



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 213 OF 2019

LEWIS OBURU OWALA.....1ST PETITIONER

DUNCAN MWANIA KYENGO.....2ND PETITIONER

THE ABILITY THERAPY PLACE LIMITED.....3RD PETITIONER

-VERSUS-

PHYSIOTHERAPY COUNCIL OF KENYA.....RESPONDENT

-AND-

CHARLES KAGUOYA.....INTERESTED PARTY

JUDGMENT

Introduction:

1. The filing of the Petition subject of this decision was prompted by the closure of a health facility known as Ability Therapy Clinic (hereinafter referred to as '**the Clinic**') by the Respondent on 29th May, 2019.
2. The Clinic is owned by the 3rd Petitioner herein, The Ability Therapy Place Limited.
3. In the Petition dated 31st May, 2019, the Petitioners vehemently challenge the decision to close the Clinic.

The Petition:

4. The 1st and 2nd Petitioners are duly trained and qualified medical personnel. The 1st Petitioner is a Physiotherapist and he is registered as such by the Respondent. He holds a Private Licence No. PCK/PP/0001 under registration number PCK0328A. The 1st Petitioner obtained a Private Practice Licence for the year 2019 from the Respondent. It is dated 29th April, 2019. The 1st Petitioner is a shareholder and the Managing Director of the 3rd Petitioner.
5. The 2nd Petitioner is an Occupational Therapist. He is registered as such by the Kenya Occupational Therapists' Association under Membership No. K/OT/0832. He held a Certificate of Practice No. KOTA/CP/17/0023 for the period between 8th March, 2017 and 8th March, 2020. The Certificate is dated 8th March, 2017.
6. In the main, the Petition variously decries contravention of the Petitioners' rights and fundamental freedoms as guaranteed under the Constitution. The Petition avers that the Respondent's actions contravene Articles 2, 20, 27, 28, 36(1), 40, 47 and 50(1) of the Constitution as well as Section 27, 31 and 32 of the Physiotherapist Act, 2014.
7. The Petition seeks the following prayers: -

1. A Declaration that the Respondent's directive to close the Ability Therapy Clinic as contained in the Respondent's letter dated 29th May, 2019 was arrived at in contravention of the Petitioner's right guaranteed under Articles 40, 47 and 50 (1) of the Constitution of Kenya and sections 27, 31 and 32 of the Physiotherapists Act, 2014.

2. A Declaration that the Respondent has no power to control the private practice of the 2nd Petitioner as an Occupational Therapist.

3. An Order for judicial review by way of an Order of Certiorari to bring this Honourable Court for the purposes of being quashed the Respondent's decision contained in the letter dated 29th May, 2019 directing that Ability Therapy Clinic be closed.

4. An Order for judicial review by way of an Order of Mandamus to compel the Respondent by itself, its servants, its agents and/or assigns to follow the provisions of Articles 40, 47 and 50 (1) of the Constitution of Kenya and sections 27, 31 and 32 of the Physiotherapists Act, 2014 before making any decisions that will affect the Petitioners.

5. A Permanent Injunction order restraining the Respondent by itself, its servants, its agents and/or assigns from interfering with the business of the Petitioners save in accordance with the provisions of Articles 40, 47 and 50 (1) of the Constitution of Kenya and sections 27, 31 and 32 of the Physiotherapists Act, 2014.

6. Compensation for the loss of income occasioned by the closure of Ability Therapy Place from 30th May, 2019 to the date that Ability Therapy Clinic shall be re-opened.

7. Any other orders that this Honourable Court may deem necessary to grant.

8. An Order for costs of this Petition.

8. The Petition is supported by three Affidavits. Two of them were sworn by the 1st and 2nd Petitioners respectively on 31st May, 2019. A Further Affidavit was sworn by the 1st Petitioner on 5th March, 2020.

9. The Petitioners also filed written submissions and a Case Digest.

The Responses:

10. The Petition is opposed by the Respondent and the Interested Party.

11. The Respondent filed a Replying Affidavit sworn by the 3rd Respondent's Registrar, one *Douglas Kotut*, on 7th February, 2020. It also filed written submissions.

12. The Interested Party relied on a Replying Affidavit he swore on 10th February, 2020 and written submissions in opposing the Petition.

