

**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E064 OF 2023**

***(Being an Appeal from the Ruling of Hon. A. Ndung'u,  
Senior Resident Magistrate delivered on 28<sup>th</sup> November,  
2022)***

**ISAAC KITHUKU NGUTI *(Suing as the Administrator of the  
Estate***

***Of RUTH MWENDE KITHUKU - DECEASED) .....***

**APPELLANT**

**VERSUS**

**DR. WAMBUI JOSEPH GATURA & 2 OTHERS**

**MAKINDU SUB COUNTY HOSPITAL**

**COUNTY GOVERNMENT OF MAKUENI .....**

**RESPONDENTS**

**JUDGMENT**

1. The Deceased, **Ruth Mwende Kithuku**, was involved in a road accident where she sustained a left radical fracture. She was admitted at the 2<sup>nd</sup> Respondent on 8<sup>th</sup> July, 2017, for a standard surgery of plate fixing. She died during the operation. Her father, the Appellant, blamed the Respondents for her death, accusing them of negligence. He filed a suit at the Makindu Law Courts vide a Plaint dated 4<sup>th</sup> July 2018, in which he sought general damages for loss of expectation of life and special damages.
2. The Appellant also lodged a complaint against the 1<sup>st</sup> Respondent to the Medical Practitioners and Dentist Board on 4<sup>th</sup> June, 2019. While the Court case at the Makindu Law Courts was still in motion, the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentist Council (KMPDC) considered the Appellant's complaint and delivered a ruling on 18<sup>th</sup> December, 2020, in which it dismissed the Appellant's complaint against the 1<sup>st</sup> Respondent.
3. Subsequently, the Respondents raised a Preliminary Objection, claiming that the Court did not have jurisdiction

to hear and determine the suit. They claimed that the matter had already been heard by the KMPDC and that the only option available for the Appellant was to challenge the KMPDC's ruling at the High Court.

4. The lower Court delivered a ruling on the Preliminary Objection on 28<sup>th</sup> November, 2022, in which it upheld the Preliminary Objection. The Court held that the only avenue available for the Appellant, being dissatisfied with the ruling of the Medical Practitioners and Dentist Board, was to move the High Court by way of Judicial Review proceedings.
5. The Appellant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 21<sup>st</sup> August, 2023. He raised the following Grounds of Appeal;

***1) The learned magistrate erred in law and in fact in failing to hold that the Appellant herein together with his advocate were never involved in the proceedings of Kenya Medical Practitioners and Dentist Council (KMPDC) being PIC case No 38 of 2019.***

***2) The learned magistrate erred in law and in fact in failing to hold that the Appellant herein was not accorded a fair hearing pursuant to Article 50 of the Kenyan 2010 Constitution as he never attended the said hearing and/or proceedings of PIC Case No 38 of 2019.***

***3) The learned magistrate erred in law and in fact in failing to hold that the Appellant herein together with his Advocate were not notified of any hearing and/or proceedings of PIC Case No 38 of 2019.***

***4) The learned magistrate erred in law and in fact in failing to hold that the correspondences and the proceedings of PIC Case No 38 of 2019 filed in the trial court and annexed as list of documents by the defendants were illegible/unreadable hence could not be admissible as evidence and used in delivering the ruling.***

***5) The learned magistrate erred in law and in fact in failing to hold that the said determination on***

**18/12/2020 was delivered during the core of COVID 19 Pandemic and at that time the Government has banned all meetings hence bewildering how meeting was convoked and a decision arrived during this COVID 19 time being 18/12/2020.**

**6) The learned magistrate erred in law and in fact in failing to appreciate that the Appellant herein filed a complaint against KMPDU setting all his addresses and of his Advocates but the said KMPDU during its hearing never invoked the Appellant and/or his advocates to present his case and be heard on merit.**

**7) The learned magistrate erred in law and in fact in failing to hold that the Appellant filed his case on 17/07/2018 after delivering demand letters to the Respondent on 3/05/2018 and on 6/07/2018 and after the KMPDU replied to his letter on 21/06/2018 hence conforming to the time**

*provided under the Limitation of Actions Act, Laws of Kenya.*

**8) The learned magistrate erred in law and in fact in failing to appreciate that Judicial Review could not have been filed by the Appellant herein as he was not involved in the PIC Case No 38 of 2019 hearings/proceedings together with his advocates as the same was conducted clandestinely hence the said decision of 28/11/2011 was ex parte.**

**9) The learned magistrate erred in law and in fact in failing to appreciate that Judicial Review application could only be filed after 6 months after the delivery of the judgment and which judgment the Appellant was not aware of as he was not involved in the proceedings and the decision delivered on 28/11/2022.**

