REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 81 OF 2020

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

HITAN MAJEVDIA, NAIROBI COUNTY

EXECUTIVE COMMITTEE MEMBER.....RESPONDENT

EX- PARTE APPLICANT:

SCION HEALTHCARE LIMITED

JUDGMENT

1. The application that is before this Court for determination is a Notice of Motion dated 16th April 2020 filed by Scion Healthcare Limited (hereinafter referred to as "the *ex parte* Applicant"), in which it is seeking the following orders:-

> **(a) An order of Certiorari to bring into this Court the decision of the Respondent to close the Applicant's hospital contained in his letter dated 3rd April, 2020 and quash it.**
>
> **(b) An order of Certiorari to bring into this Court the decision of the Respondent to investigate the Applicant.**
>
> **(c) An order of Prohibition prohibiting the Respondent from interfering with, obstructing, interrupting or closing the Applicant's hospital operations.**
>
> **(d) The Respondent pays the costs of this cause.**

2. The application is supported by a statutory statement dated 7th April, 2020 and a supporting affidavit and further affidavit sworn on 7th April, 2020 and 3rd July, 2020 respectively by Augustine Kinyua, a director of the *ex parte* Applicant. The Respondent filed its Replying Affidavit dated 26th June, 2020 sworn by Hitan Majevdia, a County Executive Committee Member serving as the Health Executive for Nairobi City County Government. A summary of the respective parties' cases is provided in the next sections.

The *ex parte* Applicant's case

3. The *ex parte* Applicant states that it is a limited liability company duly incorporated as such under the Companies' Act, and owns and operates a hospital known as Scion Healthcare - Kwa Njenga, along Catherine Ndereva Road, Nairobi. Further, that it is duly licensed by the Medical Practitioners and Dentists Board to operate the said hospital under Registration Number 002679, and annexed a copy of its certificate of incorporation, and licence to operate as a private medical institution.

4. The *ex parte* Applicant's case in a nutshell, is that the Respondent has, by a closure notice dated 3rd April, 2020, illegally closed the *ex parte* Applicant's hospital. The *ex parte* Applicant annexed a copy of the said notice and asserted that the Respondent's closure notice is unlawful, unconstitutional and procedurally flawed, for reasons that prior to issuing the closure notice, the Respondent never gave it any form of hearing, and acted arbitrarily and capriciously in abuse of power.

5. Further, that the alleged inspection report the Respondent relies upon to close the *ex parte* Applicant hospital has and had not been provided to it, and that the Respondent never notified it of any public health requirements it was expected to meet. The *ex parte* Applicant

further averred that the Respondent, in execution of his illegal processes stated that he was acting upon the *ex parte* Applicant landlord's complaint, whereas the said landlord has unequivocally stated through his lawyer that he never made any such complaint. The *ex parte* Applicant a copy of an email to this effect from the said landlord's Advocate's email.

6. It was further deponed that closure of the *ex parte* Applicant's hospital operations has not taken into account the following material considerations:

a) Interruption of healthcare services being given to patients who are presently admitted in the hospital.

b) Interruption of healthcare services being given to patients in various stages of medical attention and treatment.

c) The monumental health crisis the closure will cause many patients including risk to their health and life.

d) The healthcare strain presently being experienced by the entire country as a result of the COVID-19 pandemic.

e) Immediate loss of employment of various hospital staff.

f) Abrupt loss of business and income.

7. The *ex parte* Applicant detailed out the steps it had taken to comply with various requirements in its further affidavit, and averred that it had contracted a medical waste management company approved by the National Environment Management Authority to manage its medical waste and that no complaint has ever been made to it in regards to waste management. A copy of the waste management contract was annexed.

8. It reiterated that its hospital and facilities have been certified as fit for operation of a level 3 hospital by the Medical Practitioners and Dentists Council, which is the statutory body so mandated, and alleged that the Respondent's officers did not conduct any inspection of the premises, and only required the *ex parte* Applicant to produce a change of use certificate, and no other requirements for compliance were served upon it. Further, that the question of lack of change of user is a question only answerable by the proprietor of the premises, who has leased a substantial part of the property to various commercial operations. The *ex parte* Applicant added that in any case, the Respondent has no power to order closure of a facility or premises as only a magistrate can.

9. Lastly, the *ex parte* Applicant averred that the Respondent's arbitrary and hasty closure of its hospital is aimed at victimizing it for protesting against harassment, disruption of business and breach of peace by six of the Respondent's officers between 31st March,2020 and 1st April, 2020, and annexed a copy of its protest letter dated 1st April, 2020 to the Director General, Nairobi Metropolis. It was contended that in the circumstances, the *ex parte* Applicant is reasonably apprehensive that its hospital operations shall be brought to an end without the due process of law being followed.

The Respondent's case

10. The Respondent on his part averred that on 18th March, 2020, he received a complaint letter from one Peter Maina Njuguna in relation to the operations of the *ex parte* Applicant at Plot No.1/22 Catherine Ndereva Road Imara Daima Ward, and annexed a copy of the said letter. The Respondent contended that the said complainant was the landlord of the *ex parte* Applicant and wanted his intervention since other tenants were complaining that the *ex parte* Applicant's operations were hazardous since it did not have a proper waste disposal system, thus exposing them to health risks. He stated that as a result, he dispatched a Public health inspection team from the Nairobi City County Public Health Department to go and inspect the *ex parte* Applicant s health care facility on 31st March, 2020.

11. The Respondent deponed that the public health officers found the *ex parte* Applicant's facility operating without a change of user, and that the *ex parte* Applicant did not have proper waste disposal of surgical gloves and used swabs, as some were littered within the property exposing the other occupants to health risks. He added that the officers noted that the health facility lacked proper access and exit for patients as it is located on the first floor of the building with a very narrow stair case.

12. The Respondent further contended that their officers visited the maternity wing of the facility and noted that it was poorly lit and poorly ventilated, and that there was a very strong and foul smell in the ward which made it not habitable. Therefore, that that the *ex parte* Applicant was consequently issued with a statutory notice to stop further operations within 24 hours, until they met the minimum requirement for operation of the health facility. The Respondent annexed copies of the photos taken at the facility.

13. Subsequently, that on 1st April, 2020, the Respondent's officers made a visit to the *ex parte* Applicant's premises to confirm compliance and found out that the *ex parte* Applicant was still operating and had not implemented any of the requirements. The Respondent averred that his officers sought assistance from the Deputy Central Investigation the Officer (DCIO) stationed in Embakasi but that the *ex parte* Applicant still continued to operate. Therefore, that on 3rd April, 2020, their office officially issued an enforcement notice the *ex parte* Applicant to close the facility until they met the requirements raised by the Public Health officers, and the Respondent annexed a copy of the statutory notice dated 3rd April, 2020. He deposed that the allegation that the Applicant was not privy to the public health directives is erroneous as the conditions for reopening are very clear in the enforcement notice.

14. In conclusion, the Respondent urged the Court not to grant the Orders sought by the *ex parte* Applicant as the public shall be exposed to great harm, and that the *ex parte* Applicant should not be allowed to reopen without complying with the public health directives as the facility is inhabitable and hazardous to the general public. He reiterated that the *ex parte* Applicant flouted due process by operating the health facility in a residential flat and had not sought the necessary approvals, and as such committed fraud.

The Determination

15. The instant application was canvassed by way of written submissions. The ex parte Applicant's advocates on record, Nyamweya MamboLeo Advocates, filed submissions dated 6th July 2020, while Njenga Maina & Company Advocates for the Respondents filed submissions dated 6th August 2020.

16. I have considered the pleadings and submissions filed by the parties herein, and it is prudent at this stage to clarify this Court's judicial review jurisdiction. The parameters of judicial review were explained in detail in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

17. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator** as happens in an appeal. Judicial review therefore does not entail a re-hearing of a particular case.

18. Consequently, there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. The merit review that can be undertaken by the Court is limited to certain specified aspects of the lawfulness of a decision, as delineated by the grounds set out in section 7(2) of the Fair Administrative Action Act. These grounds include **failing to take into account relevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are also questions of law, on which there are settled applicable principles.**

19. With the above-stated delineation in mind, three substantive issues have been discerned by the Court from the parties' pleadings and. The first is whether the Respondent acted beyond its powers in issuing the closure notice dated 3rd April, 2020 and closing the *ex parte* Applicant's hospital. The second is whether the Respondent was procedurally fair. Lastly is whether the *ex parte* Applicant merits the relief sought.

On whether the Respondent acted beyond its powers

20. On the first issue, the ex *parte* Applicant submitted that the Respondent does not possess the powers he purported to exercise in closing its hospital and that his action was *ultra vires* the Public Health Act. The *ex parte* Applicant cited section 119 of the Public Health Act which requires that notice be given by the Medical Officer for the removal of the nuisance and section 120 of the Public Health Act which gives the procedure to be followed in the absence of compliance with the notice. It was averred that no medical officer issued the compliance notice specified in section 119 of the Public Health Act and that the procedure under section 120 of the Public Health Act was not observed at all. The *ex parte* Applicant added that closure of premises under the Public Health Act is the province of the court, and that the Public Health Officers under the command of the Respondent have no powers under Section 120 of the Public Health Act to order closure of premises.

21. According to the *ex parte* Applicant the provisions of the Public Health Act only empowers them to cause a complaint to be made before a magistrate, and it is only the proceedings before the Magistrate could culminate into an order for closure of the premises. The *ex parte* Applicant cited the decisions to this effect in **Republic vs District Public Health Officer, Kisii and Another, Kisii High Court Miscellaneous Application No. 226 of 2004**, **Republic v Chief Magistrate's Court at City Hall-Nairobi & 2 others ex parte Angellina Mbaabu t/a Avenue Pharmacy & others [2017] e KLR**. and **Republic v Public Health Officer, Trans-Nzoia ex Parte Hesbon Okoth Mudenyo, (2015) eKLR**. It was further submitted that under Section 119 and 120 of the Public Health Act, only a medical officer has power to issue a notice to remove a nuisance. Therefore, that the closure notice is of no effect since the Respondent did not have jurisdiction to issue it.

22. The Respondent's submissions on the issue were that it is not in dispute that the *ex parte* Applicant is a health facility and this being the case, the Respondent has the duty to regulate the operation of all health facilities including the *ex parte* Applicant to the convenience of the

public. He stated that therefore, the *ex parte* Applicant ought to follow the requirements set for operation of a health facility as it is not excluded. The Respondent submitted that his decision was reasonable and made in good faith as he was dutifully and legally executing his mandate to ensure that the *ex parte* Applicant meets the minimum requirements set for operating a health facility and that the public was being protected from its hazardous acts. The Respondent also submitted that after receiving a complaint from the Applicant's landlord, one Peter Maina Njuguna on 18th March 2020, a public health inspection team from Nairobi County was dispatched to inspect the *ex parte* Applicant's facility on 31st March, 2020, and ordered the *ex parte* Applicant to stop further operation until they met the minimum requirements for operating a health facility.

23. Further, that this led to the issuance of an enforcement notice on 3rd April, 2020, in which the Respondent halted the operation of the *ex parte* Applicant until it adhered to the directives. The Respondent asserted that this was reasonable as it was intended to protect the public from the dangers that emanated from the *ex parte* Applicant, and that he had power and authority to inspect and issue an enforcement notice to the *ex parte* Applicant. Further, it is clear that the closure of the health facility was not permanent and that once the *ex parte* Applicant had adhered to the directives, they could be allowed to continue working like any other person operating a health facility.

24. From the submissions made, it is evident that the arguments on whether the Respondent acted within its powers were urged along two fronts. The first front was that of whether the Respondent has legal or statutory powers to order the closure of the *ex parte* Applicant's hospital, and the second was whether the Respondent followed the applicable procedure. In determining whether or not the Respondent acted illegally or in error of law, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law.

25. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, the closure notice dated 3rd April 2020 by the Respondent read as follows:

"The Proprietor

Scion Nursing Home

Imari Daima

NAIROBI

RE: CLOSURE OF SCION NURSING HOME PLOT NO1/22 CATHERINE NDEREVA ROAD

The above subject matter refers.

Having carefully read the complaint by the landlord of Plot No1/22, Catherine Ndereva Raod and subsequent Public Health Inspection report, and based on the report, the facility should be and is hereby closed forthwith until the raised Public Health requirements are met.

Please ensure compliance with the given recommendations.

HITAN MAJEVDIA OGW

COUNTY EXECUTIVE COMMITTEE MEMBER"

26. In this regard, it is the constitutional position that county health services including promotion of primary health care are now a county function under Article 186 and Part 2 of the Fourth Schedule. Under section 13 of the Public Health Act, health authorities, which include municipalities which are now under county governments, have a duty to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred by the Act or by any other law within their areas of jurisdiction. In addition, under section 116 of the Public Health Act local authorities are under a duty to take all lawful, necessary and reasonably practicable measures for maintaining clean and sanitary conditions, and for preventing the occurrence therein of, or for remedying any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition.

27. These constitutional and legal provisions notwithstanding, the Respondent did not cite any specific statutory provisions that empower it to close hospital facilities within his area of jurisdiction in the closure notice dated 3rd April 2020. In addition, while he submitted that he has power to regulate the *ex parte* Applicant, he failed to specify the regulatory aspects as regards hospital or nursing home facilities that fall within his jurisdiction and the enabling law that permits him to close such facilities. The Respondent as a public officer and administrative authority is in this respect regulated by the rule of law, and can only act according to the law, and in this instance specific legal provisions that empower it to order closure of hospital facilities.

28. In addition, the procedure to be followed by the Respondent in undertaking its duty in maintaining sanitation is detailed in section 119 - 120 of the Public Health Act. Section 119 requires a medical officer of health, if satisfied of the existence of a nuisance, to serve a notice to remove the nuisance on the author of the nuisance or on the occupier or owner of the dwelling or premises on which the nuisance arises. If there is non-compliance with the notice, section 120 provides an elaborate procedure to be observed as follows:

"(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court.

(2) If the court is satisfied that the alleged nuisance exists, the court shall make an order on the author thereof, or the occupier or owner of the dwelling or premises, as the case may be, requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose.

(3) The court may by such order impose a fine not exceeding two hundred shillings on the person on whom the order is made, and may also give directions as to the payment of all costs incurred up to the time of the hearing or making of the order for the removal of the nuisance.

(4) If the court is satisfied that the nuisance, although removed since the service of the notice, was not removed within the time specified in such notice, the court may impose a fine not exceeding two hundred shillings on the person on whom such notice was served, and may, in addition to or in substitution for such fine, order such person to pay all costs incurred up to the time of the hearing of the case.

(5) If the nuisance, although removed since the service of the notice, in the opinion of the medical officer of health is likely to recur on the same premises, the medical officer of health shall cause a complaint relating to such nuisance to be CAP. 242 Public Health [Rev. 2020] 46 made before a magistrate, and the magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before him.

(6) If the court is satisfied that the alleged nuisance, although removed, is likely to recur on the same premises, the court shall make an order on the author thereof or the occupier or owner of the dwelling or premises, as the case may be, requiring him to do any specified work necessary to prevent the recurrence of the nuisance and prohibiting its recurrence.

(7) In the event of the person on whom such order as is specified in subsections (5) and (6) not complying with the order within a reasonable time, the medical officer of health shall again cause a complaint to be made to a magistrate, who shall thereupon issue a summons requiring such person to appear before him, and on proof that the order has not been complied with may impose a fine not exceeding two hundred shillings, and may also give directions as to the payment of all costs up to the time of the hearing.

(8) Before making any order, the court may, if it thinks fit, adjourn the hearing or further hearing of the summons until an inspection, investigation or analysis in respect of the nuisance alleged has been made by some competent person.

(9) Where the nuisance proved to exist is such as to render a dwelling unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment the dwelling is fit for that purpose; and may further order that no rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate the closing order and by a further order declare the dwelling habitable, and from the date thereof such dwelling may be let or inhabited.

(10) Notwithstanding a closing order, further proceedings may be taken in accordance with this section in respect of the same dwelling in the event of any nuisance occurring or of the dwelling being again found to be unfit for human habitation.

29. Compliance with this procedure was emphasized by the Courts in **Barclays Bank of Kenya vs. City Council of Nairobi [2005] e KLR,** and in **Jubilee Insurance Co. of Kenya Ltd vs. City Council of Nairobi [2007] eKLR**, wherein the Court held as follows:

"S. 119 of the Public Health Act confers authority on the Medical Officer to issue notices and file complaints relating to parties committing nuisances to remove the nuisances. Under the said Section, once the Medical Officer is satisfied that a nuisance exists, he shall serve notice on the author of the nuisance and if the nuisance is not removed in the specified time, the Medical Officer shall cause a complaint relating thereto to be made before a magistrate. And that is the reason why under S. 167 of the Public Health Act, it is provided that a health authority may specifically authorize any of its officers in writing, to prosecute any offence.

30. The Public Health Act in this respect defines a "medical officer of health" to mean — (a) the Director-General for health; and (b) in relation to the area of any municipality, the duly appointed medical officer of health of the municipality including a public officer seconded by the Government to hold such office; and (c) in relation to any other area a medical officer of health appointed by the Minister for that area. The Respondent alleged that the closure notice he issued dated 3rd April 2020, was the enforcement notice that was served on the ex parte Applicant, and it is thus evident that in the circumstances there was no compliance with section 119 and 120 of the Public Health Act.

31. Lastly, under section 153 of the Public Health Act, the power to regulate nursing homes, private hospitals, maternity homes, and other institutions where the sick are treated is specifically given to the Director General of Health or any of the medical officers who have the authority to act on behalf of the Director-General and the Central Board of Health as follows:

(1) The Minister, on the advice of the board, may make rules for the conduct and inspection of nursing homes convalescent homes, private hospitals, private mental hospitals, maternity homes, infirmaries or any institutions where invalids,

convalescents or children are treated or received upon payment of fees or charges, and no person shall open, or keep open, any such premises unless the premises and the keeper thereof are licensed by the board.

(2) The Director-General for health, on the advice of the board, may authorize a medical practitioner to visit and inspect any such premises, as are mentioned in subsection (1) and to report to the board upon any matter or thing connected with such premises or the use thereof.

(3) Any person who knowingly obstructs an authorized medical practitioner in any inspection authorized by the Director-General for health, under subsection (2), shall be guilty of an offence.

(4) The board may refuse to grant a licence and may cancel any licence which has been granted under this section on any of the following grounds—

(a) that the premises in respect of which a licence is sought or has been granted are unsuitable or otherwise do not conform with the requirements of any rules made under this section;

(b) that the granting or continuance of a licence would be contrary to the public interest;

(c) that the person in respect of whom a keeper's licence is sought or has been granted has failed to satisfy the board that he or she is a fit and proper person to be trusted to conduct or to continue to conduct the premises for which the keeper's licence is sought or has been granted.

32. Arising from the above provisions, it is the finding of this Court that the Respondent in issuing a closure notice dated 3rd April 2020, and ordering the closure of the *ex parte* Applicant's hospital, wrongly exercised powers that he does not possess, and which are to be exercised by other functionaries under the Public Health Act, namely the Director General of Health, Central Board of Health or the Courts. In addition, the Respondent in performing his duties as regards maintenance of sanitation did not follow the laid down procedure, and therefore acted *ultra vires*, both in substance and procedurally.

On whether the Respondent was procedurally fair

33. The third front argued by the parties was whether the Respondent was procedurally fair in making the decision to close the *ex parte* Applicant's hospital. The *ex parte* Applicant submitted that that the rules of natural justice were flouted in the decision-making process, as the Respondent never gave the *ex parte* Applicant an opportunity for any form of hearing to respond and make representations to any complaint made, nor to see the inspection report and comment upon it and its recommendations. Reliance was placed on the decision in **Hypolito Cassiano De Souza vs Chairman and Member of Tanga Town Council (1961) EA 377**; **David Oloo Onyango v Attorney-General,** and **Barclays Bank of Kenya v City Council of Nairobi, Nairobi High Court Miscellaneous Application Number 4475 of 2005**, that one cannot be condemned unheard. In addition, that the Respondent acted contrary to Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act, 2015. It was contended that as held in **Republic vs Nairobi City County & another Ex-Parte Premier Food Industries Limited [2016] eKLR** such infraction renders the Respondent's decision a nullity.

34. Lastly, it was submitted that it is trite law that persons who are bestowed with statutory powers and duty should exercise them reasonably, and should not use the powers whimsically, unreasonably and arbitrarily. The *ex parte* Applicant in this respect cited the cases of **Republic V. Kenya Revenue Authority ex Parte Spetre International Limited, Kisumu HCMCA No. 164 of 2009 and Republic v The Registrar General and Others ex Parte Peter Mambembe and Others Mombasa High Court Miscellaneous Application Number 102 of 2006**, it was held for the position that a person or body exercising a statutory discretion will be quashed for irrationality or for being unreasonable and it is incumbent upon bodies exercising administrative authority to give reasons for administrative actions.

35. The Respondent on the other hand contended that there was no need of a hearing as the *ex parte* Applicant's actions were exposing the public to health risks, and therefore there was need to close the health facility as soon as possible in order to protect the public until when it met the directives. Reliance was placed on the decision in **R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others, High Court Misc. Application No. 12 of 2002**, where it was held that it is not in every situation that the other side must be heard, and there are situations when the need for expedition in decision making far outweighs the need to hear the other side.

36. The fact that the right to a hearing is not specifically provided for under the Public Health Act, does not remove the Respondent from the purview of Article 47 of the Constitution or rules of natural justice. The Court of Appeal at Kisumu in **County Assembly of Kisumu & Others vs Kisumu County Assembly Service Board & Others**, **Civil Appeal Nos. 17 & 18 of 2015,** held that the right to a fair hearing encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be accorded to parties before by an administrative or quasi-judicial body, but a constitutional imperative.

37. It is now a core requirement under Article 47 of the Constitution that every person who is to be affected by a decision must be accorded fair administrative action, and the procedures to be follows are provided by the Fair Administrative Action Act of 2015. Section 2 of the Fair Administrative Action Act, which was enacted to implement Article 47, in this regard defines an administrative action to include—

a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

38. Article 47 of the Constitution provides as follows in this regard:

> ***(*1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

39. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

> **"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard;**
>
> **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
>
> **(d) a statement of reasons pursuant to section 6;**
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> **(e) notice of the right to legal representation, where applicable;**
>
> **(f) notice of the right to cross-examine or where applicable; or**
>
> **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
>
> **(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> **(a) attend proceedings, in person or in the company of an expert of his choice;**
>
> **(b) be heard;**
>
> **(c) cross-examine persons who give adverse evidence against him; and**
>
> **(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."**

40. In the present case, three observations are material. The Respondent annexed a copy of the alleged complaint from the *ex parte* Applicant's landlord, one Peter Maina Njuguna, which was dated 18th March 2020. The Respondent however did not bring any evidence to demonstrate that the said complaint was brought to the attention of the *ex parte* Applicant, or that it was given an opportunity to respond. In addition, the Respondent did not provide any evidence of the public health inspection report that he referred to in his notice of closure dated 3rd April 2020, nor that the same was availed to the *ex parte* Applicant. Lastly, the Respondent expressly admits to not having given the *ex parte* Applicant a hearing, and this is also evident from the contents of the closure notice dated 3rd April 2020.

41. Procedural fairness is embedded in the natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done. There is no fixed content to the duty to afford procedural fairness, and the answer to a question whether the threshold of fairness has been met will depend on the nature of the matters in issue, and whether there was a reasonable opportunity for parties to present their cases in the relevant circumstances.

42. It is evident that the *ex parte* Applicant was not accorded an opportunity to make representations before closure of its hospital. Contrary to the Respondent's assertion, the only discretion that is accorded to an administrator in the public interest in this regard, is as regards the nature of hearing to be afforded, and timelines to be followed, but it is constitutional imperative that the opportunity to be heard is nevertheless afforded to a party that will be affected by an administrative decision. The decision relied upon by the Respondent in **R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others** was also decided before the 2020 Constitution, and is therefore no longer applicable.

On whether Remedies sought are Merited

43. The last issue is as regards the merits of the remedies sought by the *ex parte* Applicant, which are orders of the orders of certiorari and prohibition. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the orders of prohibition and certiorari can issue as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a**

decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings….Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

44. It was in this regard submitted by the Respondent that the *ex parte* Applicant is not entitled to the prayers sought in the instant application, because it has not met the threshold set, as the Respondent's actions were lawful and that it was in the public interest to stop further operation of the *ex parte* Applicant's health facility to protect the public from being exposed to health risks.

45. The closure notice dated 3rd April 2020 and closure of the *ex parte* Applicant's hospital facility by the Respondent have however been found by this Court to have been *ultra vires* the Respondent's powers, and procedurally unfair. The order sought of certiorari to quash the said closure notice and the decision to close the *ex parte* Applicant's hospital is thus merited. As regards the outstanding orders sought, care should be taken not to unnecessarily prevent or prohibit the Respondent from undertaking his statutory duties where merited and undertaken lawfully, and to this extent they cannot issue in the manner sought.

The Disposition

46. In the premises this Court finds that the *ex parte* Applicant's Notice of Motion dated 16th April 2020 is merited to the extent of the following orders:

I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing and to quash the Respondent's closure/enforcement notice dated 3rd April 2020, and the resultant decision of the Respondent to close the *ex parte* Applicant's hospital, namely Scion Nursing Home.

II. The Respondent shall meet the Applicant's costs of the Notice of Motion dated 16th April 2020.

47. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE