



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 128 OF 2019

IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF

ARTICLES 22, 23, 27(1), 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTENDED CANCELLATION OF THE PETITIONER'S SPECIALIST RECOGNITION,

AND

IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT CHAPTER 253

BETWEEN

DR. SAMIRA DEDHIA SONI.....PETITIONER

VERSUS

HON. SHAKEEL SHABBIR.....1ST RESPONDENT

DR. MUKESH JOSHI.....2ND RESPONDENT

REGISTRAR MEDICAL PRACTITIONERS & DENTISTS BOARD....3RD RESPONDENT

AND

THE NATIONAL ASSEMBLY.....1ST INTERESTED PARTY

OPHTHALMOLOGICAL SOCIETY OF KENYA.....2ND INTERESTED PARTY

JUDGMENT

THE PETITION

1. The Petitioner through a Petition dated 29th March 2019 seeks the following reliefs:-

a) A declaration that the conduct of the Respondents threaten to violate the Petitioner's fundamental rights and freedoms guaranteed under Article 27, 47 and 50 of the Constitution of Kenya, 2010.

b) A permanent injunction restraining the 3rd Respondent from cancelling the license of the Petitioner pursuant to recommendations/ direction from Parliament.

c) Costs of the Petition to be borne by the Respondents in any events.

THE PETITIONER'S CASE

2. The Petition is supported by the Petitioner's Affidavit sworn on 29th March 2019.

3. The Parliamentary Departmental Committee on Health received concerns raised by the Ophthalmological Society of Kenya through the 1st and 2nd Respondent on 1st December 2014 alleging that the Eye and U Kenya (her clinic) had been irregularly registered by the 3rd Respondent.

4. On 26th February 2015, the said Committee met with the 3rd Respondent, the 1st Respondent and the Petitioner concerning the issues raised and made recommendations on 9th July 2015 as follows;

"It recommends that the 3rd Respondent should curb conflict of interest in exercising.

a) Its mandate especially with regard to Constituting peer review committees. Equally the Board should be fair in treating all its "members during training and registration processes and particularly ensure that all doctors are exposed to proper supervision before they acquire specialist training."

5. On 18th April 2016, the Executive officer of the 3rd Respondent wrote to the clerk of the National Assembly indicating that the issues raised by the 1st Respondent did not reflect the committee proceedings and were purely professional/ business rivalry which it did not want to be drawn into.

6. The 1st Respondent on or around July 2015 wrote another complaint letter to the clerk of the National Assembly Department/ committee of Health, necessitating a letter from the National Assembly requiring the board to confirm whether due process was followed regarding the specialized recognition for the Petitioner and the registration of her Clinic. The 3rd Respondent through a report dated 16th June 2016 reiterated its earlier on position of 18th April 2016.

7. On 17th February 2016 the 1st Respondent through his letter drew the attention of the Health Committee of Parliament to the fact that the report tabled to parliament on July, 2015 did not respond to the fact that the Petitioner was yet to undertake specialists supervision and urged the committee to ensure that she undertook the one year of specialist supervision as required.

8. A report dated 30th May 2017 was tabled in response to the said concerns recommending that the 3rd Respondent constitutes a special committee to review her recognition and to revise regulations for specialists recognition of doctors.

9. Pursuant to the recommendations by the Departmental Committee on Health in June 2017, a special committee was constituted and on 1st June 2017, the Chairman of the 3rd Respondent indicated that the Petitioner's recognition as a specialist in Ophthalmology followed due process of the board and the law, and marked the matter closed.

10. On 17th February 2016, the 1st Respondent wrote to the Clerk National Assembly making certain demands. Subsequently, Director of Committee Services for the Clerk of the National Assembly wrote to the CEO of the 3rd Respondent requesting it to provide the implementation status of the committee recommendations and specifically the Petitioner's specialist's recognition.

11. On 21st September 2018, a task force constituting of the board and various specialists was formed to facilitate that task wherein the Petitioner appeared before the task on 29th September 2018 at the 3rd Respondents offices. The task force recommended that

everything at the clinic including the personnel and the services rendered were in order.

12. The Departmental Committee on Health on 17th October 2018 recommended among other things that the board cancels the specialist recognition for the Petitioner and follows the laid down procedure to recognize her and to investigate into the allegations of medical misconduct and take action accordingly.

13. Such actions the Petitioner avers are a threat to her rights under *Articles 27, 47 and 50 of the Constitution of Kenya 2010*.

THE 1ST RESPONDENT'S CASE

14. The 1st Respondent filed a Preliminary Objection dated 21st May 2019 and urged that the petition be struck out for the reason that he is entitled to the protection of Parliamentary privilege under Article 117 of the Constitution 2010 and Section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017. As such his actions in the House of Parliament are non-justiciable.

2ND RESPONDENT'S CASE

15. The 2nd Respondent filed a Replying Affidavit sworn by Dr. Mukeshi Joshi on 16th May 2019. He deposed that he had been improperly enjoined in this suit and urged the court to strike out the petition against him with costs.

16. He averred that the only reference to him was paragraphs 1 and 20 of the Petition and it has not been specified what alleged conduct he committed that breached the petitioner's rights under the Constitution. He maintained that he did not participate in the meetings resulting in the Parliamentary Departmental Committee reports and that 2nd Interested Party was the complainant.

3RD RESPONDENT'S CASE

17. The 3rd Respondent filed a Replying Affidavit sworn by Daniel Yumbya on 23rd December 2019 in support of the petition. He substantively reiterated the contents of the Petition and maintained that everything at the clinic including the personnel and the services rendered were in order; the due process of the Board and the law were adhered to.

1ST INTERESTED PARTY'S CASE

18. The 1st Interested Party filed Replying Affidavit by Michael Sialai sworn on 5th November 2019. He confirmed that the National Assembly Committee on Health is established under *Standing Order 216(1) of the National Assembly standing Orders* and in executing its mandate it oversees the Ministry of Health and the Kenya Medical Practitioners and Dentists Board (KMPDB).

19. He further reiterated the contents of the Petition on the proceedings and deposed that what instigated this Petition was a letter from the 1st Respondent dated 14th March 2018 to the Departmental Committee on Health noting that the Petitioner had not complied with the Committee's recommendations urging it to review the matter and ensure compliance. It revisited the inquiry and after hearing the witnesses, prepared its report which was tabled before the National Assembly by the Chairperson on 17th October 2018 and was adopted by the House after deliberations.

20. He deposed that the observations made by the Departmental Committee on Health were that;

i) Dr. Soni graduated with a Master of Medicine in Ophthalmology in 2004 but her first application for specialist recognition was five years later on 5th February 2009 which was rejected.

ii) Dr. Samira Soni reapplied and appealed with recommendations from two referees namely, Dr. Jyotee Trivedy and Dr. Milicent Kariuki. The application was considered and subsequently approved on 15th May 2014 as she was considered as having met the minimum requirements for such an application.

iii) There was no evidence that Dr. Soni met the requirements for specialist recognition having not served under specialist supervision for two years.

iv) By her own admission and evidence of her peers, she was a qualified doctor but her competencies as an ophthalmological surgeon were wanting. The committee however admitted that the incompetence did not disqualify her as owner / manager of a hospital or clinic.

21. He averred that he said Committee made recommendations and of interest to this case are:

i) The Board immediately cancels the specialist recognition for Dr. Samira Soni and follows the laid down procedure to recognize her;

ii) The Board to proactively and independently investigate allegations of medical misconduct of Dr. Soni in her previous engagements, to verify their veracity and or prove or discount her claims for pure business rivalry, and take appropriate action. Towards the end, they should review the specific case of Dr. Soni allegedly removing eyes of a patient, and summon to hear evidence from those who Dr. Soni has worked under.

iii) The Board immediately review practice of foreign doctors in the country, especially on supervision of their operations

iv) The Board closely monitors the operations of the Eye N U Clinic vis a vis management of patients.

22. He averred that the reliefs sought seek to negate the procedure to be undertaken for one to receive a specialist recognition and the said orders also violate the National Assembly's mandate and the values and principles of good governance set out under **Articles 94, 95 and 10 (c) of the Constitution** respectively.

23. He contended that the orders sought offend the principle of separation of powers as they want this court to interfere with the internal management of Parliament. This court is limited to a review of the process employed by the National Assembly that led to the publication of the Report of October 2018 which was fair and in accordance with the Constitution. Further, the petition violates the principles set out by the Court of Appeal in **Civil Appeal No. 157 of 2009; John Harun Mwau vs Dr. Andrew Mullei & Others** and the Supreme Court decision in **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR**.

24. He deposed that the Petitioner being aggrieved by the Report did not exercise her right of appeal when the said report was finalized and tabled for adoption and cannot therefore turn to this court as both the High Court and a House of Parliament and / or its committees exercising the powers under **Article 125 of the Constitution** have concurrent jurisdiction.

25. According to him, the 1st Respondent acted in accordance with **Article 119 of the Constitution** and a Petition to **Parliament (Procedure) Act No. 22 of 2012** hence is entitled to the protection of Parliamentary Privilege under **Article 117 of the Constitution** and **Section 12 of the Parliamentary Powers and privileges Act No. 29 of 2017**. His speeches and contribution in the House are also non-justiciable.

26. He contended that by virtue of **Article 117 of the Constitution**, this court lacks the jurisdiction to grant the orders sought as the 1st Respondent has been sued in his personal capacity for acts done in his official capacity. Hence a contravention of the decision in **Petition No. 32 of 2013; Justus Kariuki Mate & another v Martin Nyaga Wambora & Another [2017] eKLR** and **Civil Appeal No. 157 of 2009 (supra)**.

2ND INTERESTED PARTY'S CASE

27. The 2nd Interested Party filed a Replying Affidavit by Dr. Muchai Gachago sworn on 29th July 2020. He questioned how the Petitioner got a specialist recognition, how the clinic was licensed, and how her foreign doctors had been peer-reviewed.

28. He deposed that after investigations on how the petitioner was awarded the specialist recognition status, it established that:

i) The institutions the Petitioner claimed to have worked at that would have given her the required exposure leading to the award of that status were not among the recognized institutions that could offer that exposure;

ii) The Petitioner's referees were themselves not qualified to supervise the Petitioner and did not supervise her for the said

specialist recognition certificate;

iii) It was not disclosed who peer- reviewed the foreign doctors working under the Petitioner as all the members of the 2nd Interested Party denied being called upon to undertake the exercise.

29. He averred that being aggrieved by the 3rd Respondents decision on the complaint, he referred this issue to the Parliamentary Committee on Health which took up the matter. The first committee did not call any witness from the 2nd Interested Party when its report was tabled in Parliament and that informed the reconstitution of the 2nd committee headed by the 1st Respondent and whose recommendations are subject of this Petition.

30. He averred that it is opposed to the Petition for the reasons that; the specialist recognition certificates should not be granted to non- deserving applicants who have not gone through the laid down procedures to obtain the status; granting a specialist status through documents that show that the institutions where the Petitioner worked and the referee she allegedly worked under were not qualified will greatly erode the high standards of professionalism in the society and encourage others to use a similar short cut to gain those status; and the end result will be a danger to the public as their eye health will be jeopardized.

PETITIONER'S GROUNDS OF OPPOSITION

31. The Petitioner filed grounds of opposition dated 15th January 2020 to the preliminary objection. The summary of the grounds are that:-

i) The 1st Respondent is sued as a complainant. He is sued for his letters dated 19th November 2014, 9th December 2014 and, 17th February 2016.

ii) The petition does not offend Article 117 of the Constitution 2010, and Section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017, since the 1st Respondent is not, the leader of majority party; leader of minority party; chairman of a committee; or a member of the health committee of parliament.

iii) This is not a preliminary objection as it cannot be determined without having due regard to the evidence before court.

PETITIONER'S SUBMISSIONS

32. The Petitioner in her submissions argues that Parliament had no role in the registration of professionals, other than set out the regulations that ought to be followed. That once a professional is so registered he/ she can only be deregistered using the laid allowed procedure in the relevant statute.

33. She maintained that the 1st Respondent was a major complainant in this dispute. According to her, should the 3rd Respondent act on the recommendations of the 1st Interested Party, it shall be violating her constitutional rights under **Article 27, 47 and 50 of the Constitution**.

1ST RESPONDENT'S SUBMISSIONS

34. The 1st Respondent filed submissions on the Preliminary Objection. He submitted that he had been sued in his personal capacity for undertaking his constitutional functions under **Article 95 of the Constitution**. Further, the complaint raised was a concern to the Ophthalmological Society of Kenya and the general public regarding the registration of the petitioner's business.

35. Relying on **Article 117 of the Constitution, Section 12 of the Parliamentary Powers and Privileges Act** and, **Petition No. 32 of 2014; Justus Kariuki Mate & another vs Martin Nyaga Wambora & Another (2017) eKLR**, he argued that he was protected by the doctrine of immunity.

36. He also argued that his actions while lodging the Petition to the National Assembly under Article 119 of the Constitution, were under the jurisdiction of the Chairperson of the Committee and/ or the Speaker of the National Assembly under **Article 107 of the Constitution** and **Standing Order 18 of the National Assembly Standing Orders (4th Edition)**. He relied on **Justus Kariuki Mate**

& another v *Martin Wambora (supra)*; *Civil Appeal No. 157 of 2009*; *John Harun Mwau vs Dr. Andrew Mullei & others*; *Shadrack Muyesu Sharu & 2 others v Justin Muturi & 2 others [2018] eKLR* and many other decisions quoted in his submissions. He submitted that it is only after the entire House has adopted the Recommendations per the report that the supervisory jurisdiction of this court to test the constitutionality of the report began to exist, as such it is contended he is entitled to the protection of Parliamentary privilege.

37. Based on the foregoing and while relying on *Civil Appeal No. 50 of 1989 Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* he argued that this court has no jurisdiction to hear and determine the case whilst he is unlawfully pleaded as a party to the Petition. He further confirmed that the Preliminary Objection raises issues of misjoinder and the Petition breached the doctrine of Parliamentary privilege.

2ND RESPONDENT'S SUBMISSIONS

38. The 2nd Respondent submitted that the 2nd Interested Party was the complainant. Further, that he neither participated in, nor was he privy to the decisions, discussions, and proceedings between the Petitioner and the 3rd Respondent, 1st Interested Party and 2nd Interested Party, which form the substratum of the Petition hence has been wrongly enjoined in this suit.

39. He argued that the Petitioner has failed to specify what conduct he is alleged to have committed which have infringed on her constitutional rights under *Articles 27, 47 and 50 of the Constitution* as envisaged in *Anarita Karimi Njeru v Republic [1979] eKLR* and emphasized in *Mumo Matemo v Trusted Society of Human rights [2014] eKLR*.

40. He argued that the letter he authored being referred to by the Petitioner is misleading as its contents shows that he raised concerns about the selection of one Dr. Jyoti Trivedy as one of the panelists to the vetting Board in light of the concerns raised are on her competence. The said letter did not address the Petitioner's qualifications, and clearly observed that the Petitioner's specialist recognition had been challenged by the Ophthalmological Society of Kenya. The Petitioner had also failed to demonstrate how the said letter infringed her rights under the Constitution.

3RD RESPONDENTS SUBMISSIONS

41. The 3rd Respondent confirmed that there is evidence before this Court that there was no evidence to doubt the competence of the practitioners working at the Petitioner's clinic; the foreign doctors working at the said facility were duly licensed in accordance with the law; it was one of the best and there was no written complaint of mismanagement of patients against the facility of the Petitioner. It maintained that it followed the procedure and complied with the law under the *Medical Practitioners and Dentists Act* and its Rules in recognition of the Petitioner as a specialist in ophthalmology.

42. It argued that the prayers sought in the Petition are merited and that this court has the mandate to interfere with the National Assembly's recommendations. Further, it is the medical council that has the mandate to issue specialist licenses and where there has been failure to comply with the law by a statutory body, there is a clear legal process to challenge the action. It relied on *Apollo Mboya vs Attorney General & 2 others, Petition 472 of 2017 [2018] eKLR*.

43. It submitted that it has been wrongly sued as it acted in accordance with its mandate and there is no allegations of any infringement or breach of the Law by the Medical council and hence the Petition against it should be dismissed. There is no evidence to show that the Medical Council acted in breach of the Law, either on its own motion or on the recommendations of the National Assembly, and orders cannot be issued in speculation.

1ST INTERESTED PARTY'S SUBMISSIONS

44. The 1st Interested Party substantively reiterated the contents of its Replying Affidavit and confirmed that it had an oversight role by dint of *Article 95 (5) (b) of the Constitution* hence can exercise oversight over state organs including the Ministry of health through ad hoc or standing committee of parliament established in accordance with *Article 124 of the Constitution*.