Issues for Determination:

13. On careful reading of the material presented before Court by the parties, I discern the following issues for determination: -

a. Whether the decision to close the Clinic contravenes Articles 27, 28, 36(1), 40, 47 and 50(1) of the Constitution;

b. Whether the Petitioners are entitled to any remedies.

14. I will deal with the issues in *seriatim*.

a. Whether the decision to close the Clinic contravenes Articles 27, 28, 36(1), 40, 47 and 50(1) of the Constitution:

15. This issue is at the core of the Petitioners' complaint. The Petitioners' case is fairly straight-forward. It hinges on how the Respondent unilaterally made the decision to close the Clinic. The impugned decision was precipitated by a complaint laid by the Interested Party against the Petitioners to the effect that the Petitioners are not legally qualified to practice and are, instead, passing off as Medical officers or Doctors to the unsuspecting general public.

16. The Petitioners contend that when the Respondent received the complaint, it never notified the Petitioners of its intention to order a closure of the Clinic. It is further contended that only after issuing the directive to close the Clinic on 29th May 2019 did the Respondent eventually disclose the actual complaint received from the Interested Party. It is posited that the directive to close the Clinic is, therefore, unreasonable, irrational, unwarranted in bad faith and an abuse of the Respondent's powers.

17. It is further alleged that the Respondent has no power to control the practice of the 2nd Petitioner who is an Occupational Therapist and that there is no provision in the Physiotherapists Act or any other law that restricts the ownership of a business to a Physiotherapist only.

18. The Petitioners further argue that under Section 32 of the Physiotherapists Act the Respondent does not have the power to order the closure of the Clinic as its power is only limited to imposing a fine, issuing a letter of admonishment, suspending the license, withdrawing

the license or removing a registered Physiotherapist from the Register.

19. It is also asserted that the Respondent has not provided any evidence that it complied with the provisions of the Physiotherapy Act, 2014 or the Physiotherapy Rules, 2017 before issuing the directive to close the Clinic.

20. In their submissions, the Petitioners vehemently aver that the Respondents contravened Article 47 of the Constitution as well as Section 31 of the Physiotherapists Act, 2014 and the Physiotherapists Rules, 2017 in not following the laid down procedure in Part VI of the Physiotherapists Act and Part VII of the Physiotherapists Rules on disciplinary processes. That was a breach of the right to fair administrative action.

21. On Article 50(1) of the Constitution, the Petitioners submit that the 1st Petitioner only learnt later that a Committee had sat and come up with a report that recommended the closure of the Clinic. However, the Petitioners were not availed with the proceedings or the resultant report. The Petitioners assert that the actions took place behind closed doors and in disregard of the requirement under Section 31(1) of the Physiotherapists Act to give the 1st Petitioner a fair hearing before arriving at any decision. Reliance is placed on the decision in ***Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR; EDG& Atelier Limited & another Board of Registration of Architects and Quantity Surveyors; Mtwapa Heights Limited (Interested Party) [2020] eKLR.***

22. The Petitioners also submit that the Respondent's conduct was illegal, unlawful and *ultra vires* as at the time when the directive to close the Clinic was issued on 29th May 2019 since there was no lawful Disciplinary Committee in place as the term for the Respondent's Council and Disciplinary Committee had expired in September 2018. The Petitioners further contend that even if there were a Disciplinary Committee it can only issue the orders set out in Section 32 (1) (a) – (e) of the Physiotherapists Act which does not include an order to close a Clinic. It is alleged that the Respondent acted beyond the powers given to it by the statute. Additionally, Section 27(3) of the Physiotherapists Act, which is relied on by the Respondent to close the Clinic, does not give the Respondent the power to close a business.

23. It is additionally submitted that that right to freedom of association under Article 36 of the Constitution has been infringed. It is asserted that the 1st and 2nd Petitioners have clearly stated that they are a Physiotherapist and Occupational Therapist respectively and that they offer their different services to their clients. Moreover, there is no provision in the Physiotherapists Act, the Physiotherapists Rules or any other statute that restricts a physiotherapist from carrying out business with an occupational therapist or any other therapist.

24. In further contention that the right under Article 36 of the Constitution has been infringed, the Petitioners submit that the Respondent has no power to control the practice of the 2nd Petitioner. It is further submitted that the Interested Party could have lodged a complaint against the 2nd Petitioner with the proper regulator. As such, the Respondent exercised jurisdiction over a matter it had no power over and in doing so trampled over the Petitioners' freedom of association.

25. In respect to breach of Article 40 of the Constitution, the Petitioners submit that the closure of the Clinic meant that the Petitioners cannot access their right to earn a living and they have been denied access to their property. The Petitioners, therefore, pray for compensation in the form of general damages for the unlawful closure of the Clinic and deprivation of business. Reliance is placed on ***Moses Kipkoech Rotich v Kenya National Highways Authority & 7 Others [2018] eKLR.***

26. The Respondent is of the contrary position. It contends that the 1st and 2nd Petitioners were informed of the complaint made by the Interested Party through the letter from the Council dated 12th March 2019. Furthermore, the 1st Petitioner was given an opportunity to respond to the complaint and did so vide his letter dated 26th March, 2019.

27. The Respondent asserts that the closure of the Petitioners' Clinic was a precautionary and temporary measure to protect the public from exposure to further dangers and to allow the case to be heard and determined by the Disciplinary Committee as provided under Section 29 of the Physiotherapists Act.

28. The Interested Party asserts that the Petition is incurably defective for want of compliance with the requisite law and is an abuse of the Court process.

29. The Interested Party in his Replying Affidavit alleges that the 2nd Respondent is not a Physiotherapist but has been practising and carries himself as one. That, the Interested Party's child has been a victim of his impersonation. Furthermore, the 2nd and 3rd Petitioners are alleged to have failed the test under Section 24 of the Physiotherapists Act for engaging in private practice as a Physiotherapists.

30. The Interested Party claims that the 1st Petitioner is carrying out the business of physiotherapy with quacks to the detriment of the Interested Party and the public. It is asserted that the 1st Petitioner is in breach of the Physiotherapy Act and therefore the Respondent correctly invoked Section 27 (3) of the said Act.

31. It is averred that the Petition does not raise any arguable constitutional issues and is a waste of judicial time as the disciplinary process is yet to be concluded, and the 1st Petitioner can only approach this Honourable Court for an appeal or judicial review as per the Physiotherapists Act.

32. It is further contended that the Petitioners have not demonstrated sufficient or convincing reasons to warrant granting of the discretionary writs of Certiorari and Mandamus. The Interested Party claims that the Petitioners have not come to the Court with clean hands and thus cannot be granted an order of permanent injunction and that the prayer for compensation is misplaced.

33. In his submissions the Interested Party dealt with three issues. They are whether it is lawful for the Petitioner to practice physiotherapy alongside quacks, whether the Petition be allowed and the issue of costs.

35. The Interested Party submits that the 2nd and 3rd Petitioners are not registered as Physiotherapists under the Physiotherapists Act, yet at all material times they engaged in the practice of physiotherapy in partnership with the 1st Petitioner, fully entitled to receive a share of profits. It is, hence, asserted that the 2nd and 3rd Respondents should be liable to pay a fine of KShs 1,000,000 and imprisonment for a term not less than one year.

36. The Interested Party contends that the decision by the Respondent to close the 3rd Petitioner's Clinic was rightfully arrived at and in strict compliance of the Physiotherapy Act.

36. Furthermore, it is asserted that the Petitioners are not entitled to the orders prayed for, as they have not approached the Court with clean hands.

37. It is, hence, submitted that the Petition should be dismissed with costs to the Respondent and Interested Party.

38. As a cardinal rule, I will begin with the sub-issue on **jurisdiction**.

39. *Jurisdiction* is defined in **Halsbury's Laws of England** (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". **Black's Law Dictionary**, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

40. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

41. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

42. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi Abdi & another** Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;**

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

43. On the centrality of jurisdiction, the Court of Appeal in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

44. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as

conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

45. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR*, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

46. From the foregoing, it is sufficiently settled that jurisdiction is derived from the Constitution, an Act of Parliament or both.

47. It is an undisputed fact that the 1st Petitioner is a Physiotherapist. He is registered by the Respondent as such and had a practising licence for the year 2019.

48. The **Physiotherapists Act**, No. 20 of 2014 is an Act of Parliament to make provision for the training, registration and licensing of physiotherapists, to regulate their practice, to provide for the establishment, powers and functions of the Physiotherapy Council of Kenya and for connected purposes. Therefore, as a Physiotherapist, the practise of the 1st Petitioner is under the regulation of the Physiotherapy Council of Kenya established under Section 3 of the Physiotherapist Act.

49. The **Occupational Therapists (Training, Registration and Licensing) Act**, No. 31 of 2017 is an Act of Parliament to make provision for the training, registration and licensing of occupational therapists; to regulate their practice; to provide for the establishment, powers and functions of the Occupational Therapy Council of Kenya and for connected purposes.

50. As an Occupational Physiotherapist, the 2nd Petitioner's practise fall under the regulation of the Occupational Therapy Council established under [Section 3](#) of the Occupational Therapists (Training, Registration and Licensing) Act.

51. The complaint lodged by the Interested Party against the Petitioners was in the manner in which the Petitioners rendered their services to the public. The issues raised by the Interested Party include the allegation that the Petitioners are quacks and are otherwise passing off themselves to the public as qualified Medical Officers. The allegation touch on the professional conduct and discipline of the Petitioners.

52. A complaint of such nature can only be dealt with in accordance with the regulatory law. For the 1st Petitioner the law is the Physiotherapists Act whereas for the 2nd Petitioner the regulatory legal regime is the Occupational Therapists (Training, Registration and Licensing) Act.

53. The 1st and 2nd Petitioners allege that they were rendering their respective professional services to the public under the 3rd Petitioner and in the name of the Clinic. I must say that it is not unusual to have various professionals practising together under any legal arrangement. There are many obvious reasons in support of such auspices. The most important thing in such relationships is that every single such professional must remain legally complaint in his/her area of practise.

54. In this case, the decision by the Respondent to close the Clinic affected the 2nd Petitioner as well. As said, the 2nd Petitioner is a duly registered Occupational Therapist under the Occupational Therapists (Training, Registration and Licensing) Act.

55. The Physiotherapist Act solely deals with the medical practise of physiotherapists. There is no provision in the said Act extending the jurisdiction of the said Act into the ambit of Occupational Therapists who are regulated under the Occupational Therapists (Training, Registration and Licensing) Act. Therefore, to the extent that the decision by the Respondent to close the Clinic affected the 2nd Petitioner whom the Respondent has no control over, then that decision usurped the mandate of the Occupational Therapy Council under the Occupational Therapists (Training, Registration and Licensing) Act.

56. The Respondent did not have the jurisdiction to regulate the 2nd Petitioner and as such the Respondent illegally assumed jurisdiction vide its decision to close the Clinic. The decision is, therefore, *ultra vires* the Respondent's jurisdiction and powers to the extent that it dealt with the 2nd Petitioner.

57. I will now deal with the sub-issue on whether the decision to close the Clinic infringed Article 47 of the Constitution.

58. Article 47(1), (2) and (3) of the Constitution states that: -

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.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

- a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
- b. promote efficient administration

59. The legislation that was contemplated under Article 47(3) is the Fair Administrative Act. No. 4 of 2015. Section 4 thereof provides that: -

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
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;
- 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.

5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

60. Section 2 of the Fair Administrative Act defines an '*administrative action*' and an '*administrator*' as follows: -

'administrative action' includes -

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. 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;

'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

61. In *Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR* Court of Appeal addressed itself on the above. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in

article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

62. The South African Constitutional Court in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

63. The right was further discussed in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR**. The Court had the following to say:

25. In **John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano**^[39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. Illegality - *Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.*

b. Fairness - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. Irrationality and proportionality - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

64. Emerging from the above, there is no doubt the Respondent's decision to close the Clinic was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioners. As such the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

65. Whereas the Respondent contend that it duly informed the 1st Petitioner of the complaint raised by the Interested Party and that the 1st Petitioner duly responded to the issues raised, there is no such allegation or evidence on the part of the 2nd Petitioner. The 2nd Petitioner was completely shut out of the matter. Maybe the Respondent was fully aware that its jurisdiction was only limited to the 1st Petitioner.

66. There is evidence to the effect that the complaint letter by the Interested Party which was the basis of the Respondent's decision was forwarded to the 1st Petitioner on the same day the decision to close the Clinic was made. Further, the 2nd Petitioner did not take part in the matter or at all even though the decision affected his rights and fundamental freedoms. It is, hence, obvious that the impugned decision did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act.

67. At a minimum, to meet the constitutional and statutory threshold, the Respondent had to, in the first instance, ascertain that it had the jurisdiction over the 2nd Petitioner. On the part of the 1st Petitioner, the Respondent was supposed to: -

(i) Ensure that the Complaint was, in addition to its contents, accompanied with all the necessary information, materials and evidence to be relied upon in making the decision or taking the administrative action and be timeously forwarded to the 1st Petitioner;

(ii) Inform the 1st Petitioner of the procedure to be used during the proceedings;

(iii) Inform the 1st Petitioner of his right to attend the proceedings, in person or in the company of an expert of his choice;

(iv) Inform the 1st Petitioner of his right to be heard and to make representations in that regard;

- (v) Inform the 1st Petitioner of the right to cross-examine the witnesses;
- (vi) Inform the 1st Petitioner of his right to legal representation;
- (vii) Inform the 1st Petitioner of his right to where necessary to request for an adjournment of the proceedings;
- (viii) Include in the notice the 1st Petitioner's right to a review or internal appeal against an administrative decision;
- (ix) Send to the 1st Petitioner a statement of reasons pursuant to Section 6 of the Fair Administrative Action Act.

68. The Respondent's impugned decision, therefore, infringed Article 47 of the Constitution as well as the Fair Administrative Actions Act. The impugned decision is hence constitutionally infirm.

69. The next sub-issue is whether the Respondent's decision infringed the Petitioners' right under **Article 50(1)** of the Constitution.

70. Article 50(1) of the Constitution states as under: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

71. The above provision is part of the Bill of Rights.

72. In light of the manner in which the Respondent dealt with the matter and eventually made the impugned decision, the gist of Article 50(1) of the Constitution comes into focus.

73. Article 24 of the Constitution is on limitation of human rights and fundamental freedoms in the Bill of Rights. It enumerates the specific instances where any limitation is permissible. It states as follows: -

1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

- a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
- b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31—Privacy;

- (b) Article 36—Freedom of association;
- (c) Article 37—Assembly, demonstration, picketing and petition;
- (d) Article 41—Labour relations;
- (e) Article 43—Economic and social rights; and
- (f) Article 49—Rights of arrested persons.

74. **Article 25** provides for the specific rights and fundamental freedoms which *cannot* be limited. It is tailored as follows: -

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- a. freedom from torture and cruel, inhuman or degrading treatment or punishment;
- b. freedom from slavery or servitude;
- c . the right to a fair trial; and**
- d. the right to an order of habeas corpus.

75. The right to a fair trial is among the rights and fundamental freedoms which cannot be limited in anyway whatsoever.

76. It is a fact that the Petitioners were not heard before the decision to close the Clinic was made. They, therefore, did not take part in the matter before the decision was made. As evidenced by the Respondent in paragraph 11 of the Replying Affidavit of Douglas Kotut, the Respondent was categorical that: -

11. the decision to close the clinic was intended to be temporary as indicated in the letter dated 29th May, 2019. The closure was to allow the complaints made by Munga Kibanga & Co. Advocates against the Petitioners herein be heard and a determination be made by the disciplinary Committee.

77. In upholding the Constitution and the law, the Respondent ought to have handled the matter the other way round. It, instead, ought to have first accorded the Petitioners an opportunity to be heard before making the decision. The converse cannot be legally tenable.

79. I now find and hold that the failure by the Respondent to accord the Petitioners an opportunity to be heard before making the decision to close the Clinic infringed the Petitioners' right under Article 50(1) of the Constitution.

79. I will now deal with the sub-issue on whether the impugned decision contravened **Article 36(1)** of the Constitution. The provision provides as follows: -

Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

80. The fundamental freedom of association is guaranteed in the Constitution. It is to be enjoyed by everyone unless it is limited under the Constitution. In this case, the 1st and 2nd Petitioners are duly registered medical personnel. They are also licensed to practise in their fields by the respective oversight bodies.

81. The Respondent or any other body is yet to determine the allegations by the Interested Party especially whether the Petitioners are qualified to offer their services to the public. The issue is pending determination. As such, the same pending issue cannot be a basis of a decision which decision has the effect of disfranchising the Petitioners' fundamental freedom of association.

82. On the basis of the prematurity of the decision by the Respondent, I find and hold that the decision infringes on the Petitioners' fundamental freedom to association.

83. And, for the many reasons discussed in the foregoing, the Petitioners' right to human dignity under **Article 28** of the Constitution and the right to be equally treated before the law coupled with the freedom from discrimination under **Article 27** of the Constitution as well as the right to property under **Article 40** of the Constitution were variously trampled.

84. In the end, I find and hold that the decision by the Respondent to close the Clinic contravenes Articles 27, 28, 36(1), 40, 47 and 50(1) of the Constitution.

85. The first issue is answered in the affirmative.

(b) Whether the Petitioners are entitled to any remedies:

86. The Petitioners have succeeded in proving their claims. They are entitled to some remedies.

87. One of the remedies sought is compensation. On the prayer for compensation for violation of the Petitioners' rights, I will, reproduce the guidance by the Court of Appeal in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR***.

88. Although the extract is rather lengthy, it nevertheless expounds a comprehensive comparative analysis on how other jurisdictions have dealt with the issue. The decision has good jurisprudential content. The Learned Judges expressed themselves as follows: -

The challenge, in our view is not whether we should interfere with a discretionary award of damages by a trial judge but what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual, by a State. It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.

It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of ***Siewchand Ramanoop v The AG of T&T***, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. (e m p h a s i s o u r s). All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. (emphasis ours)

In the ***Tamara Merson v Drexel Cartwright*** and ***Ag (Bahamas) Privy Council Appeal No. 61 of 2003*** the Privy Council held that in some cases, a suitable declaration may suffice to vindicate the right which has been breached. The Court quoted the postulation by Lord Scott of Foscote in ***Merson*** (supra) in which, after citing a passage from ***Ramanoop*** (supra) including the paragraphs set out above, stated thus:

"[[18]. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in *Ramanoop*) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

Taking cue from the above decisions, the Privy Council in ***Alphie Subiah v The Attorney General of Trinidad and Tobago*** Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that: -

"The Board's decisions in *Ramanoop*, paras 17-20, and *Merson*, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in *Merson's* case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of *Ramanoop*, and *Merson*, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be

assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in *Merson*, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

The position of the Privy Council is in no way altered by the South African Case of ***Dendy v University of Witwatersrand, Johannesburg & Others*** [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

In ***Peters v. Marksman & Another*** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in ***Fuller v A-G of Jamaica (Civil Appeal 91/1995)***, unreported, where the Court held that:

It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62 to include, a remedy that will:

- (1) meaningfully vindicate the rights and freedoms of the claimants;
- (2) employ means that are legitimate within the framework of our constitutional democracy;
- (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
- (4) be fair to the party against whom the order is made.

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "**appropriate and just**" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

89. In this case the Petitioners' rights are certainly vindicated *vide* an appropriate declarations and other orders.

90. It is of further importance to note that the prayer for compensation is for the loss of income occasioned to the Clinic from 30th May, 2019 to the date the Clinic will be re-opened. From the record, the Court issued a conservatory order against the closure of the Clinic on 4th June, 2019. The claim is hence quantifiable and may be recovered in the ordinary Civil and Commercial Courts. It is also instructive that the dispute between the parties is still ongoing.

91. In consideration of the circumstances of this matter I am well convinced that the grant of other remedies rather than damages will serve as adequate, just and appropriate remedies.

Disposition:

92. Flowing from these findings and conclusions, the disposition of the Petition dated 31st May, 2019 is as follows: -

a. A Declaration be and is hereby issue that the Respondent's decision to close the Ability Therapy Clinic as contained in the Respondent's letter dated 29th May, 2019 was arrived at in contravention of the Petitioners' rights and fundamental freedoms guaranteed under Articles 27, 28, 36(1), 40, 47 and 50 (1) of the Constitution.

b. A Declaration be and hereby issue that the Respondent herein, The Physiotherapy Council of Kenya, has no power to control the private practice of the 2nd Petitioner who is an Occupational Therapist.

c. An Order of Certiorari be and hereby issue quashing the Respondent's decision contained in the letter dated 29th May, 2019 directing that Ability Therapy Clinic be closed.

d. The Respondent and the Interested Party shall jointly and severally bear the costs of this Petition.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 15th day of February, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mrs. Mwangi, Counsel for the Petitioners.

Miss Wawira, Counsel for the Respondent.

Mr. Kiunga, Counsel for the Interested Party.

Elizabeth – Court Assistant