



**Mutegi (Suing on behalf of the Estate of the Late Juliet Kangai Mutegii) v  
Disciplinary & Ethics Committee & 4 others (Civil Appeal E054 of 2022)  
[2024] KEHC 1903 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1903 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E054 OF 2022**

**DAS MAJANJA, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**JESSICA GATAKA MUTEGI ..... APPELLANT  
SUING ON BEHALF OF THE ESTATE OF THE LATE JULIET KANGAI  
MUTEGII**

**AND**

**THE DISCIPLINARY & ETHICS COMMITTEE ..... 1<sup>ST</sup> RESPONDENT  
THE MEDICAL PRACTITIONERS AND DENTISTS COUNCIL .... 2<sup>ND</sup>  
RESPONDENT  
DR. MM WARSHOW ..... 3<sup>RD</sup> RESPONDENT  
MR. EDWIN MOGERE ..... 4<sup>TH</sup> RESPONDENT  
AGA KHAN UNIVERSITY HOSPITAL ..... 5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Ruling on an Inquiry by the Disciplinary and Ethics Committee of  
the Kenya Practitioners and Dentists Council dated 20th January 2022 in PIC No. 43 of 2017)*

**JUDGMENT**

**Introduction & Background**

1. On 11.02.2022, the Appellant filed an appeal against the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 20.01.2022 that dismissed her complaint against the 3<sup>rd</sup> to 5<sup>th</sup> Respondents.



2. The 3<sup>rd</sup> Respondent has opposed the appeal through his Notice of Preliminary Objection dated 16.05.2022 (“the Objection”) and avers that the Appellant does not have any right of appeal against the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dismissing a complaint. That the only right of appeal given against their decisions under the *Medical Practitioners and Dentists Act* (Chapter 253 of Laws of Kenya) (“the Act”) is against a decision made under section 20(6) which specifies the powers of the 2<sup>nd</sup> Respondent where a person is found guilty in disciplinary proceedings. Thus, the 3<sup>rd</sup> Respondent states that this court lacks jurisdiction to hear and determine the appeal.
3. The Appellant opposes the Objection through her Grounds of Opposition dated 27.09.2022. She urges the court to dismiss the Objection and rejects the argument by the 3<sup>rd</sup> Respondent that a right of appeal only accrues to him in the event he is found guilty and not to the complainant in this case the Appellant. The Appellant contends that under section 20(6) of the *Act*, the right of appeal is to any person aggrieved by a decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and this includes the complainant/Appellant.

### Analysis and Determination

4. The parties have filed written submissions which I have considered. The Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* [2014] eKLR discussed the nature of a preliminary objection and endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, where it was held that

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

5. Since the Objection challenges the jurisdiction of the court on the basis of the law, it meets the threshold of a preliminary objection hence it is properly before the court. The question then, is whether this court has jurisdiction to entertain this appeal.
6. The 3<sup>rd</sup> Respondent contends that the court’s jurisdiction is ousted by section 20(6) as read with section 20(9) of the *Act* which provides, in part, as follows:

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- (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) .....

(8) .....

(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.

7. A wholesome reading of the above provisions shows that section 20(6) aforesaid refers to specific orders that may be made by the Council upon finding a person guilty after an inquiry. The person aggrieved is therefore the person which has been found guilty and who is the subject of the orders enumerated therein.

8. The Appellant relies on the section 20 of the Act which was repealed by the Health Laws (Amendment) Act, 2019 that introduced the aforementioned provisions with effect from 17.05.2019. The repealed section 20 provided as follows:

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- (1) If any medical practitioner or dentist registered or any person licensed under this Act is convicted of any offence under this Act or under the Penal Code, whether the offence was committed before or after the coming into operation of this Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, subject to subsection (9) of this section, remove the name of such person from the register or cancel any license granted to such person, as the case may be.
- (2) Upon any inquiry held by the Board under subsection (1) of this section the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or by an advocate.
- (3) For the purpose of proceedings at any inquiry held by the Board. the Board may administer oaths and may, subject to the provisions of any rules made under section 23 of this Act, enforce the attendance of persons as witnesses and the production of books and documents.
- (4) Subject to the foregoing provisions of this section and to any rules as to procedure made under section 23 of this Act, the Board shall have power to regulate its own procedure in any disciplinary proceedings.
- (5) The power to direct the removal of the name of a person from the register or to cancel the licence of any person shall include a power exercisable in like manner to direct that during such period as may be specified in the order the registration of a person's name in the register or the licence granted to him. shall not have effect.



(6) Any person aggrieved by any decision of the Board under the provisions of this section may appeal within thirty days to the High Court and in any such appeal the High Court may annul or vary the decision as it thinks fit.

(7) ----

(8) ----

(9) ----

9. A reading of the repealed section 20(6) above permitted any person to appeal against any decision by the former Board. The amendments to section 20 of the Act clearly show the legislative intent to narrow the right and scope of appeal to a person who has been found guilty and who is aggrieved by the finding and consequent orders.

10. It is an established principle that a party who wishes to appeal must point to a constitutional or statutory right of appeal. There is no general right of appeal from a Subordinate Court, Tribunal or other judicial body to the High Court. Under Article 165(3)(e) of the Constitution, the High Court only has appellate jurisdiction as may be conferred by legislation hence the accompanying right of appeal must be founded on statute. In Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court of Kenya observed that,

“An appeal is granted in specific terms by the Constitution or Statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has specifically been granted by the Constitution or Statute.”

Likewise, in Kakuta Maimai Hamisi & 2 Others v Peris Pesu Tobiko & 2 Others [2013] eKLR, the Court of Appeal held that,

“It is enough to say that the right of appeal must be statute or other law based and so viewed, there is nothing doctrinally wrong or violative of the Constitution for such right to be circumscribed in ways that render certain decisions of courts below non-appealable”.

(see also Harman Singh Bhogal t/a Harman Singh & Co. v Jadya [1953] 20 EACA 17, Sydney Grant Ralph v R [1960] 1EA 310, Anarita Karimi Njeru v Republic (No. 2) [1976-1980] KLR 1283 and Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR).

11. I therefore agree with the 3<sup>rd</sup> Respondent that in light of sections 20(6) and (9) of the Act, only a person who is found guilty under section 20(6) and is aggrieved by that decision can appeal to the High Court. Since the Appellant was the complainant before the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and no guilty verdict was passed against 3<sup>rd</sup> and 5<sup>th</sup> Respondents, she does not have a right of appeal against the said decision to the High Court.

### Disposition

12. I allow the 3<sup>rd</sup> Respondent’s preliminary objection. As a consequence, the Appellant’s appeal be and is hereby struck out. The Appellant shall pay costs of the 3<sup>rd</sup> Respondent assessed at Kshs. 20,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**D. S. MAJANJA**

**JUDGE**



Prof Wangai instructed by Kiama Wangai and Company Advocates for the Appellant.

Mr Ondieki instructed by Hamilton Harrison and Mathews Advocates for the 3<sup>rd</sup> Respondent.

