

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E297 OF 2025

BETWEEN
UNILEVER KENYA LIMITED.....
APPELLANT

AND

**COLGATE-PALMOLIVE EAST-
WEST AFRICA REGION (PTY)
LIMITED.....RESPONDENT**

JUDGMENT

Introduction

1. In a judgment delivered on 3rd March 2025 the Standards Appeals Council (SAC) upheld the determination of the Advertising Standards Committee (ASC) made on 7th June 2024. The ASC had allowed Respondent’s complaint against the Appellant regarding the advertisement of its **PEPSODENT CAVITY FIGHTER 10X** product and directed the Appellant to remove the **“10X CAVITY FIGHTING”** claim from all advertising media within twenty (20) days.
2. Dissatisfied with the said decision, the Appellant filed the instant appeal on 13th March 2025. The appeal was canvassed by way of written submissions in which the Appellant challenged both the jurisdiction and findings of the SAC.

Background

3. On 26th June 2023, the Respondent lodged a complaint before the ASC alleging that the Appellant's "10X CAVITY FIGHTING" claim contravened several provisions of the Code of Advertising Practice and Direct Marketing ("the Code"). The alleged breaches/contraventions related to unsubstantiated advertising claims, misleading representations, lack of honesty, and unlawful comparative advertising.
4. The Appellant denied the allegations and argued that its advertisement complied with the Code and that the product's claims were scientifically substantiated. It urged ASC to dismiss the complaint.
5. The hearing of the Complaint was adjourned multiple times at the Appellant's request before finally proceeding on 9th February 2024 when both parties presented expert reports and witness evidence.
6. The Appellant subsequently wrote to the Marketing Society of Kenya (MSK) on 14 February 2024 indicating its withdrawal from membership of the Marketing Society of Kenya (MSK). In the said letter, the Appellant notified both the ASC and the Respondent of its withdrawal and asserted that the effect of such withdrawal was that the Code could

no longer apply to the Appellant as it was only binding upon MSK members. The Appellant also asserted that the ASC had consequently lost jurisdiction to hear or determine the matter and added that no valid decision could be rendered against it on the basis that it was a non-member. The Respondent objected to the withdrawal arguing that jurisdiction had already been established and could not be unilaterally revoked. The ASC however proceeded to determine the Complaint on 7 June 2024.

7. In a decision rendered on 7th June 2024, the ASC upheld the Respondent's complaint and directed the Appellant to remove the impugned claim on the advertisement and comply with its ruling.
8. The Appellant appealed to the SAC, which heard the matter on 14th January 2025 and delivered its decision on 3rd March 2025, dismissing the appeal and affirming the ASC's ruling.
9. The SAC held that once membership to the Code was established, the ASC retained jurisdiction to adjudicate disputes between members, even if one party subsequently withdrew its membership. According to SAC, jurisdiction attached at the time of filing of the complaint and persisted until judgment, unless the withdrawal occurred prior to the complaint being lodged.
10. The SAC dismissed the appeal, concluding that the ASC had jurisdiction at all material times, the Appellant's withdrawal

did not affect the ASC's authority and that the appeal lacked sufficient grounds to overturn the ASC's decision.

The Appeal

11. Aggrieved by the SAC's decision, the Appellant filed the instant appeal alongside an application dated 13th March 2025 seeking stay of execution of the SAC's decision. By consent of the parties recorded on 20th May 2025, a stay was granted pending the determination of the appeal.
12. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

13. The Appellant identified the following issues for this Court's consideration: -
 - a) ***Whether the SAC erred in finding that the ASC had jurisdiction to determine the complaint.***
 - b) ***Whether the SAC erred in its reliance on Pollak on Jurisdiction and other authorities cited in its decision.***
14. On jurisdiction of the ASC, the Appellant argued that upon its withdrawal from MSK on 14th February 2024, the ASC lacked jurisdiction to continue hearing the matter. It contended that since membership in the MSK is voluntary, the Code of Advertising Practice applies exclusively to MSK members. According to the Appellant, upon its withdrawal from membership, the ASC lost jurisdiction over the Appellant.