**10) The learned magistrate erred in law and in fact in failing to find that the Appellant lost her daughter, a Kenyatta University alumna (2<sup>nd</sup> Class**

***Honors upper division), professional teacher, in a torment/grief manner, so emotional in the hands of the Respondents hence need to a fair hearing under Article 50 of the 2010 Constitution.***

***11) The learned magistrate erred in law and in fact in failing to appreciate the circumstance of the case, the submissions filed therein and that Judicial Review orders could not have been sought after 6 months since the matter arose on 8/07/2017 hence time for filing the suit would lapse on 17/07/2019 and the decision by PIC Case No 38 of 2019 was delivered on 18/12/2020 one year later.***

***12) The learned magistrate erred in law and in fact in failing to appreciate the cause of action arose on 8/7/2017 and that the cause of action could have lapsed on 8/7/2019 even before the decision of the KMPDU and which tribunal the Appellant was not notified and/or involved of.***

6. He asked this Court to set aside the findings of the lower Court.
7. The Appeal was canvassed by way of written submissions.

### **Appellant's written Submissions**

8. The Appellant submitted that the lower Court was wrong in upholding the Preliminary Objection. He submitted that the trial Court has the jurisdiction to hear and determine the civil suit on merit. He stated that the provisions of **Section 20** of the **Medical Practitioners and Dentists Act** are not mandatory, arguing that a Complainant has the option of lodging a complaint before the Board and can opt to pursue damages through the Court.
9. He also submitted that the KMPDC mechanism does not have the efficacy to deal with the dispute and award damages. He argued that the provisions of the **Medical Practitioners and Dentists Act** do not establish a dispute resolution mechanism which awards damages to complainants against members of the medical profession. Thus, he submitted that the investigation and determination

of the Council would not effectively settle the dispute before the Court since he was seeking damages from the Respondents jointly and severally, which orders the KMPDC cannot issue.

### **1<sup>st</sup> Respondent's written Submissions**

10. The 1<sup>st</sup> Respondent submitted that the lower Court was right to hold that it had no jurisdiction to hear and determine the matter. He argued that the trial Court was being moved to review the findings of the KMPDC committee and replace the decision with a finding to the contrary. He argued that this is a role reserved for the High Court and thus, the trial court could not arrogate itself such jurisdiction. He argued that the KMPDC is an administrative body which plays a quasi-judicial role and as such, any attempt to challenge the decision should be by way of Judicial Review. He thus submitted that the only avenue available for the Appellant was to move to the High Court.

### **Issues for Determination**

11. Having considered the grounds of appeal and the submission by the parties, the singular issue for determination is whether the lower Court had the jurisdiction to hear and determine the Appellant's civil case.
12. The real issues in this appeal revolve around the interpretation of **Section 20 of the Medical Practitioners and Dentists Act**. The said provision provides as follows;

**20. Disciplinary proceedings:**

***(1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.***

***(2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.***

***(3) Upon an inquiry held by the Council to determine the complaint made under subsection***

***(2), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative.***

***(4) For purposes of proceedings at any inquiry held under this section, the Council may administer oaths, enforce the attendance of witnesses and production of books and documents.***

***(5) The Council shall regulate its own procedure in disciplinary proceedings.***

***(6) Where after an inquiry, the Council determines that a person is guilty, the Council may—***

***(a) issue a caution or reprimand in writing;***

***(b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;***

**(c) direct the medical practitioner or dentist  
be placed on probation**

**for a period not exceeding six months;**

**(d) suspend, withdraw or cancel the  
practising licence of a medical**

**practitioner or dentist for a period not  
exceeding twelve months;**

**(e) suspend, withdraw or cancel the licence  
of a health institution or a section of the  
health institution for a period not exceeding  
twelve months;**

**(f) permanently remove the name of a  
medical practitioner or dentist from the  
registers under section 5(3); or**

**(g) in addition to the penalties stipulated in  
paragraphs (a), (b), (c),**

**(d), (e) or (f), impose a fine which the  
Council deems appropriate in the  
circumstance.**

- (7) A person or health institution whose licence has been withdrawn or cancelled under subsection (6), shall forthwith surrender the license to the Council.**
- (8) A person or health institution whose name has been removed from the register under subsection (6)(f) shall forthwith surrender the registration certificate to the Council.**
- (9) A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.**
- (10) Notwithstanding the provisions of section 3A (5), the Council shall not remove the name of a person from the register under subsection (6) unless at least seven members of the Council are present in the inquiry.**

13. The parties in this appeal disagree on the legal implications of the dispute resolution mechanism established under the above provision. The Respondent argues that once a party lodges a complaint to the KMPDC and a ruling is delivered, the party cannot institute a parallel suit on the same complaint. He argued that the only recourse available, where the party is dissatisfied with the KMPDC ruling, is to approach the High Court for Judicial Review. The Appellant does not take this view. He argues that the dispute resolution mechanism established under the above provision does not oust the jurisdiction of the court and a complainant can still initiate a parallel suit to claim damages.

