



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 86 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, STATE

DEPARTMENT OF LIVESTOCK.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

AGRICULTURE, LIVESTOCK, FISHERIES AND

CO-OPERATIVES.....2ND RESPONDENT

THE KENYA VETERINARY BOARD.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

DR. JOSIAH MACHUKI MANDIEKA.....1ST INTERESTED PARTY

DR. JOHN WILBEFORCE MUCHIBI.....2ND INTERESTED PARTY

PROF. JAMES MUCUNU MBARIA.....3RD INTERESTED PARTY

EX PARTE APPLICANTS:

1. DR. ELIZABETH OUKO

2. MR. JOHN NGIGI NYUMU

3. DR. BENSON MUTISYA MUTHUI

4. MR. FRANCIS MUTHURI MUTU

JUDGMENT

1. The *ex parte* Applicants herein, Dr. Elizabeth Ouko, Mr. John Ngigi Nyumu, Dr. Benson Mutisya Muthui and Mr. Francis Muthuri Mutu (hereinafter referred to as “the 1st, 2nd, 3rd, and 4th *ex parte* Applicants respectively”), state that they are registered members of the Kenya Veterinary Board, which is the 3rd Respondent herein. They are aggrieved by the appointments made to the Council of the Veterinary Medicine Directorate by the Cabinet Secretary of the Ministry of Agriculture, Livestock, Fisheries and Co-operatives, who they have sued as the 2nd Respondent. The said appointments were published in Gazette Notice No. 3243 dated 24th April 2020.

2. The 1st, 2nd, 3rd, and 4th *ex parte* Applicants consequently sought leave to file an application by way of a Notice of Motion dated 12th May 2020, in which they are seeking the following judicial review orders:

a) That this Court do issue an order of Certiorari quashing Gazette Notice No. 3243 dated 24th April, 2020 purporting to appoint Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga as Council Members of the Veterinary Medicine Directorate.

b) That this Court do issue an order of mandamus compelling the 2nd Respondent to gazette and appoint persons as was recommended by the 3rd Respondent to the said Veterinary Medicine Directorate.

c) That the costs of the application be borne by the 2nd and 4th Respondents jointly and severally.

3. The application is supported by a statement dated 28th April 2020, and a verifying affidavit sworn on the same date by the 1st *ex parte* Applicant. The 1st, 2nd and 4th *ex parte* Applicants swore additional affidavits on 12th May 2020 in support of the Notice of Motion. In addition, Klarie, Kabita, Kihunyu & Associates, the *ex parte* Applicants' Advocates on record filed written submissions dated 15th July 2020.

4. The Respondent's response is in a replying affidavit sworn on 26th August 2020 by Peter Gatirau Munya, the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives, the 2nd Respondent herein, and submissions dated 30th August 2020, filed by K. Odhiambo, a State Counsel in the Attorney General's Office. The Interested Parties on their part filed replying affidavits sworn on 26th August 2020, and their advocates on record, Burton Isindu & Company Advocates, filed submissions dated 26th August 2020.

5. The parties' respective cases as stated in their pleadings and submissions are summarised in the next sections.

The *ex parte* Applicants' Case

6. It is the *ex parte* Applicants' case that pursuant to Section 39(2) of the Veterinary Surgeons and Veterinary Para-Professionals Act, the Veterinary Medicine Directorate is established to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons. Further, that under Paragraph 8(1) (f) and (g) of the Veterinary Surgeons And Veterinary Paraprofessionals Regulations, 2015, the 3rd Respondent is required to nominate three veterinary surgeons, and one veterinary technologist from the veterinary pharmaceutical industry to be appointed by the 2nd Respondent as Members of the Council to the Veterinary Medicine Directorate.

7. In addition, that in accordance with its mandate the 3rd Respondent nominated the following persons for appointment pursuant to Regulations 8(1) (f) and (g) of Veterinary Surgeons And Veterinary Paraprofessionals Regulations, 2015 :

- a) Dr. Mbogori Kenneth Mutua - Kenya Veterinary Board Reg. No. 785
- b) Dr. Barnard Bella Okinyi Aseto -Kenya Veterinary Board Reg. No. 2256
- c) Dr. Irene Thiguku Kamanjah - Kenya Veterinary Board Reg. No. 1483
- d) Samson Moses Kiogora Kenya Veterinary Board VTB 00364

8. The *ex parte* Applicants stated that by a letter dated 27th April 2020, the 3rd Respondent sent the names of the said persons to the 1st Respondent for onward transmission to the 2nd Respondent for gazette and appointment to the Council of the Veterinary Medicine Directorate. However, that in total disregard to the law, and contrary to the recommendations of the 3rd Respondent, the 2nd Respondent illegally and fraudulently, purported to gazette Josiah Machiki Mandieka, John Wilberforce Muchibi and James Muchini Mbaria pursuant to Paragraph 8 (1) (f) of the Veterinary Surgeons And Veterinary Paraprofessionals Regulations, 2015, and Douglas Gitonga pursuant Paragraph 8 (1) (g) of the Veterinary Surgeons And Veterinary Paraprofessionals Regulations, 2015 as Council Members to the Veterinary Surgeons And Veterinary Paraprofessionals Directorate .

9. According to the *ex parte* Applicants, the 2nd Respondent action is an illegality and unjust exercise of power, and gazette notice No. 3243 undermines the provisions of Paragraph 8 (1) (f) and (g) of the Veterinary Surgeons and Veterinary Paraprofessionals Regulations 2015, under which the 2nd Respondent purported derived his powers to appoint members to the Council of the Veterinary Medicine Directorate, lacks procedural fairness, and is contrary to their legitimate expectations. Further, the 2nd Respondent contravened the provisions of the Constitution in particular Article 21(3), Article 27(3) and Article 27 (8) of the Constitution by failing to implement the principle that not more than two-thirds of the members of the same gender shall be appointed to the Veterinary Medicine Directorate.

10. The *ex parte* Applicants annexed copies of the Gazette Notice No. 3243 dated 24th April 2020, the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2015, and of correspondence on the nominations for appointment made by the 3rd Respondent as their evidence.

11. These averments were reiterated in the *ex parte* Applicants' submissions, wherein it was contended that the appointment of the Interested Parties as Council members of the Veterinary Medicine Directorate pursuant to Paragraphs 8 (1) (f) and Paragraph 8 (1) (g) of the said Regulations by the 2nd Respondent is not only a violation of the express provisions of the law, but also an inexcusable and manifest

procedural impropriety and illegality that should be immediately remedied by an appropriate order of this Court.

12. The *ex parte* Applicants further submitted that in the present legal and constitutional dispensation, every appointment to public office must abide the law and that the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2015, do not authorize the 2nd Respondent to make the appointments. Therefore, that the said appointments are therefore erroneous, illegal and in excess and/ or without power and jurisdiction, *ultra vires* and are therefore a nullity *ab initio*.

13. It was also contended that the process leading to the appointment of the Interested Parties herein as the Council Members of the Veterinary Medicine Directorate was opaque and shrouded in mystery was therefore exclusive, discriminative and unlawful, and that the appointments was also made contrary to principles espoused in the Constitution, particularly the principle of the two thirds gender rule.

14. In conclusion, the *ex parte* Applicants submitted that the failure to adhere to the law by the 2nd Respondent constitutes procedural failure that is amenable to judicial review, and that they have a legitimate expectation that the 2nd respondent will act in good faith and will comply with the law. Reliance was placed on the decision in **Republic -vs- The Hon. Attorney General & 2 Others, Nairobi HC MISC Application No. 196 of 2015**, that unless the executive exercise of power complies with both the letter and the spirit of the Constitution, such action is liable to be quashed.

The Respondents' Case

15. The 2nd Respondent confirmed that he appointed the Interested Parties as members of the Council to the Veterinary Medicine Directorate, and explained that the 1st and 3rd Interested Parties, Dr. Josiah Machiki Mandieka and Prof. James Muchini Mbaria, were already serving and were merely reappointed as they were eligible for reappointment. Further, that the other 2 (two) members, namely Dr. John Wilberforce Muchibi who is the 2nd Interested Party, was appointed subject to nominations by the Kenya Veterinary Association, while Douglas Gitonga was nominated by the Kenya Veterinary Board.

16. The 2nd Respondent averred that he observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of his statutory mandate and the Constitution of Kenya in making the appointments, and specifically cited Article 10 on national values and principles of governance and Article 73 on responsibilities of leadership. Further, that the appointments made were in full compliance with section 36 of the Public Service Commission Act, No. 10 of 2017, and that he was satisfied that all the set conditions were met by the persons appointed including merit, qualification, experience and integrity and regional balance.

17. The provisions of paragraphs (5) and (7) of Regulation 8 of the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2015 were cited by the 2nd Respondent, for the position that the Cabinet Secretary shall appoint the members of the Council by notice in the Kenya Gazette, and that the members of the Council shall hold office for a term of three years and shall be eligible for re-appointment for one further term. The 2nd Respondent averred that it is therefore lawful for him to reappoint any member who is eligible for reappointment, and that two (2) of the appointees, namely Professor James Muchini Mbaria and Dr. Josiah Machiki Mandieka, who had served in the previous inaugural Veterinary Medicines Council, were indeed eligible for re-appointment, and he had no negative report on their performance.

18. The Respondents submitted that reappointment of state officers is not subject to the same conditions of recruitment as those of appointment, and reliance was placed on the case of **Republic vs Cabinet Secretary for Education, Science and Technology and 3 Others, (2014) eKLR** where it was held that when it comes to reappointment for a further term the body responsible for re-appointment assesses the person and makes a decision whether to re-appoint the incumbent or open the position for competition.

19. Further, that the other 2 appointees, Dr. John Wilberforce Muchibi and Douglas Gitonga met all the criteria of section 36 of the Public Service Commission Act and had good standing among their professional peers. The 2nd Respondent asserted that his decision was therefore reasonable, rational, fair and lawful, and did not overreach his mandate and jurisdiction.

20. The Respondents therefore submitted that the above appointments were lawful and were made within the confines of the law, and that in making the appointments, the 2nd Respondent observed rules of natural justice and acted lawfully and reasonably in exercise of his statutory mandate and in compliance with Veterinary Surgeons and Para-Professionals Act 2011, the Veterinary Surgeons and Para-Professionals (Regulations) 2015, the provisions of section 36 of the Public Service Commission Act.

The Interested Parties' Case

21. The Interested Parties on their part averred that the *ex parte* Applicants have misunderstood the power and role of the relevant Cabinet Secretary in appointment of the Veterinary Medicines Directorate Council, and that the Veterinary Surgeons and Veterinary Paraprofessionals Act, 2011 and the Veterinary Surgeons and Veterinary Paraprofessionals (the Veterinary Medicines Directorate) Regulations, 2015 vests the power of appointment of the Veterinary Medicines Directorate Council in the Cabinet Secretary for the time being for Agriculture, Livestock, Fisheries and Co-operatives, and not the Kenya Veterinary Board as suggested by the Applicants.

22. The 1st and 3rd Interested Parties confirmed that they had been serving as members of Veterinary Medicines Directorate Council since 2018 having been first appointed as such for a three (3) year term vide letter dated 18th June 2018, which appointment was done after we fulfilled all the requirements under Regulation 8 of the Regulations.

23. The Interested Parties contended that the 3rd Respondent wrote a letter dated 6th August 2019 to Kenya Veterinary Association and various other professional Associations in the veterinary sector requiring that nominations for appointment to the Veterinary Medicines Directorate Council be done as the term of the initial council was approaching expiry. Further, that the relevant stakeholders,

particularly the Kenya Veterinary Association, were involved in rigorous process of selection of possible nominees whereupon the five names, including those of the Interested Parties, were duly forwarded to the 3rd Respondent for onward transmission to the Cabinet Secretary, from which he would select suitable persons for appointment by virtue of the power vested in him by the law .

24. However, that instead of the 3rd Respondent forwarding the names of the qualified persons to the Cabinet Secretary for appointment as required by law, it engaged in further vetting and requested for additional names from the Kenya Veterinary Association, which was responded to by a letter dated 20th March 2020 forwarding a list of 12 names. Further, that the *ex parte* Applicants, are not aggrieved parties, as they are not members of the 3rd Respondent or proposed nominees, and participated in the nomination process that ranked and recommended the Interested Parties to represent the veterinary industry as members of the Kenya Veterinary Association.

25. They annexed a copy of the 3rd Respondent's letter dated 6th August 2019, and copies of letters dated 6th September 2019, 10th December 2019 and 20th March 2020, containing the recommendations and lists of the said names forwarded by the Kenya Veterinary Association.