15. It was submitted that the SAC erred in holding that the ASC's jurisdiction persisted after the withdrawal, and that such interpretation amounts to a re-writing of the Code. It was further submitted that the Code does not extend its reach to non-members, nor does it contain any provision allowing the ASC to retain jurisdiction after membership ceases.
16. The Appellant emphasized that jurisdiction cannot be derived by acquiescence or participation in proceedings. The Appellant relied on the decisions in ***Samuel Kamau Macharia & another vs. Kenya Commercial Bank Ltd & 2 others*** [2012] eKLR, ***Peter Gichuki King'ara vs. Independent Electoral and Boundaries Commission & 2 others*** [2013] eKLR, ***Kimondo vs. Attorney General*** [2022] KECA 1008 (KLR), and ***Parliamentary Service Commission vs. Public Procurement Administrative Review Board; Arprim Consultants (Interested Party)*** [2021] eKLR where the courts held that jurisdiction flows from law and cannot be conferred by consent or acquiescence, and that once lost, it cannot be revived.
17. It was the Appellant's case that the SAC misapplied the cited authorities and failed to consider the Appellant's reliance on decisions demonstrating that jurisdiction may be lost after initially existing such as by effluxion of time or cessation of membership, as was the position in the instant case

18. The Appellant also cited the decision in ***Macfoy vs. United Africa Co Ltd* [1961] 3 All ER 1169**, quoting Lord Denning’s observation that an act done without jurisdiction is void and of no legal effect. Similarly, the Appellant cited ***Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] KLR 1**, underscoring the principle that where a court lacks jurisdiction, it must down its tools.
19. In its Reply submissions in response to the Respondent’s submissions, the Appellant reaffirmed that jurisdiction is central to the appeal and submitted that both the ASC and SAC lost jurisdiction the moment it withdrew from the Marketing Society of Kenya (MSK). It asserted that the SAC’s interpretation effectively treated it as a *de facto* member of MSK despite its formal withdrawal, which was inconsistent with the voluntary nature of MSK membership. It argued that by purporting to extend jurisdiction to non-members, the SAC and ASC acted without legal foundation, contrary to the clear limits of the Code.
20. The Appellant argued that the Respondent had misapplied the case of ***Peter Gichuki King’ara vs. Independent Electoral and Boundaries Commission & 2 Others* (2013) eKLR**, asserting that the cited authority does not support the notion that jurisdiction, once established, cannot be lost. Rather, it emphasizes that jurisdiction must exist at every stage of proceedings and cannot be presumed to persist despite subsequent changes.

21. It was submitted that while the ASC may have initially possessed jurisdiction, such jurisdiction ceased upon the Appellant's withdrawal from MSK membership. The Appellant had a lawful right to withdraw, and such withdrawal cannot be termed "disingenuous," as suggested by the Respondent.
22. The Appellant contended that the Respondent had further misapplied ***Kimondo vs. Attorney General [2022] KECA 1008 (KLR)***, maintaining that the decision supports the Appellant's case that jurisdiction cannot be conferred by agreement, acquiescence, or participation where it no longer exists.
23. The Appellant submitted that compliance with the ASC's decision would cause grave and unwarranted reputational damage, particularly due to the threat of being listed as non-compliant on the MSK website, despite its withdrawal from membership.
24. It argued that the Code's sanctions apply only to members, and therefore, the Respondent's expectation that the Appellant should comply despite termination of its membership is unreasonable and unjustified.
25. The Appellant maintained that enforcing the ASC's decision would have direct commercial consequences, undermining its reputation and market share, amounting to unfair administrative action.

