. She contended further that section 20 of the Act made it clear that a person can appeal only if aggrieved by a decision of the Board, not by the PIC.

51. Counsel submitted with regard to the alleged publication of the PIC decision, through the media, in the letter by Dr Kimani, that even had the proceedings been held in camera, the PIC should not have written any letters to begin with on whether or not the petitioners were guilty when its mandate was confined to making recommendations to the Board. She contended that by writing the letter, the PIC exposed its pre-determined findings to the public and scuttled any chance that the Interested Party and the petitioners had of a hearing by an independent body. She therefore asked the Court to allow the petition.

Determination

52. The facts giving rise to this petition are tragic. They relate to the death of the 2nd

respondent's husband on 5th January 2002 allegedly after he sought treatment at the Nairobi Hospital and was under the care of the petitioners. Following his death, the 2nd respondent filed a civil suit which was not proceeded with, then made a complaint against the petitioners to the 1st respondent. During the pendency of the complaint, she filed a petition, No. 335 of 2011, in which she alleged that there had been inordinate delay in dealing with her complaint and sought orders to have the circumstances surrounding the death of her husband referred to a Magistrate's Court with a view to having an inquest held. With the 1st respondent having commenced an investigation through its PIC and found merit in her complaint, the petitioner withdrew her own petition and is now eager to proceed with the inquiry before the Board.

53. On their part, the petitioners contend that holding the inquiry at this point in time will be prejudicial to them and a violation of their constitutional rights. Their opposition to the inquiry by the 1st respondent is in two limbs. They allege that the conduct of the 1st respondent has been such as resulted in a violation of their right to fair administrative action under Article 47(1) in that the 1st respondent did not disclose documents and correspondence between itself and the 2nd respondent, and neither did it disclose the fact that the 2nd respondent had filed a petition in which she alleged that the matter could not properly be investigated by the 1st respondent.

54. The petitioners also allege that the 1st respondent had communicated to the media a letter in which it showed that it had predetermined the matter against the petitioners and it could therefore not be deemed a fair arbiter, a violation of the petitioners' rights under Article 50.

55. The second limb pertains to the period it has taken before the matter came up for hearing before the 1st respondent. They contend that the incident in question having occurred on 5th January 2002 and the inquiry commencing in 2013, more than 11 years after the incident, there has been inordinate delay and they are likely to suffer prejudice as they will not be able to obtain the documents or witnesses necessary for their defence.

56. They also contend that the 2nd respondent has compromised her position in the matter by her conduct during the period when the matter was before the 1st respondent and by filing and then withdrawing Petition No. 335 of 2011. They take the view that her complaint before the 1st respondent should be dismissed.

57. Having considered the respective pleadings of the parties, their submissions, oral and written, as well as the issues that they propose as falling for determination, I take the view that three issues arise for determination:

i. Whether the Court has jurisdiction to entertain and determine the issues raised in this petition;

ii. Whether the 1st respondent has conducted itself in such a manner as to violate the petitioners' rights to fair administrative action guaranteed under Article 47(1) and 50(i) of the Constitution;

iii. Whether there has been such inordinate delay in dealing with the complaint before the 1st respondent as would result in a violation of the petitioners' rights under Article 50 of the Constitution.

Jurisdiction

58. The respondents take the position that this Court has no jurisdiction to deal with this matter at this stage, and that the petitioners could only come before the Court on appeal against the decision of the Tribunal. They rely in this regard on the provisions of the Medical Practitioners and Dentists Act and the rules made thereunder.

59. In its decision in the case of **Samuel Kamau Macharia vs Kenya Commercial Bank and Two others**, Civ. Appl. No. 2 of 2011, the Supreme Court of Kenya stated as follows with regard to jurisdiction:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

60. Article 165 of the Constitution confers jurisdiction on the High Court by providing as follows at **Article 165(3)** -

“(3) Subject to clause (5), the High Court shall have:-

- (a) unlimited original jurisdiction in criminal and civil matters;*
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;*
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
 - (iv) a question relating to conflict of laws under Article 191; and*
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”*

61. Article 165(6) gives the High Court jurisdiction over bodies such as the 1st respondent by providing that the High Court shall have supervisory jurisdiction over *“subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function”*.

62. With regard to petitions alleging violation of Constitutional rights under Article 22, Article

23 of the Constitution grants the High Court authority to uphold and enforce the Bill of Rights in the following terms:

“(1)The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

63. Further, Article 23 (3) provides that the High Court, in any proceedings brought under Article 22, may

...”grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

64. The petitioners allege violation of their constitutional rights and invoke the jurisdiction of the Court set out above. It cannot, in my view, in the face of the above provisions, be in dispute that the Court has jurisdiction to entertain the present petition. Whether in the exercise of its jurisdiction to enforce and protect fundamental rights or to supervise the functioning of inferior tribunal such as the 1st respondent, the jurisdiction of the Court cannot be validly disputed. A proper reading of the provisions of section 20 of the Act shows that it applies to appeals from decisions of the Board made specifically under that section, not to decisions of the PIC. I therefore find and hold that the Court has jurisdiction to hear and determine this petition.

Violation of The Petitioners’ rights to fair administrative action under Article 47.

65. The second issue for consideration is whether the 1st respondent violated the petitioners’ rights under Article 47(1) by failing to disclose the correspondence between itself and the 2nd respondent, and that it was the 2nd respondent who had occasioned the delay in this matter.

66. Having read the pleadings and submissions of the parties with regard to this issue, it is not clear in what manner the petitioners have been prejudiced by the non-disclosure of the correspondence between the respondents. It is evident from the averments of the parties that a complaint was made against them by the 2nd respondent on 8th December 2004. The 1st respondent referred the complaint to the Preliminary Inquiry Committee (PIC) to undertake an investigation in accordance with the provisions of Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) Procedure) Rules.

67. On 16th December 2004, the Board wrote to the petitioners and other parties involved in the matter seeking information and full reports on the incident giving rise to the complaint to enable the PIC undertake its investigations. It was not until 2011 that the 2nd respondent wrote to the 1st respondent with the basis of her claim, and the process of investigation commenced, with PIC Cause No. 22 of 2003 against the petitioners being heard on 16th September 2011.

68. I have considered the submissions of the parties in this regard. While the petitioners allege non-disclosure of the correspondence between the respondents or the existence of High Court Petition No. 335 of 2011, they have not demonstrated how this non-disclosure resulted in a violation of their rights under Article 47(1) which provides as follows:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

69. Even if, as alleged, there was non-disclosure of the correspondence or the existence of the petition, it is difficult to see how this amounted to a violation of the petitioners' rights to fair administrative action. As deponed by Dr. Kimani, the petitioners were represented by Counsel, had an opportunity to cross examine the 2nd respondent and to raise any issues with regard to the holding of the inquiry and any matters preceding it.

70. Further, the material that the petitioners complain was not disclosed to them is not material in any way to their defence on the complaint by the 2nd respondent. Apart from showing that the 2nd respondent had delayed in filing her response to the PIC, and that she had filed Petition No. 335 of 2011 in which she alleged that she could not get a fair hearing before the Board due to inordinate delay, the documents referred to in the petitioners' Advocates letter dated 13th May 2013 do not go into the issue before the 1st respondent save in respect of the allegation of inordinate delay. In the circumstances, I find no violation of the petitioners' rights under Article 47(1) or any prejudice caused to them by the non-disclosure.

Violation of the Right to be heard by an Independent and Impartial Tribunal under Article 50(1)

71. The petitioners have raised two issues with regard to the provisions of Article 50. The first pertains to the provisions of Article 50(1) which provides that

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

72. The petitioners complain that the 1st respondent had predetermined the complaint against them. The basis of this contention is that the then Chairman of the Board, Dr Francis W. Kimani, communicated to the media and made statements that indicated that the PIC had found the petitioners guilty. The 1st respondent denies communicating with the media or making any statement to it with regard to the inquiry facing the petitioners.

73. I have considered the averments of the parties on this issue, the letter from the Chairman dated 6th February 2012, and the article from the Daily Nation of 20th February 2012. A perusal of this article shows that it quotes the contents of the letter dated 6th February 2012 and attributes them to Dr. Kimani. There is nothing to indicate that Dr. Kimani gave an interview to the media or gave them access to the letter.

74. Secondly, while the article was published in February 2012, no complaint was raised with regard to it until May 2013, more than one year later, and only after the Notices of Inquiry had been sent to the petitioners and their request for an adjournment of the inquiry scheduled for 20th May 2013 denied. The issue of the article is raised in the letter dated 13th May 2013 which makes the allegations now before the Court against the 1st respondent.

75. With respect to the petitioners, I am unable to agree that the publication of the article is an indication that the Board is prejudiced, or that the outcome of the inquiry is predetermined. Had this been a serious concern to the petitioners, it would have been raised as soon as it arose, not one year and several months later, when the date of the inquiry before the Board had been set. More importantly, under the Act, the inquiry is to be held before the full Board, not before Dr Kimani. Unless the petitioners are alleging lack of impartiality against all the Board members, it is difficult to find any substance in the complaint.

Whether the Delay was so Inordinate as to Result in Violation of the Petitioners' Right to Trial Within a Reasonable Time Contrary to Article 50(2)(e).

76. The next issue relates to the period between the incident forming the basis of this petition

and the inquiry, and whether the delay has been so inordinate as to result in a violation of the petitioners' rights under Article 50 of the Constitution which guarantees the right to trial without unreasonable delay.

77. The incident in question occurred on 5th January 2002. The 2nd respondent made her complaint in 2004, and it was not until 16th September 2011 that the proceedings before the PIC of the 1st respondent commenced. The PIC ruled on 13th January 2012 that the 2nd respondent's complaint had merit, and it communicated this decision and the charges that the petitioners and the hospital were to answer by its letter of 6th February 2012. They also recommended charges against the pathologist who had carried out a post mortem examination of the deceased. The 1st respondent communicated the Notice of Inquiry to the petitioners and the hospital in its letter dated 19th April 2013 and scheduled the inquiry for 20th May 2013.

78. Admittedly, a long period of time had elapsed between the date of the incident and the time the PIC commenced its investigation of the matter and recommended that the petitioners and the hospital answer charges in connection with the death of the 2nd respondent's husband. The question is whether, in the circumstances, it would be just for the Court to find that there has been such inordinate delay as would lead to violation of the petitioners' rights under Article 50. Article 50(2)(e) which is relevant to the present issue states as follows:

“Every accused person has the right to a fair trial, which includes the right-

(e) to have a fair trial begin and conclude without unreasonable delay.”

In support of their contention, the petitioners have relied on several decisions in which the Court has considered the issue of delay and its impact on criminal trials. In **Githunguri vs Republic (1986) KLR 1**, the applicant was charged in 1984 before the Chief Magistrate, Nairobi with four counts of contraventions of the Exchange Control Act (now repealed). Two of the offences that he was charged with were alleged to have been committed in 1976, while the third and fourth were alleged to have been committed in 1979.

79. The charges against the applicant were preferred nine years after the alleged commission of the offences, six years after the completion of investigations, and 4 years after the Attorney General had communicated to the applicant the decision that he would not be prosecuted. The Court considered the application and found that in the circumstances of the case, charging and prosecuting the applicant was an abuse of the Court process and against public policy. It proceeded to grant an order of prohibition, stating in so doing that:

“We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.”

80. The decision in **Githunguri** related to a situation where the offences alleged against the applicant had occurred some nine years before; had been investigated six years before, and a decision communicated to him by the Attorney General that he would not be prosecuted. Four years later, the same office of the Attorney General, who had communicated the decision that no

charges would be laid, sought to re-open the matter and prosecute the applicant.

81. With respect to Counsel for the petitioners, this decision does not assist the petitioners. The facts and circumstances are entirely different. The petitioners and the Interested Party knew that a complaint had been made against them and, given that there had been no communication to them that it had been resolved or withdrawn or found to have no merit, they cannot claim to be in a situation similar to that of the applicant in **Githunguri**. Indeed, they participated without complaint in the preliminary inquiry, with the petitioners' Counsel raising none of the matters canvassed in this petition except the issue of delay. None of the other arguments made before this Court with regard to the unavailability of evidence were raised before the PIC.

82. The petitioners have also relied on the decision of the Court of Appeal in **Julius Kamau Mbugua vs Republic (supra)**. In that case, which had been lodged under the provisions of the former Constitution, the Court held that the trial within a reasonable time guaranteed in section 77(1) of the former Constitution (which is similar to the provisions of Article 50(2)(e) of the current Constitution) relates to the whole of the judicial process, starting from when a person is charged and ending at the determination of the trial. This is indeed the view held in many other jurisdictions: that the guarantee to a hearing within a reasonable time applies to the entire trial process, from the time an accused person is charged in court to the time of judgment, and right up to the appeal.

83. Given, as submitted by Counsel for the petitioners and the 2nd respondent, that the proceedings before the 1st respondent are quasi-criminal in nature, two issues arise. First, what are the implications of the constitutional guarantees of a fair trial on the facts of this case?

84. Secondly, do the inquiries before the PIC form part of the trial process so that the petitioners can allege violation of Article 50(2)(e) on the right for the trial to proceed without unreasonable delay? From the material before me, it appears that the function of the PIC under rule 4(2) of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules is to receive complaints, conduct preliminary inquiries or investigations, and make recommendations to the Board on whether or not there is merit in the complaint to warrant charging the medical practitioners involved.

85. It is only after the Board commences an inquiry in accordance with the mandate under section 20 of the Act that the 'trial' can be said to have commenced. As the Court of Appeal observed in the case of **Julius Kamau Mbugua (supra)**, the protection under Article 50 (2) are trial related. They do not cover the period preceding the laying of charges and commencement of the trial. Thus, while there was a delay in the commencement of the proceedings, I do not find that such delay as predated the commencement of the inquiry in 2011 was such as can be said to be a violation of Article 50.

86. Section 20 of the Medical Practitioners and Dentists Act gives the Board, established under section 4 of the Act, power to inquire into complaints against medical practitioners and to regulate its own procedure in carrying out its functions. No time limit is set for the investigation of such complaints. The 1st respondent thus exercises a statutory function in accordance with a procedure that it has the statutory mandate to set. The Court, in exercising its supervisory jurisdiction, must do so only where it is satisfied that the Board has conducted itself in a manner that is outside its jurisdiction or in violation of the constitution or rules of natural justice.

87. In the present case, the 1st respondent had not commenced its hearing of the complaints against the petitioners and the hospital. What is being impugned is not the conduct of the Board in the proceedings before it, but the events preceding the charging of the petitioners, and the failure by the PIC to disclose certain documents to the petitioners which, as observed above, were not material to their defence before the Board.

88. However, what would be the position even were the delay considered to have been to the

trial process? Would the delay, as submitted by the petitioners and the hospital, merit the grant of an order of prohibition against the 1st respondent?

89. The petitioners have relied on the decision of the House of Lords in **Attorney General's Reference No 2 of 2001(supra)**. They observed that in the leading judgment in that matter, the House rejected the idea that just because there had been a delay in any prosecution, this would render any charge laid against a defendant to be treated as being unlawful and therefore automatically leading to termination of the proceedings; and further, that a stay would never be an appropriate remedy if any lesser remedy, such as a declaration, a reduction in sentence or an award of damages, would adequately vindicate the defendant's Convention right.

90. In his written submissions, Mr. Inamdar quotes the following words from that judgment:

“If the court were satisfied, before an impending trial, that the prosecution had been guilty of serious delay such as to cause serious prejudice to the accused, to the point that no fair trial could be held, or if the authorities were shown to have acted in such a way as to render any trial of the defendant unfair in the circumstances, further proceedings would be restrained as an abuse of the court's process by imposition of a stay: Attorney General's Reference (No 1 of 1990) [1992] 1QB 630; R vs Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42”

91. The petitioners further quote, from the same judgment, the following words:

“...If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant.” (Emphasis added) ...

92. It appears to me that the petitioners have, albeit inadvertently, provided a response to their complaint on the issue of delay. Even if there has been a delay in dealing with the 2nd respondent's complaint, that is not, in itself, a basis for not carrying out the inquiry against the petitioners. Secondly, they have not shown such conduct on the part of the public authority, the 1st respondent, that has led to a failure to proceed with the hearing of the matter within a reasonable time. From the material before me, the delay in proceeding with the complaint by the 2nd respondent has primarily been caused by the 2nd respondent herself, a matter I shall revert to in due course.

93. Suffice to say that in the present circumstances, even if the delay in this matter was to the 'prosecution' or trial of the petitioners, rather than to the pre-trial proceedings, no reason has been shown by the petitioners that would justify a finding that the inquiry and charges against them should not proceed at all.

94. I am persuaded in this view by dicta from various Courts in this and other jurisdictions to the effect that a delay such as is evident in the present case would not justify a prohibition of the inquiry before the 1st respondent. First, in **R vs Morin (1992) 1 SCR 771**, the Canadian Supreme Court, in considering an application for stay of proceedings for infringement of the right to be tried within a reasonable time held that:

“The general approach to the determination as to whether the right has been denied is not by the application of mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against the factors which either inevitably lead to the delay or are otherwise the cause of the delay”.

95. Similarly, in **Zanner vs Director of Public Prosecutions Johannesburg 2006(2) SACR 45 (SCA) 2 ALL SA 588**, the South African Supreme Court of Appeal had to deal with whether a ten year delay in instituting criminal proceedings for murder called for a stay of prosecution. Maya, AJA highlighted the importance of the nature of a crime in the balancing enquiry. She observed as follows;

“The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It also instils public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crimeit is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe ...Clearly, in a case involving a serious offence such as [murder], the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay.”

96. In **Martin vs Tuaranga District Court, (1995) 2LRC 788**, the Court held as follows;

“...the right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently is, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages”.

97. The Court of Appeal of Kenya, in the case of **Julius Kamau Mbugua vs Republic (supra)** held as follows;

“Had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised If by the time an accused person makes an application to the court, the right has already been breached and the right can no longer be enjoyed, secured or enforced, as is invariably the case....”.

98. In the instant case, the petitioners and the Interested Party face a complaint of medical negligence that resulted in the death of the 2nd respondent’s husband. The public places great trust in medical personnel and institutions, and there is therefore great public interest in ensuring that the highest standards of care are observed and maintained. Where a complaint is made that there was medical negligence that resulted in death or other harm to a patient, public interest considerations demand that such a complaint be investigated.

99. Notwithstanding the delay in the matter, to quash the proceedings before the 1st respondent would be injurious to the public interest and should not be contemplated except in very exceptional circumstances, where serious prejudice has been shown as likely to occur to the defendant, which has not been shown to be the case here. As the Court observed in the **Zanner Case (Supra)**:

“Although the time period was central to the enquiry of whether it was unreasonable, the fact of a long delay cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The accused must show definite and not speculative prejudice”.

Delay by the 2nd Respondent

100. The petitioners have also asked the Court to find that the conduct of the 2nd respondent has compromised her position in that she delayed in making her response to the 1st respondent and, secondly, filed a petition against the 1st respondent and others, which she later withdrew.

101. It is indeed true that the 2nd respondent delayed unduly in submitting her response to the 1st respondent's request for more information about her claim, and that she subsequently filed a petition seeking to have the matter investigated through an inquest. She had also filed a civil claim which she did not prosecute. In the absence of an explanation from her, and in my view none is required in the present petition, one can only speculate with regard to the factors influencing her conduct. However, in the circumstances of this case, I take the view that her conduct would not influence the 1st respondent, which has the statutory mandate to regulate the conduct of and to discipline medical practitioners and dentists, in the conduct of its mandate. The issues that the petitioners raise with regard to the conduct of the 2nd respondent are, in my view, best raised before the 1st respondent.

Disposition

102. In the circumstances, I find no merit in the present petition. Moreover, I am satisfied that the interests of justice demand that the incident resulting in the death of the 2nd respondent's husband should be investigated and the matter brought to a close. It cannot be in the interests of either the petitioners or the 2nd respondent to have the issues in dispute, which relate to the loss of life and touch on the professional competence of the petitioners, hanging, unresolved, indefinitely.

103. The petition is therefore dismissed, and the 1st respondent is at liberty to proceed with the inquiry into the matter.

104. Each party shall bear its own costs of the petition.

105. In closing, I would like to express my gratitude to Counsel for the parties for their exhaustive pleadings, submissions and authorities. If I have not referred to them in this decision, it is not because they were not useful to the Court.

Dated, delivered and signed at Nairobi this 13th day of May 2014

Mumbi Ngugi

Judge

Mr. Samir Inamdar instructed by the firm of Inamdar & Inamdar & Co. Advocates for the Petitioners

Mr. Munge instructed by the firm of Muriu, Mungai & Co. Advocates for the 1st Respondent

Mr. Kiama Wangai instructed by the firm of Kiama Wangai & Co. Advocates for the 2nd Respondent

Ms. Mathai instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the Interested Party.