26. According to the Interested Parties, the 2nd Respondent did not breach any law or regulations in exercising his powers to re-appoint the sitting members of the Veterinary Medicines Directorate Council and the rest of the members vide the Kenya Gazette Notice No.3243 dated 24th April 2020, and the Veterinary Medicines Directorate Council is properly constituted with all the requisite/ specified categories of professionals as shown by the copies of the letters they attached. Hence that the instant proceedings are mischievous and brought in bad faith without demonstration of any right or prejudice on the part of the *ex parte* Applicants.

27. The Interested Parties submitted that the *ex parte* Applicants have not established or proved their present status or interest, and that there is no evidence on record that they participated in the process leading to the nominations or objected to the nomination or intended appointments through the mechanisms/processes within, and as members of Kenya Veterinary Association or Veterinary Input Suppliers Association of Kenya that nominated and recommended the nominees .

28. Further, that the *ex parte* Applicants are under the erroneous thinking that it is the 3rd Respondent that has power of appointment, since under the Veterinary Surgeons and Veterinary Paraprofessionals Act, 2011 and Regulations 8 of the Veterinary Surgeons and Veterinary Paraprofessionals (the Veterinary Medicines Directorate) Regulations, 2015, the power of appointment is vested in the Cabinet Secretary, and the 3rd Respondent is merely a 'conveyor belt' by which the stakeholders pass on their names of their members' choices/nominees to the Cabinet Secretary for appointment.

29. The Interested Parties submitted that the names conveyed to the 3rd Respondent to choose 3 therefrom based on lawful and reasonable criteria are contained in the letters dated 6th September 2019 and 20th March 2020, and that the 3rd Respondent in this regard must act lawfully and responsibly, and not recklessly or based on extraneous considerations. In addition, that the Cabinet Secretary, as the appointing authority in law, is not expected to be a rubber stamp to endorse the names passed on to him, and As much as procedural processes and technicalities are important, they should never override the substance of the decisions being made or public interest or policy. The Interested Parties in this regard submitted that the 2nd Respondent had access to all the names and ranking done by the stakeholders, which were copied to him.

The Determination

30. The Interested Parties have raised a preliminary issue as regards the locus of the *ex parte* Applicants to bring the current application. If the *ex parte* Applicants are found to have locus, the Court will then proceed to address the substantive issues raised in the application, namely, whether the 2nd Respondent acted lawfully in appointing the Interested Parties as members of the, and whether the remedies sought are merited.

On the standing of the ex parte Applicants

31. The general approach to the issue whether a claimant has standing in judicial review application, is that the claimant must have sufficient interest in respect of the action or decision under challenge, which is a mixed question of fact and law. The Court will therefore consider the issue of standing by reference to a number of factors, and is generally liberal in its approach to the issue of standing.

32. Relevant factors that are considered by the Court include the nature of the claimant's interest, and whether the claimant has a clear private interest in the action or decision under challenge. A private interest may arise because the decision was specifically targeting, or taken in relation to the claimant, or because it has an impact upon him or her. Other factors are where a claimant is seeking to represent the public interest, and demonstrate that they have a real or genuine interest in the decision under challenge; where a clear stake in the issue before the court is demonstrated; and where the claimant seeks to vindicate the rule of law, or address an important issue of the law.

33. J. Odunga in explaining how such sufficient interest is demonstrated referred to the direct effect that judicial review proceedings will have on a party in **Republic v Office of the Director of Public Prosecution & 2 others Ex-Parte Sylvia Wairimu Njuguna also Known as Sylvia Wairimu Muli** ,[2018] eKLR as follows:

“25. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a

later stage of the proceedings.

34. The *ex parte* Applicants in this respect described themselves in paragraph 2 of the statement of facts dated 28th April 2020 as registered members of Kenya Veterinary Board, the 3rd Respondent herein, and also repeated these averments in their respective supporting affidavits. The 3rd Respondent is established under section 3 of the Veterinary Surgeons and Veterinary Paraprofessionals Act, 2011, and its composition is set out in section 4 as the said Act follows:

(1) The Board shall consist of—

(a) the Principal Secretary in the Ministry responsible for matters relating to livestock;

(b) the Principal Secretary in the Ministry responsible for finance;

(c) the Director of Veterinary Services, who shall be a registered veterinary surgeon under this Act; (d) a Dean of the Faculty of Veterinary Medicine of a public university in Kenya, being a registered veterinary surgeon, or a member of the faculty, who is a registered veterinary surgeon, nominated by him;

(e) one veterinary surgeon who is a principal of a veterinary paraprofessional training institute appointed by the Cabinet Secretary;

