

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR. NO. E091 OF 2024**

**EPUBLIC..... APPLICANT**

**VERSUS**

**THE KENYA MEDICAL PRACTITIONERS AND DENTISTS’  
COUNCIL.....RESPONDENT**

**LAWRENCE OYARO**

**(Suing as the Administrator of the Estate of the Late Valerie  
Cherono Misoï) .....EXPARTE APPLICANT**

**RULING**

**The Applicant’s case;**

- 1.** The late Valerie Cherono Misoï and the Ex Parte Applicant were husband and wife.
- 2.** The late Valerie Cherono Misoï was a patient at the Respondent-Agha Khan University Hospital in Parklands Nairobi, where she attended pre-natal clinics which culminated into her delivering the Ex Parte Applicant’s and her child at the said institution.
- 3.** During her delivery of the child at the Hospital aforesaid, the deceased was attended to by among others, Dr. Albert Gichuki.
- 4.** In the Course of her delivery and or treatment at the Hospital, and due to professional negligence of Dr. Albert Gichuki and the said

Hospital for failure to exercise reasonable care and skill in the provision of professional care and treatment, the late Valerie Cheronno Miso contracted a hospital acquired infection (Nosocomial infection) which led to her untimely death.

5. Therefore, having been dissatisfied with the professional service offered, the misconduct, malpractice and breach of standards by the said licensed medical practitioner and the Respondent, the Ex Parte Applicant lodged a complaint in the prescribed manner to the Respondent.
6. The complaint dated 15th July, 2022 together. The Complaint was given the case number DC Case No. 70 of 2022.
7. Despite various letters and office visit to the Respondent, from 26th July, 2022 to 17th July, 2023, the matter has never proceeded.
8. No reason whatsoever has been provided to the Ex Parte Applicant for the failure and/ or refusal of the Respondent to investigate, hear and make final determination over the complaint filed within the stipulated period and or within a reasonable time.
9. Consequently, and due to the unexplained reasons by the Respondent as to why the matter has stalled, the Ex Parte Applicant's right to a fair hearing under Article 50 and access to justice under Article 48 of the Constitution of Kenya was denied. More specifically, his right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, as per Article 47 of the Constitution

of Kenya and sections 4, 5 and 6 of the Fair Administrative Actions Act, Laws of Kenya, have been infringed upon.

10. The Ex Parte Applicant avers that the failure of the Respondent to undertake its duty and obligation over the complaint filed as per section 20 of the Medical Practitioners and Dentist Act and without any reason, was arbitrary, discriminatory and unfair and further inconsistent with rules of natural justice.
11. Moreover, the Ex Parte Applicant had been prevented from accessing the Court process since the law under the Medical Practitioners and Dentist Act requires that the Ex Parte Applicant to first pursue the matter with the Respondent after which, if dissatisfied with the decision, to approach the Court in the form of an appeal.
12. It was not until the Judicial Review Application was lodged in this Honorable Court that a hearing date of the Exparte Applicant's complaint was granted by the Respondent rendering the orders of Mandamus sought as spent.
13. The court in **DGM v EWG [2021] KEHC 2940 cited, Rtd Justice Kuloba** in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at pg. 95 denotes that the words the event means as a result of all proceedings incidental to litigation. Accordingly, the event means the result of the entire litigation. Section 27 of the Civil Procedure Act provides that costs shall follow the event unless the court, for a good reason, otherwise orders.

14. The Court of Appeal in **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR**: “... Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”
15. In conclusion, and for the reasons stated herein, the Ex Parte Applicant most respectfully pray that this Honorable Court be pleased to: Order the Respondent to bear the Costs of the Judicial Review Application in the following itemized particulars as per the Advocates Remuneration order in the sum of Kshs.**810,395.33** in consideration of the severity and importance of the matter, time taken for Respondent to accord a Hearing to the Respondent and in light of the status of the Judicial Review Application, noting that Judgment was the only remaining issue to be delivered by this Honorable Court.

### **The Respondent’s Case;**

16. The Respondent submits that the Application was wholly unnecessary, premature, and served no legitimate purpose within the meaning of the judicial review jurisdiction. Consequently, the same ought to attract an award of costs in favor of the Respondent.
17. In **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR**, where the Court held that:

*“The fundamental principle on award of costs is that costs follow the event unless the Court, for good reason, directs otherwise.”*

18. The Respondent's Replying Affidavit, sworn by Dr. David Kariuki, demonstrated that the complaint had been received, investigated, and was pending formal hearing in line with the Respondent's statutory and procedural timelines.
19. The Applicant therefore invoked the judicial review jurisdiction without exhausting administrative procedures and while the matter was still under active consideration.
20. As was held in **Republic v Technology [2022] KEHC 494 (KLR)**,

*“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be of a last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...”*

21. The Applicant's demand that his complaint be heard within a self-imposed timeline of forty-five (45) days seeks preferential treatment over other complainants whose matters are pending before the same Board.

- 22.** The Respondent handles numerous complaints, and scheduling is done in order of priority and availability of the Board, consistent with fairness and equality before the law.
- 23.** In the Replying Affidavit of its Chief Executive Officer, that the Council is currently hearing complaints filed around the same period as the Ex Parte Applicant's own complaint of July 2022. The Council sits quarterly, hears an average of one case per day, and is presently seized of a cohort of 2022 matters, including the Applicant's. The Applicant is therefore not uniquely affected; he is part of a wider docket of complainants whose cases are being processed in chronological order. To single him out for a preferential "fast-tracking" through costs orders would undermine the principle of equal treatment of all complainants who have patiently awaited their hearings within the same statutory framework.
- 24.** It is also significant that the Respondent is a statutory regulator funded by public resources. As deponed in the Replying Affidavit, the judicial review proceedings have required the Council to divert time and funds away from its core mandate and from other pending complaints, including those lodged in 2022. To punish the Respondent with an adverse costs order in these circumstances would, in substance, visit upon taxpayers the financial consequences of a single litigant's decision to demand priority treatment over other complainants. Such an outcome would not advance access to justice; rather, it would incentivize premature and unnecessary litigation by those seeking to leapfrog the orderly queue managed by the Council.

- 25.** The court in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & 5 others [2016] KEHC 8374 (KLR)** held that:

*“It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely.”*

- 26.** The Ex Parte Applicant’s complaint has not been ignored; it is being heard “alongside others”, in the words of the Replying Affidavit.
- 27.** To nonetheless award him costs would risk sending the wrong signal –that a complainant who side-steps internal processes and moves the Court ahead of their turn may, even when their judicial review is overtaken by events, shift their private litigation costs onto the public purse. That is neither fair to other complainants nor consistent with the equitable underpinnings of the law on costs.
- 28.** In **Republic v Kenya Revenue Authority & 2 others; County Government of Nairobi (NCC) & 4 others (Exparte) [2023] KEHC 861 (KLR)** the court held that:

*“The purpose of Application for leave to apply for judicial review is firstly to eliminate at an early stage any Applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case t for further consideration. The requirement that leave must be obtained before making an Application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived...”*

- 29.** The Respondent was unnecessarily dragged into these proceedings despite discharging its mandate in accordance with law.
- 30. Wamwere v Attorney General [2004] KEHC 2676 (KLR)** it was held that:

*“As it is, I see no need for a party to seek leave that a public officer should be compelled to do something when there is no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal had been shown, it must also be shown to be unlawful. Sadly, in this case neither was shown.*

*Additionally, costs have repeatedly held that where a party moves the Court prematurely or unnecessarily, it is only just that such a party bears the costs of the proceedings.”*

**Analysis and determination:**

- 31.** The only issue to be determined is that of costs.
- 32.** In the case of **Musaina v General & another; Salaries and Remuneration Commission & 3 others (Interested Parties) (Petition E019 of 2023) [2024] KEHC 8239 (KLR)** the High Court cited with approval the case of **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd Judicial Review Application no 6 of 2014** where the court held as follows:

*“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”*

- 33.** The Supreme Court in the case of **JashirSingh Rai & Others vs. Tarlochan Rai & Others** observed that;

*“In the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question*

*shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...”*

- 34. Joreth Ltd v Kigano & Associates [2002] eKLR**, which emphasize the need to assess instruction fees based on the pleadings, judgment, or settlement value, and where such is not readily ascertainable, on the basis of the nature and importance of the matter, the interest of the parties, and all other relevant circumstances.
- 35. The Court of Appeal in Premchand Raichand Ltd. and Another v. Quarry Services of East African and Others [1972] EA 162**
- a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
  - b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
  - c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and so far as practicable there should be consistency in the award made, and
  - d) The court will only interfere when the award of the Taxing Officer is so high or so low as to amount to an injustice to one party.
- 36. The Applicant secured a hearing date at the Tribunal and this suit was consequently withdrawn.**

- 37. The court is of the view that the Applicant cannot claim costs since it is clear that he ought to have waited for a hearing date before the Tribunal before moving to court.
- 38. The Applicant at the tail end of the case told the court that he had secured a date and he was fearing to withdraw this suit because of costs.
- 39. Costs follow the event being that the Applicant was very candid to the court that he was not withdrawing the suit because of fear.

**Determination;**

- 40. The Applicant cannot claim costs.

**Order;**

Each party shall bear its costs.

**Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of March, 2026.**

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**J. CHIGITI (SC)**

**JUDGE**