

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

AT DAR ES SALAAM

CIVIL CASE NO. 167 OF 2022

JAMILA MBARAKA GOSI PLAINTIFF

VERSUS

GRACE MILLANZI 1ST DEFENDANT

ILALA MUNICIPAL COUNCIL 2ND DEFENDANT

MUHIMBILI NATIONAL HOSPITAL 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

30th June, & 12th July, 2022

ISMAIL, J.

The plaintiff has instituted proceedings against the defendants, jointly and severally, for a claim of TZS. 408,200,000/- and TZS. 200,000,000/-. The claim constitutes specific and general damages, respectively. The cause of action against the defendants is negligence, allegedly committed by the defendants by mishandling the plaintiff, when she submitted herself for delivery of a child. The contention by the plaintiff is that her delivery was

shrouded in serious professional lapses that caused injuries and permanent infertility.

The claims by the plaintiff have encountered a challenge. The challenge is in the form of a preliminary objection raised by the 1st defendant, and the contention is that the suit against the 1st defendant has been preferred prematurely, noting that the forum before which the matter has been placed is inappropriate. The preliminary objection has been coined in the following words:

"That the plaintiff failed to comply with essential steps preceding these proceedings which requires (sic) her to lodge complaints before the registrar and the latter set the council in motion for determination of the validity of purported professional misconduct, lack of competence and negligence by way of INQUIRY as provided under PART VI: DISCIPLINARY PROVISIONS STIPULATED IN THE NURSING AND MIDWIFERY ACT NO 1 OF 2010."

At the hearing of the matter, the plaintiff was represented by Mr. Abdulfatah Abdallah, learned advocate, while the 1st defendant enlisted the services of Christian Rutagatina, learned counsel. The 2nd and 3rd defendant were ably represented by Ms. Thuwaiba Jumbe and Wemael Wilfred, learned State Attorneys. The arguments were made through oral submissions made by counsel for the parties.

In his submission, Mr. Rutagatina argued that the matter has been preferred prematurely. This is in view of the fact that the provisions of the disciplinary procedure governing conduct of nurses and midwives has set a distinct process that did not intend that the High Court should act on the complaints. The dispensation requires that complaints be forwarded to the Council and the latter causes the staging of an inquiry. The Council then hands down a decision. An aggrieved party has a leeway of instituting an appeal to the Minister, and the latter hears the parties and give a verdict.

He argued that it is the decision of the Minister that is subjected to an appeal to the High Court. He contended that, under this dispensation, the Court stands as a second appellate court. It was his view that if the Court is allowed to proceed with the matter, the 1st defendant will be jeopardized as she will have to stand another inquiry, an act that will amount to a double jeopardy.

Mr. Rutagatina took the view that even the High Court itself will be faced with double work of some kind, as it will have already decided the matter by the time the same comes on appeal. He prayed that the 1st defendant be released from the proceedings as there are other disciplinary proceedings to be taken against her.

Ms. Jumbe did not have anything to submit on. She merely registered her concurrence with the submission made by her counterpart, and urged the Court to uphold the objection.

Submitting in rebuttal, Mr. Abdallah began by submitting that the law on which the objection is premised does not oust jurisdiction of the Court. He argued that Articles 105 through to 107 of the Constitution of the United Republic of Tanzania, 1977 (as amended) vest jurisdiction in the Court, in respect of all legal issues. The learned advocate took the view that the Council would not be an appropriate forum to deal with cases involving other defendants who are not subjected to the disciplinary process enshrined in the cited law. Regarding double jeopardy, the argument is that the same has not been explained. Mr. Abdallah contended that the issue at stake is that of negligence whose scenario is not covered in the law. He prayed that the objection be overruled with costs.

In rejoinder, Mr. Rutagatina defended the purity of the objection and added that the forum established under the cited law serves as a channel through which problems and issues of nurses are to be catered for. He took the view that dropping the 1st defendant from the proceedings would not prejudice other parties or stifle proceedings against the rest of the defendants. After all, learned counsel argued, the role played by the 1st

defendant is free from any culpability, taking into account that she only ended at the door step of the theatre room.

From the counsel's rival contentions, the issue is whether the dispute was prematurely instituted. As rightly contended by Mr. Rutagatina, the Nursing and Midwifery Act, No. 1 of 2010, provides, under Part VI, for a mechanism for handling disciplinary matters touching on the conduct of nurses and midwives. The appropriate provision in that respect is section 28 of the Act which states as hereunder:

- "28 (1) The Council may upon receipt of:*
- (a) a complaint against a nurse or midwife or*
 - (b) a report from the supervisory authority,*
temporarily suspend a nurse or midwife from practicing
pending the conduct or completion of inquiry.
- (2) On completion of inquiry, the Council may suspend,*
confirm, extend or reduce the temporary suspension.
- (3) The Council after due inquiry made in accordance with the*
provisions of this Act may:-
- (a) order the removal of the name of the nurse or midwife*
from the register or roll;
 - (b) order the suspension from practice of the nurse or midwife*
for a period that it may deem fit; or
 - (c) caution, censure or otherwise reprimand the nurse or*
midwife."

What is clear is that any contemplated disciplinary action against a nurse or a midwife must, as a matter of imperative requirement, follow the procedure enshrined in the cited provision of the law. Any deviation from this procedure would render the proceedings utterly flawed and unsupportable. The question is: are the instant proceedings intended to inquire into the 1st defendant's disciplinary conduct in discharging her duties?

My unflustered answer to this question is in the negative. Looking at the plaint, nothing conveys any feeling that the plaintiff's claims are intended to impeach the 1st defendant's disciplinary conduct. There is no indication that the 1st defendant's disciplinary or behavioural conduct are on the trial. What is in Court is the allegation of negligence or anything falling short of the professional standards expected of her and her principals. It is not in the interest of the plaintiff that the 1st defendant be indicted for indiscipline that she has not imputed. Her interest is to see that the suffering, allegedly experienced as a result of the alleged negligent conduct, is recompensed through an award of damages. These are matters which would not be part of the Council's mandate under the cited law. They fall squarely within the powers vested in the Court, through institution of claims such as the instant claim. In other words, tortious claims are not in the remit of the Council.

The 1st defendant's advocate has expressed his worries about the possible infliction of double punishments on the 1st defendant, but he has not told the Court if any disciplinary action against the 1st defendant is pending or impending, as to bring about the possibility of her facing a sanction, while this matter is pending or before it was instituted. He has not stated, either, that the plaintiff has given an indication that any further action, besides institution of the instant matter, is in the offing. In the absence of any of the raised possibilities, it cannot be said that the 1st defendant is staring at the danger of being punished twice for the same violation.

In view of the foregoing, I take the view that the objection is misconceived and, therefore, destitute of merits. Accordingly, the same is overruled. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 12th day of July, 2022.



M.K. ISMAIL

JUDGE

12/07/2022