26. On the applicability of ***Pollak on Jurisdiction*** the Appellant submitted that the Respondent's discussion of *Pollak on Jurisdiction* misrepresents the actual sequence of events before the Council. It contended that the SAC had expressly indicated that parties would be invited to make submissions on any new authorities it might rely upon, including *Pollak*. The Appellant quotes the Chairperson's statement confirming that if an unmentioned authority arose, "both sides" would be given an opportunity to address it.
27. The Appellant argued that despite this assurance, no such opportunity was afforded, resulting in serious procedural prejudice. It was the Appellant's case that the SAC's reliance on *Pollak on Jurisdiction*, without party input, violated the its right to fair administrative action under Article 47 of the Constitution.
28. It was further submitted that *Pollak on Jurisdiction* is a South African text, inapplicable to Kenya's constitutional and jurisprudential framework. The Appellant relied on ***Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR*** for the argument that foreign jurisprudence is only persuasive when dealing with comparable legislative frameworks, which was not the case here.
29. The Appellant also distinguished the *Pollak* doctrine, asserting that it relates to civil court jurisdiction and not self-regulatory bodies such as the ASC and SAC. Hence, its

reliance in the Council's decision was misplaced and irrelevant to Kenyan law.

30. On the right to fair hearing, the Appellant reiterated that the SAC's reliance on *Pollak* without notice infringed its constitutional rights under Articles 47 and 50 of the Constitution, as it was denied a chance to contest the text's applicability.
31. The Appellant cited ***Republic vs. Firearms Licensing Board & another; Ex parte Jimi Wanjigi [2019] KEHC 10916 (KLR)***, asserting that the failure to invite parties to respond to evidence or authorities relied upon constitutes a denial of the right to be heard.
32. The Appellant maintained that the SAC's decision was therefore procedurally unfair, resulting in prejudice to its case.
33. It was further submitted that the SAC's reasoning that jurisdiction persists from the time of filing until judgment overlooked the principle that jurisdiction is contingent on existing legal relationships. The Appellant maintained that once membership, which was the basis of jurisdiction, ceased, the ASC no longer had authority to adjudicate the matter.
34. The Appellant also contended that the SAC failed to engage with or distinguish binding precedents cited before it, including ***Arprim Consultants*** (supra) which directly

addressed loss of jurisdiction upon the expiry of a governing framework or statutory timeline.

35. The Appellant's case was that jurisdiction derived solely from the Appellant's MSK membership and that withdrawal from MSK automatically divested the ASC of jurisdiction to continue the proceedings. The Appellant faulted for misapplying both the Code and established judicial authorities and added that any decision rendered by the ASC post-withdrawal of membership of the MSK is void *ab initio* and without legal effect.

The Respondent's Submissions

36. On the preliminary issue over the validity of the hearing before the Council, and the Appellant's challenge alleging that only the Chairperson sat without two other members, thus violating its right to a fair hearing, the Respondent submitted that this argument lacks merit since the Code does not prescribe a fixed quorum for Council proceedings. The Respondent argued that the Chairperson was procedurally competent to hear the matter.
37. It is submitted that the Respondent expressly consented to the hearing proceeding in the absence of the two co-panellists, and was therefore estopped from objecting after consenting. The Respondent maintained that Council's decision remained a valid collective decision as there was no proof of any violation of the Appellant's right to a fair hearing.

38. On jurisdiction, the Respondent maintained that the ASC and Council correctly found jurisdiction based on Clause 8 of the Code, which binds all subscribers, including MSK members. The Respondent noted that the Appellant was a member when the complaint was filed and actively participated in the proceedings. Reference was made to the decision in **Samuel Kamau Macharia vs. Kenya Commercial Bank (2012) eKLR** and **Peter Gichuki King'ara vs. IEBC (2013) eKLR**, for the argument that jurisdiction is a continuum, which, once established, remains until final determination and cannot be ousted by withdrawal.
39. The Respondent argued that allowing members to withdraw mid-proceeding would undermine self-regulation under the Code and lead to procedural abuse.
40. The Respondent further submitted that reputational harm alleged by the Respondent is not a valid defence against compliance with the Code or ASC orders.
41. On Reference to *Pollak on Jurisdiction* the Respondent submitted that the Council properly relied on the academic text **Pollak: The South African Law of Jurisdiction (3rd Edition by De Van Loggerenberg)** to support the principle of continuity of jurisdiction, which complements Kenyan case law.

42. The Respondent argued that the Council's reliance on *Pollak* was to affirm that jurisdiction, once established, persists to the end of the action even if the original basis ceases.
43. The Respondent denied any procedural unfairness, asserting that there was no undertaking by the Council to invite parties to address the *Pollak* text and that the Appellant was not prejudiced by its citation.
44. The Respondent further cited the case of ***Leonard Otieno vs. Airtel Kenya Ltd (2018) eKLR*** for the argument that foreign jurisprudence is of persuasive value where comparable legal principles are involved. The Respondent noted that the Council first relied on Kenyan authorities before referencing *Pollak on Jurisdiction* for persuasive value, and that no inconsistency exists between the two.
45. It was the Respondent's case that the ASC lawfully exercised jurisdiction over the complaint as it was properly seized at inception and that the Appellant's withdrawal from MSK membership did not affect the already established jurisdiction.

Analysis and Determination

46. I have carefully considered the record of appeal and the parties' respective submissions. I find that the following issues fall for my determination: -

- a) ***Whether the ASC and the Council had jurisdiction to determine the complaint after the Appellant's withdrawal from MSK membership;***
- b) ***Whether the hearing before the Council, conducted by the Chairperson alone, violated the Appellant's right to a fair hearing;***
- c) ***Whether the Council erred in relying on Pollak on Jurisdiction without inviting parties to make submissions on the same.***

Jurisdiction of the ASC and SAC After Withdrawal

47. The central issue in this appeal is whether the Advertising Standards Committee (ASC) and subsequently the Standards Appeals Council (SAC) retained jurisdiction to hear and determine the complaint after the Appellant's withdrawal from membership of the Marketing Society of Kenya (MSK).
48. It is trite that jurisdiction is the foundation of any adjudicative authority. In the oft cited case of ***Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1***, Nyarangi, J.A. held:

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

49. In ***Peter Gichuki King'ara vs. Independent Electoral and Boundaries Commission & 2 Others*** [2013] eKLR, the Court of Appeal held that jurisdiction is invoked at the commencement of proceedings and subsists to the end of those proceedings unless terminated by law or by operation of statute.
50. My understanding of the above decision is that jurisdiction must exist at the time of filing the suit and continue throughout the proceedings. This means that once validly seized, a court or tribunal's jurisdiction cannot be ousted by consent, withdrawal, or conduct of the parties, unless expressly permitted by law.
51. The principle that emerges from the above cited cases is that a party's withdrawal from membership, or change in status, will not ordinarily retrospectively invalidate jurisdiction that was already properly established.
52. The same principle, on jurisdiction, applies *mutatis mutandis*, to quasi-judicial bodies such as the ASC and SAC, which derive jurisdiction from the constitutive instrument(s), in this case, the Code of Advertising Practice and Direct Marketing ("the Code").
53. In the instant case, it was not disputed that the Appellant was a member of MSK at the time the complaint was filed, and therefore subject to the Code. The Appellant, however,

withdrew from membership mid-proceeding and contends that such withdrawal divested the ASC of jurisdiction.

54. The SAC held that jurisdiction, once validly established, persists to finality and is not extinguished by subsequent withdrawal.

55. It is trite that jurisdiction attaches when proceedings are properly commenced before a court or tribunal that has lawful authority. Once jurisdiction is validly invoked, a party generally cannot unilaterally withdraw from it retrospectively.

56. There are, however, limited and specific circumstances where jurisdiction can be retrospectively lost or rendered ineffective. For instance; where the enabling statute or code is repealed or declared void or lapses by operation of law. In such an eventuality, the jurisdiction ceases and decisions made after the repeal may be rendered void. In ***Aprim Consultants vs. Parliamentary Service Commission & PPARB [2021]*** eKLR, the Court of Appeal held that the Public Procurement Administrative Review Board lost jurisdiction once the statutory timelines under the Public Procurement Act expired.

57. Jurisdiction may also be lost retrospectively where proceedings were incompetently commenced and it is later discovered that the tribunal never had jurisdiction ab initio, for example, because the subject matter was excluded by

law, any proceedings even if completed are void retrospectively. Thus, if jurisdiction was wrongly assumed at the outset, all subsequent steps are void *retrospectively*. This is the position that was taken in ***Macfoy vs. United Africa Co. Ltd* [1961] 3 All ER 1169**, where Lord Denning stated: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside.”

58. Another instance where jurisdiction may cease retrospectively is where a condition precedent to jurisdiction ceases to exist such as if a tribunal’s jurisdiction depends on a continuing status e.g., citizenship, licensing, or membership, and that status never existed or was fraudulently obtained, jurisdiction can collapse retrospectively because the foundation never existed in law in the first place. This is however distinct from withdrawal. This is to say that voluntary withdrawal after jurisdiction was validly invoked cannot retroactively erase jurisdiction that is already in existence.
59. Lastly, jurisdiction may cease retrospectively where statutory or regulatory provisions expressly allow withdrawal. This happens where some regulatory schemes or arbitration frameworks explicitly allow a party to withdraw from jurisdiction before a determination, but only where the law so provides. For example, in arbitration, a party can terminate its submission to arbitration before the

tribunal is constituted under section 6 of the Arbitration Act, 1995). Once constituted, however, withdrawal without consent of the other party or the tribunal's leave does not retrospectively affect jurisdiction.

60. In ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others*** [2012] eKLR, the Supreme Court stated:

“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 law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

61. Applying the above reasoning to the present case, I find that once the ASC lawfully assumed jurisdiction under the Code when the complaint was lodged, that jurisdiction persisted until the matter was concluded, unless the Code expressly provided otherwise. I note that there is no provision in the Code that terminates jurisdiction upon cessation of membership.

62. My considered view is that allowing parties to evade accountability, through mid-proceeding withdrawal, would set a very dangerous precedent as it would have the effect of defeating the very object of the Code's self-regulatory

function, which is to ensure truthfulness, fairness, and integrity in advertising.

63. My finding is that the South African text ***Pollak on Jurisdiction***, cited by the Council, while not binding, reflects a similar doctrine recognized in common law jurisdictions, which is that; *“Once a court is duly seized of a matter, its jurisdiction continues until the suit is finally determined, unless specifically divested by law.”*
64. The above proposition in aligns with the principle articulated in ***Peter Gichuki King’ara vs. Independent Electoral and Boundaries Commission & 2 others*** (supra) where the Court of Appeal observed that jurisdiction is not static and once invoked at the commencement of proceedings subsists to the end of those proceedings unless terminated by law or by operation of statute.
65. In the present case, I find that the Appellant’s withdrawal letter, while effective to terminate future membership obligations, could not retrospectively nullify jurisdiction already properly invoked by the ASC. The complaint, having been filed while the Appellant was a member, remained within the ASC’s purview to determine.
66. For the above reasons, I find no error in the SAC’s conclusion that jurisdiction attached at the inception of the complaint and subsisted to the final decision.

Fair Hearing and Composition of the Council

67. The Appellant contended that the SAC's hearing before the Chairperson alone violated its right to a fair hearing under Article 50 of the Constitution.
68. A perusal of the record however reveals that the Respondent consented to the hearing proceeding before the Chairperson, and that no evidence was presented to show that the composition violated any prescribed quorum under the Code. In ***Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR***, the Court of Appeal held that the right to a fair hearing is not to be understood as a technical right to every procedural formality but as a substantive right to be heard and to respond to the case one faces.
69. A perusal of the record of the proceedings before the SAC reveals that both parties were accorded full opportunity to file submissions, present evidence, and respond to the issues. I find that no procedural unfairness or prejudice was demonstrated. Accordingly, I find no violation of the right to a fair hearing on this ground.

Reliance on *Pollak on Jurisdiction*

70. The Appellant's central grievance concerns the SAC's reference to *Pollak on Jurisdiction*. The Appellant argued that the SAC's reliance on *Pollak on Jurisdiction* without notice or invitation to submit on it violated its right to fair administrative action under Article 47 of the Constitution.

71. This Court accepts that fairness requires notice and opportunity to be heard, as emphasized in ***Republic vs. Public Procurement Administrative Review Board & Another; Ex parte Selex Sistemi Integrati [2008] eKLR***, where it was held that fairness demands that a party be informed of any material that may influence a decision so that they can comment on it before the decision is made.
72. In this case, however, the Court notes that the SAC's decision was not materially or substantially based on the *Pollak* text. The decision, read in full, reveals that the Committee relied primarily on Kenyan statutes, regulations, and case law, and that the reference to *Pollak* was merely explanatory to elucidate the general concept of jurisdiction, not to determine the substantive issue.
73. The obligation of procedural fairness in administrative and quasi-judicial proceedings requires that a party be afforded an opportunity to know and respond to the material relied upon in reaching a decision. However, that obligation is not without limits. The duty of disclosure attaches to adverse factual material, evidentiary matter, or information forming the substantive basis of the decision. It does not extend to every citation of persuasive authority or legal text referenced in support of the reasoning.
74. In ***Republic vs. Firearms Licensing Board & another; Ex parte Jimi Wanjigi [2019] eKLR***, the High Court

underscored that a person must be supplied with the material facts and evidence relied upon before an adverse administrative decision is made. In my considered view, the essence of the right to fair hearing lies in the opportunity to answer the case founded on undisclosed factual material. It does not encompass a right to prior rebuttal of judicial authorities, statutory provisions, or general legal principles invoked in support of a decision. My take is that legal reasoning is not synonymous with evidentiary material.

75. In the present case, I note that the Appellant fully participated in the proceedings before the SAC, filed comprehensive submissions, and was afforded a fair opportunity to address the issues in dispute. No specific prejudice has been demonstrated arising from the SAC's citation of the impugned text. I find that in the absence of undisclosed evidentiary material or demonstrated prejudice, the complaint of procedural impropriety cannot be sustained.
76. I find that the SAC's reliance on *Pollak* was supplemental and consistent with Kenyan jurisprudence already cited. The Appellant has not demonstrated that the reference introduced new factual or legal issues that caused prejudice.
77. This Court agrees that foreign authorities are persuasive but not binding. However, as stated in ***IEBC vs. Maina Kiai & 5 Others [2017] eKLR***, comparative jurisprudence

can be referred to so long as it enriches the understanding of domestic principles without supplanting them.

78. I find that the SAC's brief reference to *Pollak on Jurisdiction* falls within this permissible scope. The Committee was entitled to refer to a persuasive foreign text for contextual understanding of jurisdictional boundaries. I therefore find that the reference to *Pollak* does not amount to an error of law.

Disposition

79. Having found that the SAC acted within its jurisdiction and that no violation of fair hearing or fair administrative action occurred, I find that there is no legal basis to interfere with the Committee's findings. In ***Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR***, the Court of Appeal held that an appellate court will not interfere with the findings of a specialized tribunal unless it is shown that the decision was irrational, illegal, or reached in violation of the law.

80. It is my further finding that the SAC's reliance on *Pollak on Jurisdiction* did not amount to a breach of Articles 47 or 50 of the Constitution.

81. Consequently, I find that the instant appeal lacks merit and I therefore dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2026.

HON W. A. OKWANY
JUDGE

In the presence of
Bet for Mrs Opiyo for Appellant
Orora for Kuyo for Respondent
Abdirzak - Court Assistant

ORIGINAL