(f) four registered veterinary surgeons elected by registered veterinary surgeons and appointed by the Cabinet Secretary;

(g) three veterinary para-professionals appointed by the Cabinet Secretary after being elected by registered veterinary paraprofessionals;

(h) the chairperson of the Kenya Veterinary Association;

(i) one person appointed by the Cabinet Secretary to represent veterinary research institutions;

(j) one veterinary surgeon or veterinary para-professional nominated by the Director of the Kenya Wildlife Service and appointed by the Cabinet Secretary to represent the Wildlife sector;

(k) two persons, not being veterinary surgeons or veterinary paraprofessionals, appointed by the Cabinet Secretary from the animal resource industry.

35. The *ex parte* Applicants however did not annex or bring any evidence to show that the said membership of the 3rd Respondent, or of their appointment as members of the 3rd Respondent in line with section 4 of the Act. In the circumstances, as their identity and description has not been verified, and as their interest in this regard is contested, this Court cannot make a finding that they have sufficient interest to bring the instant suit.

36. It is also notable in this respect that the letter the *ex parte* Applicants rely upon dated 27th April 2020 as evidence of the names forwarded by the 3rd Respondent to the 2nd Respondent, was a letter written by the 3rd Respondent's Chief Executive Officer to the *ex parte* Applicant's advocates on record upon request, and cannot therefore be evidence of the actual nominations by the 3rd Respondent. This fact is also contested by the Interested Parties who have brought evidence of a letter dated 20th March 2020 of nominations made by the Kenya Veterinary Association to the 3rd Respondent, and which includes their names.

37. The Veterinary Medicines Directorate is in this respect established by the relevant Cabinet Secretary pursuant to the provisions of section 39(1) and (2) of the said Act and Regulation of the Veterinary Surgeons and Veterinary Paraprofessionals (the Veterinary Medicines Directorate) Regulations, 2015 for purposes of management of the animal resource industry, and specifically to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons.

38. The manner of appointment of the Council members of the Directorate and the roles and functions of the 2nd and 3rd Respondents in the process is detailed in regulation 8 of the Veterinary Surgeons and Veterinary Paraprofessionals (the Veterinary Medicines Directorate) Regulations, 2015 as follows:-

(1) The Council shall be appointed by the Cabinet Secretary and shall consist of?

(a) the Director of Veterinary Services who shall be the Chairperson;

(b) the Registrar of the Pharmacy and Poisons Board;

(c) the Chief Executive Officer of the Kenya Veterinary Board;

(d) the Principal Secretary for the time being responsible for Finance;

(e) the Principal Secretary for the time being responsible for animal health matters;

(f) three veterinary surgeons nominated by the Kenya Veterinary Board;

(g) one veterinary technologist from the veterinary pharmaceutical industry nominated by the Kenya Veterinary Board; and

(h) the Chief Executive Officer of the Directorate who shall be the Secretary to the Council and shall be an ex-officio member.

(2) A person appointed under paragraph (1)(f) shall be nominated by the Kenya Veterinary Board from a list of five names drawn from the veterinary pharmaceutical industry including a trainer in veterinary pharmacology submitted by a registered professional association representing the interests of veterinary surgeons countrywide.

(3) A person appointed under paragraph (1)(g) shall be nominated by the Kenya Veterinary Board from a list of three names from the veterinary pharmaceutical industry submitted by the registered association representing the interests of veterinary paraprofessionals.

(4) The nominating bodies referred to under paragraphs (2) and (3) shall observe Constitutional principles relating to gender, youth, persons with disability and minorities in identifying the persons whose names shall be submitted for nomination by the Kenya Veterinary Board for appointment to the Council.

(5) The Cabinet Secretary shall appoint the members of the Council by notice in the Kenya Gazette.

39. It is evident that the nominations are to be made by the 3rd Respondent to the 2nd Respondent from names submitted by registered associations in the veterinary medicine sector. The *ex parte* Applicants have in this respect not brought evidence of any such nominations or submissions by the 3rd Respondent and registered associations, while the Interested Parties have.

The Disposition

40. I accordingly find that the *ex parte* Applicants' Notice of Motion application dated 12th May 2020 is not merited for the foregoing reasons, and is hereby dismissed. The *ex parte* Applicants shall meet the Interested Parties' costs of the said application.

41. 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* Applicants', Respondents' and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE