Republic v Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB); Mutea (Exparte Applicant) (Judicial Review Miscellaneous Application E052 of 2022) [2023] KEHC 25666 (KLR) (Judicial Review) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25666 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E052 OF 2022

JM CHIGITI, J

NOVEMBER 23, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD (KMLTTB) ..... RESPONDENT

AND

ELIZABETH WAMAITHA MUTEA ..... EXPARTE APPLICANT

JUDGMENT

1. The application before this Court is dated 28th June,2022 and it seeks the following orders;

    1. An Order of Certiorarito call, remove, deliver up to this Honorable Court and quash the decision of the Respondent declaring the Ex Parte Applicant's Practice License No. KMLTTB/PL/07012 to be a forgery.

    2. An Order ofMandamusdirected to the Respondent compelling them to renew the Ex Parte Applicant's Practice License.

    3. ThatCosts of this Application be in cause.

2. The application is supported by a Statutory Statement dated 13th May,2022 and a Verifying Affidavit sworn on even date by Elizabeth Wamaitha Mutea

3. The facts of the Ex parte Applicant's case are that on 14th February,2018, she presented her Practice License No. KMLTTB/PL/07012 to the Respondent herein for renewal however that the Board declined to renew the license claiming that it was forged and did not bear the requisite security marks. A complaint of forgery was lodged by the Board against the Ex parte Applicant with the law enforcement authorities.

4. The Ex Parte Applicant is said to have subsequently been arrested and charged with the offence of making a document contrary to section 3775(a) of the Penal Code and in the alternative uttering a false document with intent to defraud contrary to section 357(b) of the Penal Code.

5. The Ex Parte Applicant was arraigned before the Chief Magistrate's Court at Milimani vide Criminal Case No. 262 of 2018, Republic vs Elizabeth Wamaitha Mutea where in its judgement delivered on 14th December 2021 she was acquitted under Section 215 of the Criminal Procedure Code having established that the Prosecution did not prove its case beyond reasonable doubt.

6. The Respondent is said to despite this Judgment continue holding the Ex Parte Applicant's Practice License and that it has refused and/or failed to renew the same without giving any reason or justification of the same.

Respondent's Case

7. The Respondent in response filed a Replying Affidavit sworn on 14th February,2023 by one Patrick Kisabei who swears to be the Executive Officer of the Respondent herein.

8. In response the Respondent begins by stating that the Board is established pursuant to the provisions of Section 3 of the *Medical Laboratory Technicians and Technologists Act* as a body corporate with perpetual succession mandated by the said provision of being capable of doing or performing all such other acts necessary for the proper performance of the Respondent's functions under CAP 253A.

9. The Board's object and purpose is said to be established under Section 5 which states that the Board is established to exercise general supervision and control over the training, business, practice and employment of Medical Laboratory Technicians and Technologists Kenya and to advise the Government in relation to all aspects thereof.

10. The Board is said to work closely with the training institutions in fulfilment of the said mandate. The Respondent it is deponed indexes the candidates who have been admitted to various training institutions to pursue courses in various fields of medical laboratory sciences.

11. The Ex parte Applicant is said to have pursued a Diploma in medical laboratory sciences and was duly indexed by the Respondent to pursue the said course as a student at Mount Kenya University. Further that upon completion of studies in their respective training colleges, candidates are required to sit for professional registration examinations offered by the Respondent as a condition precedent to their registration and license.

12. The Ex parte Applicant is said to have strangely presented to the Respondent a purported practice license no. KMLTTB/PL/07012 purporting that the same had originated from the Respondent and requiring its renewal this is despite the fact that she had not been registered by the Respondent as she had failed the professional Board examination.

13. The Respondent it is deposed had reasonable cause to believe that the said practising certificate was forged and it therefore made a complaint against the Ex parte Applicant to the police leading to her prosecution in Nairobi Magistrates Criminal Case No. 262 of 2018.

14. It is the Respondent's case that although the Ex parte Applicant was acquitted, the court did not find the practising certificate as genuine and the position of the Respondent remains that the document was a forgery and did not originate from the Respondent.

15. The Respondent argues that no practising certificate was issued to the Ex parte Applicant and therefore it cannot be compelled to issue what it does not hold. Further that there is no reason to exempt the Ex parte Applicant from passing the professional Board Examinations this requirement is uniformly applied by the Respondent.

16. It is averred that the Respondent has a statutory mandate and mission to protect the health of all Kenyans by ensuring compliance with standards in training in medical laboratory sciences and as such allowing the Ex parte Applicant to be registered despite having not passed the professional Board examination would mean that the Board is abdicating its statutory mandate of regulation of standard of training technicians and technologists.

Applicant's Further Affidavit

17. In her Further Affidavit sworn on 10th March,2023 the Ex parte Applicant denies having been issued with any document by the Respondent showing that she had failed key units offered for registration and licensing. She also contends that she has never seen annexure "PK 2" as the same has never been sent to her. Further that the said annexure seems to be incomplete as it only has her name as the only student which according to her begs the question whether she was the only one who sat for the examination.

18. It is also her averment that no proof has been produced by the Respondent that she was notified. The Ex parte Applicant reiterates that she was indeed registered. The Court in Nairobi Magistrates Criminal Case No. 262 of 2018 is said to have observed that if she knew that the card was fake she would have gone to get the same card where she got the first one as opposed to having to go through the tedious process of applying and paying for the same.

19. The Ex parte Applicant also contends that she has a certificate of registration issued by the Respondent and therefore she should not be castigated for the Board's mistake.

Written Submissions

20. The Application was canvassed by way of written submissions. The Ex parte Applicant filed two sets of submissions dated 19th September,2022 and 26th May,2023.The Applicant's submission is that the Respondent's decision was not only arbitrary and capricious, but also amounted to a violation of her constitutional right. The decision is also said to be ultra vires and an abuse of the powers and mandate of the Respondent.

21. The Respondent's failure to renew the Applicant's license is said to be in contravention with Section 24(3) of the *Medical Laboratory Technicians and Technologists Act* which states "The Board shall have the power to renew any practising certificate and may refuse to renew, cancel, withdraw or suspend any certificate if satisfied that the laboratory technician or technologist is guilty of professional misconduct or is in breach of any provisions of this Act or any regulations made thereunder, for a period of twelve months".

22. The case of Republic v Chief Licencing Officer & another Ex-Parte Tom Mboya Onyango [2017] eKLR is cited in this regard where the court stated as follows;

> " In my view unless a certificate is previously cancelled or revoked, the same is, unless section 5(7) applies, renewable. In this case the 1st Respondent has not satisfactorily proved that the conditions under section 5(7) of the Act have been fulfilled in order to justify non-renewal.
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> ...However, after issuing the same, the presumption is that the laid down procedure was duly followed and the same can only subsequently be cancelled or its renewal denied in accordance with the due process of the law which in my view does not allow for shortcuts. This must be so, so that the decision to withdraw or decline the renewal of the certificate is not arbitrarily taken and used as a political weapon with a view to exposing to harm those whose views are deemed to be contrary to the system's or in order to settle personal scores."

23. On legitimate expectation the Applicant cites the case of Republic v Kenya Medical Laboratory Technicians and Technologist Board & another Ex parte Nicky Odongo Lubanga [2017] eKLR where Justice G V Odunga as he then was authoritatively quoted the case of Haoucher vs. Minister for Immigration and Ethnic Affairs Reference [1990] 169 CLR 648 where the court pronounced itself on the doctrine of legitimate expectation.

24. The Applicant also cites the case of R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607 where the court held that "if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires".

25. It is submitted that the Respondent is acting ultra vires or in excess of its powers by refusing to renew the Applicant's practicing certificate. Further that as was held in the case of Commissioner of Lands v. Kunste Hotel Limited [1997] eKLR judicial review is only concerned with the process and that the Court cannot delve into the merits of the case.

26. The Applicant also contends that it is not in contention that she sat for the required professional examination from an accredited institution as per the law as the Respondent only indicated that she could not have been registered since she had not been registered as having qualified for the said examination.

27. The Ex parte Applicant cites section 7(2) of the Act on standards of merit on Judicial Review. On the order of Mandamus and the discretionary nature of orders of Certiorari, Mandamus and Prohibition, the Applicant cites the case of Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR.

28. The Respondent in response filed written submissions dated 10th July,2023.In the submissions the Respondent cites the case of Republic vs. Judicial Service Commission Ex parte Pareno Misc. Civil Application No.1025 of 2003 on the scope of judicial review.

29. It is the Respondent's submission that the Ex parte Applicant has been treated fairly and that the decision not to issue her with the practice license was made without any iota of prejudice. The Applicant is also said to have been accorded a fair hearing and the decision not to issue her annual practice license was made after due regard to the required procedure and the law.

30. The Respondent contends that this court deals with the legality of decisions and not the merits of the decision itself. The Applicant is said to have been offered an opportunity to re-sit the key units that she

failed and these are Clinical Chemistry,Hematolgy,Blood Transfusion Sciences, Histopathology and Parasitology which offer she is said to have declined.

31. It is submitted that the Ex parte Applicant has failed to demonstrate that the Respondent herein acted illegally, irrationally or with any procedural impropriety. The case of Republic vs. Chief Magistrate's Court at Kibera Law Courts Nairobi & 2 Others Ex parte Qian Guo Jun & 2 Others eKLR was cited to further buttress this argument where the court reiterated that for an Applicant to succeed in an application for judicial review he has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

32. The Respondent also submits that an order of certiorari cannot issue against an action or decision that has been taken or made in execution and discharge of a legal mandate.

33. In conclusion the Respondent submits that in J.R. Misc. App. No.269 of 2016 Republic vs. Kenya Medical Laboratory Technicians and Technologists Board, Ex-parte Applicant; Christine Inkobia Limungi whose facts were similar to the facts in the present case, Justice Odunga dismissed the Application having found that the Ex parte Applicant violated the doctrine of exhaustion as the she had failed to appeal the decision to the minister within thirty days in accordance with Section 24 (4) of the Act. The Respondent urges the Court to be guided by the finding in the above case.

Analysis and Determination

34. I have carefully considered the Notice of Motion application dated 28th June,2022,the Statutory Statement and Verifying Affidavit in support of the application, the Respondent's Replying Affidavit, and respective written submissions and authorities and the following are the issues for determination;

    i. Whether the doctrine of exhaustion applies to this case?

    ii. Whether the Orders sought are merited?

35. The Respondent herein challenges the competency of the Ex parte Applicant's application before this court on grounds that the Applicant failed to pursue the dispute resolution mechanisms that was available to her pursuant to the provisions of section 24(4) of the Medical Laboratory Technicians Act.

36. Section 24 (3) and (4) of the Act provide as a follows;

> "(3) The Board shall have the power to renew any practising certificate and may refuse to renew, cancel, withdraw or suspend any certificate if satisfied that the laboratory technician or technologist is guilty of professional misconduct or is in breach of any provisions of this Act or any regulations made thereunder, for a period of twelve months.
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> (4) Any laboratory technician or technologist aggrieved by the decision of the Board in the exercise of its powers under subsection (3) may appeal to the Minister within thirty days of the receipt of the decision and in every such case, the decision of the Minister shall be final.

37. The Court of Appeal in the case of Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR held as follows on the need to strictly follow any procedures that are specifically prescribed for resolution of particular disputes before invoking the jurisdiction of the courts;

> This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER

OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:

> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

(See also Kones v. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others(2008) 3 KLR (ER) 296).

It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost-effective manner. In Rich Productions Ltd. V. Kenya Pipeline Company & another, Petition No. 173 of 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> "The reason why *the Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."

ertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in

Vania Investment Pool Ltd. v. Capital Markets Authority & 8 others, CANo 92 of 2014 this Court also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established by the *Capital Markets Act*.

We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts.

What we have stated above also sufficiently disposes of the appellant's contention that the High Court failed to invoke its inherent jurisdiction or abdicated its jurisdiction. It also answers the applicant's contention that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under Article 159 (2) (d) of *the Constitution*. Granted the express constitutional principle under which the dispute resolution mechanisms provided by the PPA and the EMCA are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality. In Raila Odinga & 5 others V. Iebc & 3 Others, Petition No. 5 of 2013, the Supreme Court stated that in interpreting *the Constitution*, it must be read as one whole and that Article 159(2) (d) cannot be read or applied in a manner that ousts the provisions of other clear Articles of *the Constitution*. And in Lemanken Aramat v. Harun Maitamei Lempaka, Petition No. 5 of 2014, the same Court, while considering the provisions of Article 159(2) (d) of *the Constitution* noted that where the issue at hand is one of mere procedural lapse which has no bearing on jurisdiction, the court can cure the same under Article 159(d). However, where *the Constitution* links certain vital conditions to the power of the court to adjudicate a matter, Article 159(2)(d) has no application.

38. The court in Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR held thus;

> " The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law."

39. In our instant case the Ex parte Applicant has not provided this court with any reasons as to why she did not pursue the dispute resolution mechanism provided under Section 24(4) of the *Medical Laboratory Technicians and Technologists Act* nor has she proven before this court that the said mechanism would not yield any results or that the Minister was incapable of determining the Appeal effectively.

40. The Court in the case of Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR held thus;

> " The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the

particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no argument was advanced that the mechanism under the act was not adequate nor do I find any reason to find or hold so."

41. The court in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others (supra) continues to state that;

> " 36. The question that begs for an answer is whether the dispute resolution mechanism established under the Act and the Regulations is competent to resolve the issues raised in this application. Except the submission that there is no alternative remedy, no argument was presented before me that the mechanism is not competent to resolve the dispute.
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> 37. Our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute. [30] It is also settled that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.[31]
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> 38. Having fully considered the dispute disclosed in this Petition and the Regulations, I am clear in my mind that the mechanism established under the Act and the Regulations can afford the ex parte applicant an effective remedy. In any event, the ex parte applicant has not demonstrated that it cannot get an effective remedy under the dispute resolution mechanism established under the statute. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in *the Constitution* and our law. The "deepest norms" of *the Constitution* should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. In this regard, I am persuaded beyond doubt that the adjudication of the issues complained herein can safely be left to the statutory provisions."

42. This court is persuaded beyond doubt that the adjudication of the issues complained of herein would have safely been left to the statutory provisions. No exceptional circumstances have been adduced by the Ex parte Applicant on why she failed to exhaust the internal mechanisms that were available to her before invoking this court's jurisdiction.

Orders;

In light of the above the application dated 28th June,2022 is hereby dismissed. I make no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

J. CHIGITI (SC)

JUDGE