45. It submitted that by virtue of *Articles 37 or 119 of the Constitution*, it is obligated to investigate and give a report to the public whenever it receives a written Petition. Such report comes with recommendations which require implementation and have legal implications and sanctions.

46. It maintained that the Health Committee oversees the Ministry of Health and the Kenya Medical Practitioners and Dentists Board (KMPDB) where the Petitioner is a member thus is subject to the jurisdiction of the National Assembly's Health Committee in its oversight role. Relying on *The Judicial Service Commission vs Speaker of the National Assembly and others Petition No. 518 of 2013 (UR)*, it submitted that recommendations of the National Assembly committee through its oversight role should represent the will of the people and be people centered.

47. It submitted that the internal procedures of Parliament can only be examined / impeached by a court of Law where the acts of the National Assembly pursuant to its powers and obligations under Chapter Eight of the Constitution, the Petitioner must establish that there is a violation or threatened violation of the Constitution which he has not demonstrated. It relied on *Article 117, 124, 165 (3) (b), (d) (ii) of the Constitution* and the cases of *Speaker of the Senate & another v Attorney General & 4 others (supra)*; *Madbury vs Madison, 5 U.S 137 (1803)*; *HC Petition No 227 of 2013 Okiya Omtatah Okioti & 3 others v Attorney General & 5 others [2014] eKLR*.

48. It is averred that having failed to demonstrate a constitutional violation, there is no basis to invoke the jurisdiction of this court under *Article 165 of the Constitution* and neither has the Petitioner alleged that there was a violation of the Constitution. Hence this court should down its tools and decline to interfere with the internal management of legislature. It relied on *Owners of Motor Vessel Lilian S (1989) KLR 1 (CAK)*.

49. It emphasized that this court has no jurisdiction to supervise the internal workings of Parliament and that Parliamentary privilege does not allow for decision of either House or its Speaker to be questioned by any court hence the petition violates the principle set out by the Court of Appeal in *Civil appeal No. 157 of 2009 (supra)*. It further relying on *Justus Kariuki Mate & Another vs Hon. Martin Nyaga Wambora & Another (supra)*; *Prebble v Television New Zealand Limited [1995] 1 AC 32*; *Speaker of the Senate & Another vs Attorney General & 4 others (supra)*; *Okiya Omtatah Okioti vs Attorney General & 5 others (supra)*; *The commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] eKLR*; *Patrick Ouma Onyango & 12 others vs Attorney General and 2 others [2005] eKLR*; and *Blackburn vs Attorney General [1971] 1 WLR 1037 I*, urged this court to exercise judicial restraint and decline to tolerate any call for violation of the principle of separation of powers by interfering with the internal workings of Parliament as sought by the Petitioner.

50. It argued that it considered all the evidence and examined witnesses before making the recommendations they made and granting the orders would be to allow the Petitioner to continue with her trade despite her limitations to offer specialized treatment endangering the health of Kenyans.

2ND INTERESTED PARTY'S SUBMISSIONS

51. It submitted that the Petition is incompetent as its joinder to the suit reveals that it is the one that raised the complaint against the Petitioner and not the 1st and 2nd Respondents initially to the 3rd Respondent and subsequently to Parliament.

52. It argued that it deponed in its Replying Affidavit that the Petitioner had not attained the qualifications to be conferred Specialist Recognition status with the reason in the aforesaid Replying Affidavit and that the said averments had not been controverted hence the recognition by the 3rd Respondent was null and void and Parliament was right in its recommendations.

53. It submitted that the Petitioner has not demonstrated how her rights under *Articles 27 and 47 of the Constitution* had been violated and further that *Article 50 of the Constitution* was irrelevant in this Petition. It further associated itself with the authorities supplied and analyzed by the Respondents and the 1st Interested party in their respective submissions and drew the courts attention to *Article 46 of the Constitution* on consumer protection rights as the guiding article behind its mission to uphold high professional standards of its members.

ANALYSIS AND DETERMINATION

54. Having carefully considered the parties pleadings, parties rival submissions, as well as the authorities relied upon, the following issues arise for determination:-

i. Whether the 1st Respondent preliminary objection has merits.

ii. *Whether the Respondents have been wrongly sued*

iii. *Whether the petitioners' rights were violated.*

A. WHETHER THE 1ST RESPONDENT PRELIMINARY OBJECTION HAS MERITS

55. The 1st Respondent argued that he petitioned parliament on this issue in his official capacity and while discharging his constitutional mandate. He further submitted that by virtue of **Article 117 of the Constitution** and **Section 12 of the Parliamentary Powers and Privileges Act** he is entitled to immunity from the court process for acts done in good faith in discharge of duties done in his official capacity. He further argued that this is a preliminary objection because it raises issues on misjoinder and the doctrine of parliamentary privilege.

56. The Petitioner did not touch on the issue of the preliminary objection in her submissions. However the same was addressed in her grounds of opposition where she averred that; the 1st Respondent was a complainant by virtue of his letters dated 19th November 2014, 9th December 2014 and, 17th February 2016, that the Petition does not offend **Article 117 of the Constitution 2010**, and **Section 12 of the Parliamentary Powers and Privileges Act No. 29 of 2017**, and this is not a preliminary objection as it cannot be determined without having due regard to the evidence before Court.

57. The 1st Interested Party more or less supported the 1st Respondent's position and argued that its internal procedures and management are not subject to this court's jurisdiction. It further submitted that the Petition offended the doctrine of separation of powers and that the court should be reluctant in interfering with its mandate and constitutional functions.

58. The 2nd Respondent, 3rd Respondents and the 2nd Interested Party did not touch on the issue of the preliminary objection save for the 2nd Interested Party who indicated that the complaint originated from it hence the complainant.

59. **Article 117 (1) of the Constitution** provides for the freedom of speech and debate in Parliament. **Sub Article (2)** obligates Parliament to provide for powers, privileges and immunities of Parliament, its committees, the leader of majority party, the leader of the minority party, the chairpersons of committees and members for the purpose of the orderly and effective discharge of the business of Parliament

60. **Section 2 of the Parliamentary Powers and Privileges Act No. 29 of 2017** defines a member as a member of the National Assembly or of the Senate. **Section 12 provides** for Immunity from legal proceedings as follows;

“12. Immunity from legal proceedings

(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.

(2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.

(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.”

61. Based on the foregoing it is evident that the 1st Respondent while performing his constitutional mandate as envisaged in the Constitution, representing the will of his people; the concerns raised by the 2nd Interested Party after being aggrieved by the actions of the 3rd Respondent. That while acting in his official capacity and not for his own benefit and being not the complainant as confirmed by the 2nd Interested Party which would negate the allegations by the Petitioner, and acting in good faith, in my view, he is entitled to the privileges and immunity guaranteed under **Article 117 of the Constitution and Section 12 of the Parliamentary Privileges and Immunity Act** and as was observed in the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & Another [2017] eKLR and John Harun Mwau vs Dr. Andrew Mullei & Others Civil Appeal No. 157 of 2009.**

B. WHETHER THE RESPONDENTS HAVE BEEN WRONGLY SUED.

62. The 1st Respondent submitted that he has been wrongly sued and that there is a misjoinder as he is entitled to parliamentary privileges and immunity which I have considered above. Also that the complaint originated from the 2nd Interested Party and that he was only discharging his constitutional mandate under *Article 119 of the Constitution* and representing the will of the people.

63. The 2nd Respondent equally submitted that it has been wrongly sued and that the 2nd Interested Party was the complainant. He also submitted that he did not participate in the proceedings and discussions from which the Petitioner is aggrieved. Lastly, that the letter alluded to by the Petitioner is misleading and does not in any way threaten to violate her constitutional rights.

64. The 3rd Respondent submitted that it has been wrongly sued as it followed the due process and the Petitioner has not shown anything that it did that violated or threatened to violate her constitutional rights.

65. The 2nd Interested Party on the other hand submitted that this Petition lacks merit as it was the one that made the complaint and neither the 1st Respondent nor the 2nd Respondent. This was after it was aggrieved by the decision of the 3rd Respondent.

66. I have already determined that the 1st Respondent is entitled to the parliamentary privileges and immunities as long as his acts are in good faith and in his official capacity while discharging his constitutional mandate. As regard the 2nd Respondent it is noted on the other hand that he was not privy to the proceedings or discussions that gave rise to the complaints in this petition. The 3rd Respondent followed due process and has not violated any of the petitioner rights or threatened to do so. In fact it is in support of the Petition. The 2nd Interested Party has also confirmed that it is the originator of the complaint.

67. *Rule 5 (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)* provides that a petition shall not be defeated by reason of misjoinder of parties, and the court may in every proceeding deal with the matter in dispute.

68. *Article 23 (1) of the Constitution* mandates the High court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. *Sub Article (3)* provides for the reliefs that the court may grant.

69. In as much as I agree with the Respondents that the right party in this case should have been the Parliamentary Departmental Committee on Health, it is evident that the National Assembly is enjoined as the 1st interested party and as such and by dint of *Rule 5 (b) of the Mutunga Rules* and *Articles 23 (1) and (3) of the Constitution*, this suit cannot be defeated by misjoinder of parties and should not be dismissed on the allegations relied herein by the Respondents and Interested Party.

C. WHETHER THE PETITIONER'S RIGHTS HAVE BEEN VIOLATED.

70. The Petitioner has submitted that if the recommendations of the Committee are acted upon her rights under *Articles 27, 47 and 50 of the Constitution* will be violated. She has further submitted that the mandate to revoke her recognition is not for parliament but for the 3rd Respondent.

71. The 2nd Respondent has submitted that the petitioner has not met the threshold in the *Anarita Karimi case (supra)* and that she has not demonstrated anything he has done to violate her rights. He further avers that she has also not shown how the letter she alluded to threatened to violate her rights.

72. The 3rd Respondent submitted that the due process and the law were followed before the Petitioner was granted the specialists recognition and that the petition should be allowed.

73. The 1st Interested Party submitted that it has the oversight authority over the Petitioner and that the Department of Health Committee does too by virtue of her being a member of the Kenya Medical Practitioners and Dentists Board. It is further submitted that the Petitioner has not demonstrated any violation against her as the due process was followed before the recommendations were made; all evidence was collected, witnesses called and she was given a chance before the committee before the said decision was made.

74. The 2nd Interested Party refuted that her rights were threatened or threatened to be violated because based on their investigations and findings she was not certified to work as specialist and the recognition was issued in error. It is further submitted that **Article 50 of the Constitution** is irrelevant herein.

75. It is trite law that for Petition to succeed it has to meet the threshold in the **Anarita Karimi Case (supra)**. The Petitioner has shown how the Respondents have violated or threatened to violate her rights. The Petition to the Parliamentary Departmental Committee on Health was presented to them by the 1st Respondent who is entitled to the parliamentary privileges and immunities so long as he is acting in good faith. As stated earlier the right party to have been sued is the Parliamentary Departmental Committee on Health or the National Assembly which has been enjoined to this suit as the 1st Interested Party. It is the one that received the complaint from the 1st Respondent, heard the Petitioner, the 3rd Respondent and made recommendations after conducting fresh investigations.

76. The 1st Interested Party submitted that its proceedings are not amenable to this court's jurisdiction and that the court can only intervene if the process was flawed by way of judicial review. It also submitted that this Petition goes against the doctrine of separation of powers and that the court should be reluctant in interfering with the conduct of its constitutional mandate.

77. **Article 165 (3) (b) of the Constitution** gives this court the jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Under **Sub-Article (3) (d) (ii) of the Constitution**, this Court has jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of, the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution. Under **Sub-Article (6) of the Constitution** it is provided that this court has supervisory jurisdiction over the subordinate courts and over any persons, body or authority exercising a judicial or quasi-judicial function. The Parliamentary Departmental Committee on Health was exercising quasi-judicial functions as was rightly stated in **Apollo Mboya v Attorney General & 2 others [2018] eKLR**.

78. In that case the learned judge further observed that **"a decision rendered by a parliamentary committee in the exercise of its quasi-judicial functions can be quashed for being ultravires, an error of law, unreasonable, illegal, arbitrary or for violating the Bill of Rights...the court is mandated to assess the constitutionality of legislation, executive actions and government policy. That therefore part of the role of the judiciary is to ensure that the public authorities act lawfully and to serve as a check and balance on the government power...In our constitutional dispensation, it is not Parliament or the Executive or the Judiciary that are Supreme, but the Constitution."**

79. The question that should be determined herein is whether the Parliamentary Departmental Committee on Health had the mandate to hear and determine matter concerning the registration of the Petitioner's Clinic and whether it has the mandate to make recommendations for revocation or cancellation of the Petitioner's specialist's recognition. In other words which body is mandated to do so"

80. Medical practitioners are guided by **the Medical Practitioners and Dentist Board Act, Cap 253 Laws of Kenya (Hereinafter the act)**. **Section 3(1) of the Act** establishes the Kenya Medical Practitioners and Dentists Council. **Section 4(1) of the Act** stipulates the functions of the said council and of interest to this Petition, are the functions listed as **(h)-(p) of the said section**. **Section 4A of the Act** establishes the Committees of the Council. To wit, training, assessment, registration and human resource committee; disciplinary and ethics committee; inspection, licensing, finance and general purpose committees, and audit and risk committee are well provided for.

81. **Section 11B of the Act** provides for the recognition of specialists and the requirements for one to be recognized as such. **Section 12 of the Act** provides for the specialists licenses and **Section 15** provides for the Registration of health institutions, and proper consideration of the aforesaid Section. It is clear from these sections of the law that issuing specialists' recognition is the council's mandate and not of the National Assembly or any other body.

82. **Section 20 of the Act** provides for disciplinary proceedings. It mandates the council to make an inquiry into a complaint, made by an aggrieved person. Under **subsection (6) of the Act** some of the steps it may take is to suspend, withdraw or cancel the practicing license of a medical practitioner, suspend, withdraw the license of a health institution or a section of the health institution or permanently remove the name of the medical practitioner from the register. Under **Subsection (9) of the Act** it is provided that any person aggrieved by the council's decision has a recourse to the High Court and not to any other forum.

83. *The Medical Practitioners and Dentists (Training, Assessment and Registration) Rules 2014* is instrumental to this Petition. *Rule 3 of the Act* establishes the Training, Assessment and Registration Committee. *Rule 4 of the Act* provides for the functions of the committee, key among them being, to review postgraduate qualifications for the purpose of awarding specialist recognition; scrutinize applications for specialists and sub- specialists. Lastly, *Rule 6* provides for the specialist recognition.

84. It is clear, that from the said Act and the Rules, that the mandate to issue licenses, revoke license, cancel licenses and grant specialists recognition is bestowed upon the Medical Council. The said Act further provides for a right of appeal to the High Court where a party is aggrieved by the decision of the council. The 2nd Interested Party submitted that it made a complaint to the 3rd Respondent but the 3rd Respondent nonetheless went ahead and issued the specialist recognition to the Petitioner. Being aggrieved it came to the Parliamentary Departmental Committee on Health. This was a departure from the Law. It should have moved to the High Court and not the said Committee. The said Committee did not have the powers to investigate into the matter or even make recommendations on the revocation of the licenses or recognition of the Petitioner. In this aspect I agree with the Petitioner. The Committee acted beyond its powers as observed in *Commission on Administrative Justice v Insurance Regulatory Authority & another [2017] eKLR*.

85. Based on the foregoing, I also do agree with the Petitioner that implementing the recommendations by the Health Committee will infringe on her rights under *Article 27 of the Constitution* as no other professional has undergone the same process, *Article 47 of the Constitution* as she has not been heard before the right body; the right body supported the Petition herein and submitted that all the laws were adhered to before the recognition, and *Article 50 of the Constitution* as the process she was subjected to was not fair. Having stated as herein above I find that this court has the mandate to issue appropriate reliefs as held in *Okiya Omtatah Okiiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR*. I find that the Petitioners rights were violated and/or threatened and appropriate reliefs ought to be issued.

86. *The upshot is that the Petitioner's Petition has merits. I proceed to issue orders as follows:-*

a) A declaration be and is hereby issued that the conduct of the 1st and 2nd Respondents and interested parties threaten to violate the Petitioner's fundamental rights and freedom guaranteed under Article 27, 47 and 50 of the Constitution of Kenya 2010.

b) An appropriate relief under Article 23(3) of the Constitution be and is hereby issued restraining the 3rd Respondent from canceling the license of the Petitioner pursuant to recommendation / directions from the Parliament.

c) Costs to the Petitioner to be borne by the 1st, 2nd Respondents and Interested Parties.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF MARCH, 2022.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA



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