14. The Court in **Musyoka & another v Mama Lucy Kibaki Hospital & 6 others [2023] eKLR** faced a similar question. In that case, the petitioner lodged a complaint before the KMPDC alleging medical negligence against the Respondent. He also simultaneously lodged a constitutional petition at the High Court seeking an order for general damages against the Respondent. The Respondent raised a

preliminary objection that the Court did not have jurisdiction, arguing that the issues raised in the Petition could be aptly decided by the KMPDC.

15. The court overruled the preliminary objection and held that it had the jurisdiction to hear the petition. It held that the doctrine of exhaustion did not apply in the case because the KMPDC lacks the legal and adequate jurisdiction to grant compensatory reliefs. It observed as follows;

***27. A look at the Petition reveals that most of the remedies sought by the Petitioners were indeed within the purview of the Council. However, the remedies under Section 20(6) of the Medical Practitioners Act do not include compensation in the nature of damages. The much the Council can do is to impose a fine, but it has no mandate to compensate for wrongs committed by a registered or licenced medical service provider.***

***28. As such, the complaint lodged by the 2<sup>nd</sup> Petitioner before the Council seeking compensation must have suffered a false start.***

***29. In this matter, therefore, the doctrine of exhaustion is voided in that the Council lacks the legal and adequate jurisdiction to grant compensatory reliefs. If the Petitioners are to be compelled to proceed with their dispute before the Council, then that will be tantamount to acting in vain on account of the Council lacking jurisdiction.***

***30. This Court will also be denying the Petitioners their right to access justice under Article 48 of the Constitution since they will be rendered without any legal redress or forum or at all.***

***31. It is on the basis of the foregoing that this Court finds and hold that, given the nature of remedies sought in the realm of compensatory damages, the doctrine of exhaustion does not apply in the unique circumstances of this case.***

16. The court in **Kofuu v Board of Trustees St Marys Mission Hospital Mumias [2025] eKLR** gave a similar

interpretation on **Section 20** of the **Medical Practitioners and Dentists Act**. In that case, the Plaintiff lodged a complaint with the KMPDC against the Defendant. The Council heard the complaint and dismissed it. The Plaintiff brought fresh suit at the High Court seeking damages, where she raised the same issues and grounds that had been determined by the Board. The Defendant raised a preliminary objection that the court lacked jurisdiction, arguing that the issues raised were *res judicata*.

17. The Court dismissed the Preliminary Objection and held that the provisions of **Section 20 of the Medical Practitioners and Dentists Act** are not mandatory and that a Complainant has the option of lodging a complaint before the Board and can opt to pursue damages through the court. It held as follows;

***26. The Applicant moved to this court to seek damages. She has maintained that she has sufficient evidence to prove her case and has expressed her unwillingness to have the complaint investigated and determined by the***

**Council. The provisions of Section 20 of Cap 253 Laws of Kenya are not mandatory. A complainant has the option of lodging a complaint before the Board and can opt to pursue damages through the court.**

**30. I therefore find and hold that the Court has jurisdiction to hear and determine the intended suit.**

**.....37. The Applicant in this case allegedly suffered medical negligence and has filed a civil suit seeking damages for the loss she has suffered. She has a right to be heard on merit in the interest of justice.**

18. I have considered the Appellant's amended Plaint dated 4<sup>th</sup> June, 2021. The Appellant seeks general damages for loss of expectation of life and special damages against the Respondents. Based on these two authorities discussed above, it is clear that the KMPDC does not have the legal and adequate jurisdiction to grant compensatory reliefs, and

thus the Appellant’s claim as captured in the amended  
plaint can only be heard and determined by a Court.

19. Accordingly, the Preliminary Objection dated 14<sup>th</sup> April,  
2022 is dismissed.

**Disposition**

20. The Appeal succeeds, with costs to the Appellant.

21. The lower Court’s ruling delivered on 28<sup>th</sup> November,  
2022 is hereby set aside.

22. The lower Court had the jurisdiction to hear and  
determine the Appellant’s suit.

23. The file to be allocated to a different Magistrate, other  
than Hon. A. Ndung’u, for hearing and determination.

**DATED, DELIVERED and SIGNED at NAIROBI** through the  
Microsoft Teams Online Platform on this **17<sup>TH</sup>** day of  
**FEBRUARY, 2026.**

.....

**C. KENDAGOR**

## **JUDGE**

### **In the presence of:**

Court Assistant: Beryl

Mr. Kiluva, Advocate for the Appellant

No attendance for the Respondent