IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 307 OF 2015

BETWEEN

DR. WANYOIKE ……………..………………………….............. .APPELLANT

AND

MEDICAL PRACTIONTIONERS AND

DENTIST BOARD……………………………………………..…...1ST RESPONDENT

A N K.……………………….................................….…………..2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Odunga,, J.) dated 24th March, 2015

in

***H.C. Misc. Appl. No. 70 of 2014*)**

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JUDGMENT OF THE COURT

1. Dr. J. Wanyoike Gichuhi *(the appellant)* is a consultant Obstetrician/ Gynaecologist duly registered by the Medical Practitioners and Dentist Board *(the 1st respondent)*, (hereafter referred to as '*the Board')*.

2. A N K *(the 2nd respondent)* was at one time the appellant's patient who sought, and received his services at a maternity hospital on 13th March, 1998, or thereabouts. N was dissatisfied with the said services as she suffered some medical complications which she attributed to the doctor's negligence.

3. Consequently, she filed a complaint with the Board, against the appellant sometime in December, 2000. Having waited for some time and having received no response from the Board, she filed suit on 2nd March, 2001 against the appellant and Edelvale Trust Jamaa Home and Maternity Hospital, being the hospital where she had sought and received the appellant's impugned services. Her complaint was that due to the appellant's conduct, she sustained severe tears to her uterus and also lost her unborn baby. She enumerated in her plaint in detail the particulars of negligence she attributed to the appellant. She claimed from the appellant and the said hospital general damages for pain and suffering and for psychological

trauma.

4. After waiting for the Board's response in vain, the 2nd respondent, on 6th April, 2002 wrote a very detailed complaint and addressed it to the chairman of the Board in person. This letter appeared to have nudged the Board into action, and on 21st July, 2003 it forwarded the complaint to the appellant seeking from him a response within twenty one days of the said letter.

5. The matter was then taken up by the Preliminary Inquiry Committee, (PIC) which is established under **Section 3** of the Medical Practitioners and dentists (Disciplinary Proceedings) Procedure Rules, under Cap 253 of the Laws of Kenya.

This committee is comprised of seven members who are elected from amongst the members of the Board, and is charged with receiving and reviewing complaints against Medical Practitioners or Dentists, and after reviewing the complaints, decide whether the same warrant to be forwarded to the Board for any further action as the Board may deem necessary.

6. It was in this capacity that the PIC wrote to the appellant and the 2nd respondent and other relevant parties, seeking more information that would assist it in carrying out investigations into the 2nd respondent's complaint. It received documents from the appellant, and other doctors who had attended the 2nd respondent after her medical debacle. At the end of the investigations, it compiled its findings and made recommendations and forwarded the same to the Board.

7. Before the committee (PIC) commenced the said investigations, it deliberated on the matter, and in view of the pending civil suit, decided to put a lid on any further investigations as they waited for the conclusion of the civil suit. From the record however, the 2nd respondent did not pursue the civil suit and it was dismissed for want of prosecution under the relevant provisions of the Civil Procedure Rules on 30th June, 2011.

8. On 26th August, 2013, the appellant wrote to the Board and informed it that the suit filed against him by the 2nd respondent had been dismissed. Following this information, the Preliminary Inquiry Committee (PIC) considered the evidence it had already gathered from the appellant, the 2nd respondent, and other persons who had recorded statements with it. It concluded that the complaint needed to be escalated to the Board for further necessary action.

Upon receiving and considering the findings and recommendations of PIC, the Board through its chairman, Prof. George A. O. Magoha, wrote to the appellant on 25th October, 2013 informing him of the Board's decision to ratify the said recommendations. The recommendations of PIC which were ratified by the Board included the following:-

> *"(1) The complaint has merit as Dr. Wanyoike Gichuhi should not have inserted the McDonald stitch on the patient who was 22 weeks of gestation as it induced labour. He thereafter failed to remove the stitch despite established induced labour which led to a posterior tear.*
>
> *(2) Dr Wanyoike shall appear in person before the PIC for admonition on a date to be advised by the Board.*
>
> *(3) Dr Wanyoike do initiate mediation with the complainant with a view of compensation her (sic) for the loss incurred and report back to the Chairman of the Board on the progress within 90 days.*
>
> *(4) That Dr Wanyoike Gichohi do pay part-costs of the committee sittings of Ksh. 250,000 within 30 days."*

9. Instead of preferring an appeal against the decision in question pursuant to **Section 20(6)** of the Medical Practitioners and Dentist Act, the appellant moved to the High Court by way of Judicial Review

proceedings on 19th February, 2014 seeking the quashing of the orders we have outlined above. He also sought an order of mandamus directed at the Board compelling it to immediately issue him with his 2014 annual practice license and retention certificate; and an order of prohibition to prohibit the first respondent from acting on the recommendations of its Preliminary Inquiry Committee in PIC No. 17 of 2013, or instituting any fresh or similar proceedings against the applicant based on the said recommendations.

10. This was the Judicial Review application that was heard by Odunga, J., and which resulted in the impugned judgment rendered on 24th March, 2015. In the said judgment, the learned Judge granted the orders of certiorari sought, but declined to issue the orders of mandamus and prohibition. The learned Judge also directed that each party bears the costs of the Judicial Review proceedings. The notice of motion before the High Court was supported by the appellant's verifying affidavit deposed on 19th February, 2014. Among the issues raised in the said affidavit were that, in failing to take action for over 13 years, the Board had acted in an unfair and unreasonable manner; that the appellant was not accorded a proper/fair hearing by the Board; that the decision violated his rights guaranteed under **Articles 47, 48** and **50** of the Constitution of Kenya 2010. The appellant contended further that the decision of the Board went against the provisions of **Section 20 (2)** of the Medical Practitioners and Dentists Act; that the repealed pre 2013 Medical Practitioners and Dentists (Disciplinary Proceedings) Procedure Rules did not provide for payment of part-costs of the committee's sittings and so the imposition of payment of part costs to the tune of Kshs. 250, 000 was *ultra vires*, and so was the order on admonition and compensation.

The appellant entreated the court to allow the motion and grant the orders sought.

11. In opposition to the motion, the Board through the then Director of Medical Services, Dr. Nicholas Muraguri deposed that the appellant was well informed of the complaint and the charges levelled against him. In response to the complaint, the appellant had even submitted to the PIC the 2nd respondent's medical report, and had expressed his willingness to co-operate with the Board. Further, that the appellant and the 2nd respondent had been engaged in active out of court negotiations which nonetheless failed to bear fruit. He also deposed that the Board was infact willing to give the appellant another chance to present his defence afresh, but the appellant had rebuffed the offer. He said that the appellant also had an opportunity to appeal the Board's findings before the High Court but he had opted not to. In his view, the appellant's challenge of the decision through the Judicial Review process was an abuse of the process of the court. He maintained that the process was fair, lawful and devoid of all manner of procedural unfairness or unreasonableness as alleged. He urged the court to dismiss the motion.

12. After hearing the parties, the learned Judge came to the conclusion that the appellant had been given an opportunity to present his case before PIC, and further that although there was no evidence that he had been given an opportunity to be heard by the Board, the Board had merely adopted the findings of the PIC and it was not therefore necessary for the Board to hear the parties afresh before adopting the said findings. On this point, the learned Judge cited the following dicta from the High Court decision in **R vs Aga Khan Education Services ex parte Ali Sele & 20 Others**, **High Court Misc. Application No. 12 of 2002**, which we too find spot on in this case.

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

13. On the issue of delay, which according to the appellant had violated his constitutional right to a speedy and fair hearing and occasioned him prejudice, the learned Judge held that the delay *per se* would not lead to an automatic quashing of the proceedings. What the court was supposed to consider was the effect of the delay on the process and on the resultant decision. It was incumbent on the appellant to prove that he had suffered prejudice as a result of the delay. In this case the learned Judge found that the

appellant had failed to prove that the delay had rendered it impossible for him to get a fair hearing. The learned Judge also observed that the delay was not occasioned by the Board but by the fact that the Board had to wait for the conclusion of the civil suit, a process it had no control over. The Judge therefore concluded that the delay had been satisfactorily explained, and further that the appellant had not suffered any prejudice as a result of the said delay.

14. The appellant nonetheless felt aggrieved by the judgment as a result of which he filed the Notice of Appeal on 7th April, 2015. According to the Notice of Appeal, the appellant clarifies that his appeal is against the whole of the said decision save for the order of certiorari quashing the decision of the Medical practitioners and Dentist Board. It reads as follows:-

> ***"TAKE NOTICE that Dr. J. Wanyoike Gichuhi, the Ex parte Applicant herein, being dissatisfied with decision of the Honourable Justice G.V. Odunga given at Nairobi on the 24th day of March, 2015, intends to appeal to the Court of Appeal against the whole of the said decision save for the Order of Certiorari quashing the decision of the Medical Practitioners and Dentists Board to ratify the recommendations of its Preliminary Inquiry Committee in PIC No. 17 of 2013, and more particularly that the applicant shall appear in person before the Preliminary Inquiry Committee for admonition on a date to be advised by the Board; that the applicant do initiate mediation with the complainant with a view of compensation her (sic) for the loss incurred and report back to the Chairman of the Board on the progress within ninety (90) days; and that the applicant pays part-costs of the committee's sittings of Kshs.250,000/- within thirty (30) days…"***

It is important to note that there is no cross appeal by the 1st respondent challenging the orders of certiorari that quashed its decision.

15. The appellant has proffered 15 grounds of appeal in his memorandum of appeal dated 21st December, 2015. By way of paraphrase, in the main, the appellant faults the learned Judge for finding that the existence of the civil proceedings was not a bar to the disciplinary process; for failing to find that the appellant's right to be heard had been violated; that the Judge erred in failing to find that the appellant had satisfied the threshold required for the grant of orders of mandamus and prohibition; that the Judge ought to have allowed the appeal in its totality. The appellant prays that this Court sets aside the impugned judgment and allow his Notice of Motion dated 21st of February, 2014.

16. Both learned counsel filed written submissions and made brief highlights when the appeal came up for plenary hearing. We have considered carefully, the entire record of appeal, the submissions of learned counsel and the applicable law. Before we get into the analysis of the grounds of appeal raised *vis a vis* the evidence, and draw our own independent conclusions as to whether the learned Judge fell into error in arriving at the impugned decision, it is important to set out the jurisdiction or limitations/ parameters of a court sitting on Judicial Review. The law on Judicial Review is well settled and this Court has pronounced itself severally in this area. We shall therefore revisit a few of such decisions. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, this Court expressed itself as follows:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and *whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters*…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."** [Emphasis

added]

17. Similarly, in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected to. It is not our mandate to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

However once the issue is considered and a finding made thereon, any challenge thereon cannot be entertained by way of judicial review proceedings since that would amount to trespassing onto the realms of merits, unless it is shown that there was no evidence upon which such a finding could be made so as to render the finding *Wednesbury unreasonable*.

18. In this case, the learned Judge was confined to examining the procedure adopted by the PIC and deciding whether indeed the same could pass muster, within the parameters set out in the above decisions. After analyzing the procedure adopted by the Board, the learned Judge found that PIC had no jurisdiction under the Rules governing it prior to the 2013 amendments, to pass the sanctions it did against the appellant. On account of acting *ultra vires* its jurisdiction, the Judge quashed the said sanctions of PIC. As stated earlier however, that decision has not been challenged in this appeal and we must eschew discussing those orders. What concerns us for purposes of this judgment are the orders of mandamus and prohibition that the learned Judge declined to grant. We cannot however do this without considering whether the process adopted by PIC was proper or not.

Was it fair, procedural, reasonable? Was the appellant properly heard or was his right to a fair administrative action flouted? Was the delay in the matter prejudicial to him, and what was the cause of the delay?

19. We note that PIC had no specific procedure provided for under its Rules and regulations. When such is the case, the committee or other organ becomes a master of its own procedure. It creates the procedure to follow and there is nothing wrong with that as long as the procedure is fair and in keeping with good practices of fair hearing. This Court had occasion to address that issue in our decision in **Kenya Revenue Authority vs. Menginya Salim Murgani, Civil Appeal No. 108 of 2009,** where the Court held:-

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

In this case, a complaint was lodged. It was received and admitted. The appellant was promptly informed of the same and asked to submit the patient's record, and he did so and even informed the committee that he was willing to co-operate with the Board and he even forwarded to the Board the pleadings in the civil suit that had been filed by the 2nd respondent against him.

20. From the record, we note that he was invited to present his defence but he did not. Indeed we note that it was after the appellant served the Board with the said pleadings that PIC decided to stay investigations until the civil suit was concluded. We are not told that the appellant ever complained to the PIC that this matter had been stayed, until the report which he deemed to be unfavourable to him was served on him. In our view, he failed to complain because during all those years, the Board dutifully renewed the appellant's licence and he continued practising his profession uninterrupted. He was not therefore prejudiced in any manner. He cannot say either that the delay caused him anxiety. Had it caused him any anxiety he could have moved PIC. On the contrary, he is the one who after the dismissal of the civil suit served the Board with the order of the court dismissing the suit. This clearly shows he was on

top of things and knew exactly what was happening. We note further, that the delay in question was actually not caused by the Board but other parties which the Board had no control over. The appellant cannot be sincere now when he turns round and blames the delay on the 1St respondent and even claims to have been prejudiced.

It is our finding that this ground cannot succeed and we therefore dismiss it. We are also not lost to the fact that the appellant had actually been offered another chance to be heard by PIC but he declined. He also declined attempts to have the matter resolved amicably through arbitration. We find that the appellant was given a fair hearing, and further that he was subjected to a fair process by PIC.

21. As severally enunciated by this Court, Judicial Review is concerned with reviewing not the merits of the decision in respect of the application for Judicial Review is made, but with the decision making process. See **Municipal Council of Mombasa v Republic of Umoja Consultants Ltd**, (supra).

In our view, the process adopted by the 1st respondent cannot be impeached. In the absence of breach of any rules of procedure spelt out in the Act, we find that the procedure adopted by PIC was fair, inclusive and accorded the appellant his right of being heard and he was actually heard because whatever documentation he availed to the Board was actually considered.

Under the Rules before the amendments in December, 2013 vide Legal Notice No. 223 of 2013, the functions of PIC were set out as follows:-

(i) The functions of the Preliminary Inquiry Committee shall be to receive and review complaints against a medical practitioner or dentist.

(ii) Subject to paragraph (i), the Preliminary Inquiry Committee after considering the complaint and making such inquiries with respect thereto as it may think fit, shall - (a) if of the opinion that the complaint does not warrant reference to the Board for inquiry, reject the complaint and so inform the Chairman; (b) if or the opinion that the complaint does warrant reference to the Board, cause it to be referred to the Professional Conduct Committee together with its findings and recommendations.

22. From the foregoing, it is clear to us that nothing turns on the issue of the correct procedure not having been followed. PIC conducted the proceedings, fairly, procedurally, rationally and in a credible manner. The appellant was in our considered view accorded an unfettered opportunity to be heard and he was not denied his right to be heard. The Board had observed the rules of natural justice and it cannot be faulted as regards the process.

As to whether the learned Judge ought to have granted orders of prohibition and mandamus, we agree with the learned Judge that where the act sought to be performed involves an element of discretion on the part of the party in question, the court cannot command such a party to behave in a particular way, or to consider the facts before it in a particular way. This Court when dealing with that point in the case **of Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & Others, Civil Appeal No. 266 of 1996 [1997] eKLR** pronounced itself as follows:-

> ***"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a***

specific way*.”(Emphasis added)*

The learned Judge cannot therefore be faulted for declining to order the 1st respondent to issue the licence in question. The Board is duty bound to consider the appellant’s licence, like any other, following the laid down procedure under its governing statute.

23. Lastly, this Court cannot prohibit the 1st respondent from investigating the complaint in question further, because it is only the Board that is charged with the mandate to investigate its members on allegations of professional misconduct. The court cannot be a substitute for the Board. Indeed neither the High Court nor this Court has the requisite capacity to investigate the complaint and make its findings on merit. If the Board is still minded to conduct the investigations, it should be at liberty to do so, so that the matter can be laid to rest.

We may add here that a charge of professional misconduct is not personal to the individual allegedly wronged. Nay, it transcends personal interest and goes into the root of the reputation and integrity of the particular professional body to which the alleged transgressor is a member. This is so because professional misconduct by one member can besmirch and bring into disrepute the good name and esteem of an otherwise honourable profession, particularly one as important as the 1st respondent, whose members have immense responsibility on their hands , and to whom mortal humans entrust their lives to. That is why, even if the second respondent has no interest in pursuing her complaint, it is still in the interest of the Board to bring this matter to a close one way or the other.

For the foregoing reasons, we are satisfied that this appeal lacks merit. The same must therefore fail. We dismiss it with costs to the 1st respondent.

Dated and delivered at Nairobi this 30th day of June, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR