



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 22 OF 2018

PROFESSOR STANLEY KHAINGA, DR. LOISE KAHORO &

DR FERDINAND NANGOLE Suing as Officials of the

KENYA SOCIETY OF PLASTIC SURGERY AND

RECONSTRUCTIVE SURGERY.....PETITIONERS

VERSUS

KENYA MEDICAL PRACTITIONERS AND

DENTISTS BOARD.....1ST RESPONDENT

COLUMBIA AFRICA HEALTH CARE LIMITED.....2ND RESPONDENT

AGA KHAN UNIVERSITY HOSPITAL NAIROBI.....3RD RESPONDENT

DR. TILMAN STASCH.....4TH RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES.....5TH RESPONDENT

DIRECTOR OF MEDICAL SERVICES.....6TH RESPONDENT

JUDGEMENT

THE PETITION

1. The Petitioners filed the Petition herein and the Supporting Affidavit of Professor Stanley Khainga on 19th January 2019 seeking the following reliefs:-

a) A Declaration that the 1st Respondent has been violating the Petitioners fundamental rights and freedoms guaranteed under Article 27, 28, 41 43, 46 and 47 of the Constitution by licensing foreign doctors to practice plastic surgery in Kenya in private medical facilities.

b) A Declaration that all license and / or registration of foreign medical practitioners should be limited to authorising practise of medicine or dentistry in a government institution and not a private medical facility.

c) A permanent Injunction restraining the 1st and 6th Respondents from issuing a private practitioners medical license for the year 2018 and thereafter to the 4th Respondent or any other medical practitioner or dentist and restrain the 2nd and 3rd Respondents and any other private medical facility from employing the 4th Respondent or any other foreign medical practitioner or dentist.

d) A permanent Injunction restraining the 6th Respondent from issuing or renewing a work permit for the 4th Respondent and or any medical practitioner or dentist undertaking private medical practise in Kenya.

e) Costs of this Petition be borne by the Respondents.

PETITIONERS' CASE

2. The Petitioners' case is premised on the facts that the 4th Respondent who is a foreign national from Germany applied to the 1st Respondent for licensing under **Section 15 of the Medical Practitioners and Dentists Act Chapter 253** intending to practise by employment with the 2nd and 3rd Respondents. The 1st Respondent was not satisfied with the application and sought a peer review meeting with the 4th Respondent and was due to give its verdict on or before 24th January 2018.

3. The Petitioners claim that there is no evidence that the 2nd and 3rd Respondents carried out an interview or survey to establish that no local plastic surgeon doctors area available to offer required services as opposed to giving that opportunity to foreigners. The Petitioners asserts that there already exist locally trained or Kenyan Plastic Surgeons practising medicine either with government or as private practitioners, and they need protection from the influx of foreign medical practitioners

4. It is alleged that the 4th Respondent has been describing himself in a misleading and misrepresentative manner to mislead the general public that he is more qualified by virtue of being white or a foreigner. The Petitioners' Society alleges to be fighting against discrimination of local plastic surgeons by a foreigner who has misled the 6th Respondent that there are no local plastic surgeons.

5. The Petitioners claim that the Respondents have infringed their consumer rights, freedom and entitlement to a fair competitive platform with all other foreign doctors in breach of **Articles 27, 36, 46 and 47 of the Constitution of Kenya 2010**. The Petitioners contend that the licensing of the 4th Respondent by the 1st Respondent on account of misrepresentation or false experience infringed upon the medical health stakeholder consumer rights. It is alleged that **Article 47 of the Constitution** was infringed as the employment opportunities with the 2nd and 3rd Respondent were not competitively advertised for them to seek employment.

6. Furthermore, it is alleged that the 4th Respondents intended licensing and or registration as a private medical is contrary to **Section 15 of the Medical Practitioners and Dentist Board Act** and **Rules** as foreign doctors are prohibited from engaging in private practice.

1ST AND 6TH RESPONDENTS' CASE

7. The 1st Respondent filed its response to the Petition through the Replying Affidavit sworn on 5th April, 2018 by Dr. Jackson Kioko, who was the Director of Medical Services at the time, being the 6th Respondent herein.

8. The response by 1st Respondent though the above-stated affidavit is that:

a) The Medical Council has the statutory mandate to license and register medical and dental practitioners and medical institutions, both citizens of the Republic of Kenya and also temporary licenses for foreign doctors as provided by the Act;

b) **Sections 13 and 14 of the Act**, as read with **Rule 5(2) of the Medical Practitioners and Dentists (Inspections and Licensing Rules, 2014)** empowers the Medical Council to assess and license foreign Nationalities who have graduated from recognized medical schools as medical or dental practitioners to practice within the Republic of Kenya;

c) The applications of foreign medical or dental practitioners who apply for temporary license are reviewed through the inspections and Licensing Committee, which is a Committee established under **Rule 3 of the Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014**, to confirm whether the Applicant therein meets the minimum qualifications as prescribed by the Act;

d) The Medical Council has recognized only 11 Plastic and reconstructive Surgeons serving a population of approximately 50 Million Kenyans, guided by the last census, out of which only 3 have undertaken plastic and reconstructive surgery as their main specialty, and the others have plastic and reconstructive surgery as a sub-specialty of general surgery;

e) From the records of the Medical Council the 4th Respondent is a qualified doctor whose qualifications were verified by the **Educational Commission for Foreign Medical Graduate ("ECFMG")**, through its **Electronic Portfolio of Internal Credentials ("EPIC certification")**.

f) The Medical Council has licensed several foreign medical practitioners, most of whom are rendering services in mission Hospitals located across the Country for the benefit of the General public;

g) Foreign doctors applying for temporary licensure in Kenya are at the onset required to demonstrate their qualification and also specify the names or details of their intended employer or the intended employer before the application is considered or they are eventually issued with the temporary license. The eventual license is pegged to their practice at the medical or Health Facility declared in their application;

h) The 4th Respondent has in previous years successfully applied for Temporary license to practice at the Aga Khan University Hospital and also at Kenyatta National Hospital and he was granted Temporary Licenses. He later applied for a Temporary Licence to be allowed to practice at Columbia Africa.

i) The 4th Respondent applied to be recognized as a specialist and a peer review was undertaken. The peer review was undertaken by

a Committee of the Medical Council which was known as TARC on 10th January 2018. The peer review Committee consisted of the Council's members of TARC and it also incorporated Dr. Ferdinand Nangole, who is one of the Petitioners herein, and Dr. Joseph Wanjeri, who is a recognized specialists in plastic and reconstructive surgery. In this regard the Medical Council incorporated renowned and senior specialists, who are not its members, in undertaking the peer review.

j) The Petitioners have known and worked together with the 4th Respondent from the year 2014 or thereabout in diverse areas in Kenya and they have severally given him recommendations to assist him secure temporary licenses or employment. Further, the 4th Respondent is also an associate member of the Petitioner;

k) The Petitioners have not pleaded with precision or with particulars to demonstrate or prove within the required threshold the manner in which their rights or any rights of Kenyans have been violated or infringed under the provisions of **Articles 27, 28, 41, 43, 46 and 47 of the Constitution**.

l) The facts and statistics pleaded by the Petitioners are unwarranted, misleading and speculative as the World Health Organization recommendations for doctor/patient ratio is 1 doctor for 600 patients and currently the situation in Kenya has not achieved the said recommendations. It is not in dispute that currently Kenya has One (1) doctor for 7,402 patients and one (1) dentists for 67,606 patients, and

m) The Petition is vexatious and lacking in merit as the Petitioners have come to these Courts of equity with unclean hands as they have failed to disclose material facts and it has been field in bad faith and it's thus an abuse of the Court process.

2ND RESPONDENT'S CASE

9. The 2nd Respondent filed a Replying Affidavit sworn by Sumit Prasad on 14th February 2018 in which it is asserted the Petitioner Association is a voluntary association registered under the Societies Act with no legal authority to regulate the manner in which a private hospital recruits its staff. The Deponent asserts that the employment of foreign doctors is not discriminatory if they obtain the requisite license and permit from the 1st and 5th Respondents.

10. It is deponed that the Petitioners have not disclosed and/or provide particulars to support their general allegations that the 2nd Respondent has discriminated and or is capable of discriminating the Petitioners. Moreover, it is alleged that the 4th Respondent was not an employee of the 2nd Respondent at the time of filing the Petition; and that the Petitioners have not provided evidence in support of the allegation that the 2nd Respondent intends to employ the 4th Respondent. Therefore enjoining the 2nd Respondent is vexatious and scandalous as it is based on unfounded apprehensions.

3RD RESPONDENT'S CASE

11. The 3rd Respondent filed a Replying Affidavit dated 19th February 2018 sworn by Dr Majid Twahir. It is averred that the Petition does not disclose any constitutional violation by the 3rd Respondent or any of the Respondents.

12. The 3rd Respondent claims that this Petition is merely a continuation of a campaign by Professor Khainga against selected foreign plastic surgeons. Prior to filing this Petition, Professor Khainga filed **ELRC No. 2618 of 2016, Stanley Ominde Khainga v Aga Khan University Hospital** in respect to Dr Radovan Boca. Hon. Lady Justice Linet Ndolo issued a ruling dismissing the application as the Petitioners have failed to provide any particulars to support the allegations of discrimination. A further application was filed by the Professor namely, **ELRC JR No. 18 of 2017, Republic v The Director of Immigration Service and Radovan Boca**.

13. The 3rd Respondent asserts that the 1st Respondent in discharging its duties does not distinguish between locally trained and foreign-trained medical practitioners and dentists. Therefore, there is no credible allegation that the 1st, 5th and 6th Respondents have fallen short in the faithful discharge of their respective statutory duties and/or obligations.

14. The Court is urged not to usurp the statutory functions vested in the 1st and 5th Respondents. The Deponent clarifies that the 4th Respondent is not the employee of the 3rd Respondent as alleged, he has however been granted admission rights. Moreover, it is claimed that one of the 4th Respondent's referees in his application to the 3rd Respondent was Professor Khaing. Further, the Professor as section head for Plastic Surgery within the 3rd Respondent's Department of Surgery was part of the team which evaluated and approved the 4th Respondent's application for admission privileges.

15. The 3rd Respondent prays for the Petition be dismissed with costs.

4TH RESPONDENT'S CASE

16. The 4th Respondent filed a Replying Affidavit sworn by himself on 19th February 2018 and pursuant to **Rules 15 (2) (a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

17. The 4th Respondent claims that the Petition is based on unfounded facts aimed at tainting his reputation as a highly qualified plastic surgeon and to unfairly prejudice his application for permanent residency in Kenya. The 4th Respondent avers that the allegation that he is "half baked" is baseless, defamatory, negligent and reckless so as to injure his reputation.

18. Furthermore, the 4th Respondent asserts that there has been material non-disclosure by the Petitioners of the 4th Respondent's membership in the Association. It is deponed that the 4th Respondent obtained the necessary permits from the 5th Respondent, and licences from the 1st Respondent with the recommendation of Professor Khainga, and upon meeting the qualifications and conditions to work in Kenya as a foreigner. Therefore the Petition is unmerited and an abuse of the process.

19. The 4th Respondent asserts that he has been authorised to provide medical services at the 2nd Respondent but at the request of the 2nd Respondent has not practised therein since the institution of the Petition and is therefore hindered from earning a living. It is further contended that there is no legal requirement compelling the 2nd and 3rd Respondents to carry out an interview or survey to ascertain that there are no local surgeons available to offer services before considering applications by foreign medical practitioners.

20. It is the Deponents contention that having obtained the medical licenses after a successful application, the licence is prima facie evidence that he has complied with all the requirements necessary to practice as a reconstructive surgeon in Kenya. Furthermore, the prayer seeking an injunction against the 1st and 6th Respondent has been overtaken by events. The 4th Respondent urges that their application before the 5th Respondent should not be prejudiced by the vexatious Petition and the 5th Respondent should consider the same without undue influence.

21. It is prayed that the Petition be dismissed with costs.

5TH RESPONDENT'S CASE

22. The 5th Respondent filed Ground of Opposition dated 28th September 2018 on the grounds that the Petitioner has failed to demonstrate the authority to institute this Petition on behalf of all Kenyan trained medical students in the field of plastic, reconstructive and aesthetic surgery and the Petitioners have no locus standi.

23. It is further claimed that the Petitioners have failed to demonstrate the exact manner in which the 5th Respondent has infringed the Constitution; in general, the Petitioners have failed to demonstrate with reasonable precision the manner in which his rights under the Constitution have been violated.

24. The 5th Respondent asserts that if the orders sought by the Petitioners are granted it would amount to the interference of the functions and discretion of the 5th Respondent. Furthermore, this court lacks jurisdiction to determine any dispute regarding the exercise of administrative discretion to issue or refrain from issuing immigration permits.

ANALYSIS AND DETERMINATION

25. I have very carefully considered the Petition, the responses in reply by the Respondents; rival submission by the parties herein and from the above the following issues arises for consideration:-

- a) Whether the 1st Respondent is in violation of Section 15 of the Medical Practitioners and Dentist Act?*
- b) Whether the Licensing and registration of foreign medical practitioners should be limited to authorizing practice of medicine or dentistry in a government institution and not a private medical facility?*
- c) Whether the Petition discloses any constitutional violations as against the Respondents to warrant the relief sought in the Petition?*
- d) Whether the court can superintend the statutory functions of the 1st, 5th and 6th Respondents in respect of licencing of foreign doctors?*
- e) Whether Court has jurisdiction to interfere with recruitment process of the 2nd and 3rd Respondents?*
- f) Whether the Petition is vexatious and an abuse of the Court process due to material non-disclosure?*

A. WHETHER THE 1ST RESPONDENT IS IN VIOLATION OF SECTION 15 OF THE MEDICAL PRACTITIONERS AND DENTIST ACT?

26. It is Petitioners contention that the "intended Licensing and registration of the 4th Respondent is a violation of **Section 15 of the Medical Practitioners and Dentist Act and Rules**, urging that foreign doctors are not competitively recruited. It is further their averments that the intended licensing of the 4th Respondent by the 1st Respondent is on account of misrepresentation and fake experience.

27. A clear and meticulous perusal of the Petitioners Petition reveal that the Petitioners have not specifically pleaded or given proper particulars in support of the allegations nor have they pleaded them with precision nor given supportive documents to enable the Respondents respond appropriately to the pleaded allegations.

28. The 1st Respondent's statutory functions, which include the licensing and registration of medical and dental practitioners and licensing medical institutions, are expressly and clearly spelled out in the Act. The Registrar of the medical Council is obligated to maintain a register of all interns; medical and dental practitioners and also foreign medical and dental practitioners. Under **Section 13 and 14 of the Medical**

Practitioners and Dental Act and Rule 5(2) of the Medical Practitioners and Dentists (Inspections and Licensing Rules 2014) the medical council is empowered to assess and licence foreign nationality who have graduated from recognized medical schools as medical or dental practitioner to practice within the Republic of Kenya.

29. The Petition was filed on 19th January 2018 prior to the enactment of **Health Laws Amendment Act, 2019** which came into force on 17th May 2019. The law then and now empowered the Medical Council to issue Temporary Licenses to eligible medical and dental practitioners.

30. **Section 6 of the Act** then provided for registration of all medical practitioners and dentist where it stated that:-

“Every person eligible to be registered as a medical practitioner or as a dentist may apply in the prescribed form to the Registrar for registration in the register, and every such application shall be accompanied by the prescribed fee.

Where a person has complied with the provisions of subsection (1) and has been accepted by the Board as being eligible for registration and has satisfied the Registrar that he has been so accepted, he shall be registered.”

31. The eligibility of such a person is provided under **Section 11 of the Act** which stipulates as follows:-

“(1) Subject to the provisions of the section, a person shall be eligible for registration under this Act as a medical or dental practitioner if he is the hold of a degree, diploma or other qualification which is recognized by the Board as making him eligible for registration, and

a) After obtaining that degree, diploma or other qualification, he has engaged in training employment in a resident medical capacity in one or more institutions approved by the Board for such period, being not less than one year, as the Board may approve; and

b) He satisfies the Board that, whilst engaged in training employment under paragraph (1), he has acquired sufficient knowledge of, and experience in, the practice of medicine or dentistry, as the case may be; and

c) He satisfies the Board that he is a person of good moral character and a fit and proper person to be registered under this Act.

(2) Where the Board does not recognize a degree, diploma or other qualification in medicine or dentistry held by a person as making him eligible for registration, it shall take steps to assess his suitability for registration and for the purpose of so doing may require to attend an interview and to under any oral or written examination.

(3) The Board may, offer assessing the suitability for registration of a person under subsection (2), direct that before registration he shall undergo such further period of training or pas such further examination as it may specify.

(4) The Board shall not authorize the registration of a person until it is satisfied that the requirements of subsection (1) have been fulfilled or, in the case of a person referred to in subsection (2), that the requirement of paragraphs (1), (b) and (c) of subsection (1) have been fulfilled and that any further period of training or examination directed by it under subsection (3) has been completed or passed.

(5) The Board may, where it considers it expedient so to do, delegate the assessment of suitability for registration under subsection (2) to a committee of the Board which shall, after making the assessment, make recommendations to the Board accordingly.”

32. Further **Rule 5(2) of the Medical Practitioners and Dentists (Inspections and Licensing) Rules 2014** empowers the 1st Respondent to grant temporarily licenses to eligible foreign medical and dental practitioners to perform specific work or works in specific institutions or healthcare institutions within the Republic of Kenya.

33. Further to the above **Section 13(3) and 15 of the Act** clearly stipulates that the medical Council:-

“(3) The Medical Council shall grant temporary licenses to eligible foreign medical and dental students to perform specific work or works in specific institutions in Kenya.

(5) A temporary license issued under subsection (3) shall be for a period not exceeding twelve months within a practicing year and may be renewed.”

34. It is clear from the provisions of **Sections 13 and 14 of the Medical Practitioners and Dentist Act**, as read with **Rule 5(2) of the Medical Practitioners and Dentist (Inspection and Licensing Rules, 2014)** the medical Council is given mandate or powers to order and eventually license foreign Nationalities who have graduated from recognized medical schools as medical or dental practitioners to practice within the republic of Kenya. The powers to assess and license foreign nationals to practice medicine and dentistry in Kenya is granted to the medical Council by statue and I find that it cannot be faulted for undertaking its statutory mandate in accordance with the provisions of the law.

35. I note that the Medical Council has several committees which were previously established by virtue of the Rules made under **Section 23 of the Act** and now pursuant to the provisions of **Section 4A of the Act**. The provisions of **Section 23 of the Act** grants the Cabinet Secretary, previous the Minister; in consultation with the Medical Council to make Rules for carrying out the provision of the Act. In that regard the

Training, Assessment and Registration Committee (“TARC”) was a committee of Medical Council which was established under **Rule 3 of the Medical Practitioners and Dentist (Training, Assessment and Registration) Rules, 2014. (TARC Rules)**, whose function included, undertaking peer review, among others.

36. The Petitioners in this Petition has not demonstrated that the medical council, in undertaking its statutory mandate, reviewing applications received through the **Inspections and Licensing Committee**, established under **Rule 3 of the Medical Practitioners (Inspection and Licensing) Rules, 2014**, that it acted wrongfully and that it did not follow the amendment to the Act; neither has it been shown that the Medical Council did not receive an application from the 4th Respondent as a foreigner, seeking recognition as a specialist in Kenya; nor have the Petitioners demonstrated the application was not subjected to assessment through peer review by TARC and therefore TARC did not submit its recommendation to the Medical Council.

37. It is 1st Respondent’s contention that at the time of filing its response to this Petition, it had recognized only 11 plastic and reconstructive surgeon in Kenya, out of the 11, only 3 had undertaken plastic and reconstructive surgery as their main speciality while others have plastic and reconstructive surgery as a sub-speciality of general surgery (see annexure JK-1) of attached to 1st Respondent’s Replying Affidavit). The 1st Respondent contend guided by the last census in the Republic of Kenya 2019 the Republic has approximately 50 million people. I find that from the population in the Republic and with only 11 recognized plastic and reconstructive surgeon in Kenya; the decision by the Medical Council to register the 4th Respondent, who was assessed and found eligible, is in best interest of the general public in Kenya. He was not only qualified and eligible but was highly recommended; qualified and previously training medical students. There is no doubt the medical council acted in the best interest of public considering regrettably the very low number of qualified specialists as already demonstrated by the 1st Respondent. The decision by the 1st Respondent, at the material time was fair and justifiable.

38. In addition to the aforesaid, the 1st Respondent has demonstrated that the 4th Respondent is a qualified doctor, who has attained a Bachelor of Medicine, Bachelor of Surgery and a post graduate credentials in Surgery and later post graduate credentials to be recognized as a medical Specialists for Plastic Surgery and Aesthetic surgery. The said qualifications have not been challenged. Further, the petitioners’ allegations are, with respect, doubtful, contradictory and in bad faith, as the Petitioners have not rebutted the fact that the their organization and some of them had previously made recommendations on behalf of the 4th Respondent and they have also not challenged his previous work record, as deponed or set out in the response by the Medical Council.

39. It is further not in dispute that the Medical Council confirmed that the qualifications and credentials for the 4th Respondent had been verified by the Educational Commission for Foreign Medical Graduate, hereinafter referred to as **“ECFMG”** and **“EPIC”** certification which is used by other medical councils to verify credentials for foreign medical or dental practitioners or specialist. I find that this fact remains unrebutted at all by the Petitioner, therefore it is unchallenged and the court accepts the same as correct.

40. The Medical Council set up a committee for peer review which was undertaken by TARC on 10th January 2018, and thereafter upon recommendations of the said Committee the 4th Respondent was issued a Temporary Licence to practice for the year 2018 as borne out in annexure “TS 8” of the Replying affidavit of Dr. Tilman Stasch. The Petitioners have not challenged or disputed the peer review or incorporation of its members thereto.

41. It is not indispute that the peer review was a committee consisting of members of TARC and had incorporated Dr. Ferdinand Nangole who is one of the Petitioners herein and Dr. Joseph Wanjeri both of whom are senior and recognised specialist in plastic and reconstructive surgery. This once again remains unrebutted at all as none of the petitioners herein challenged the recommendation of the committee.

42. A perusal of the document before this Honourable Court, it turns out clearly that the Petitioners had severally given recommendations on behalf of the 4th Respondent on previous occasions and it thus defeats logic how and/or why the same Petitioners are now challenging grant of a temporary license to the 4th Respondent without giving any evidence of change of circumstances or otherwise.

43. I find to say the least, the Petitioners are not sincere in this Petition. Their conduct speaks volumes against their seeking the orders against the Respondents. There is a lot that has not been disclosed as the 4th Respondent is not a stranger to them as he is also an associate member of the Petitioners, as clearly borne out in the annexed copies marked “JK 4” to the 1st Respondent’s Replying Affidavit. This once again is not rebutted by the Petitioners.

44. The documents presented before this court further reveal that the Petitioners and the 4th Respondent begun working together in 2014 or thereabout, at a time when the 4th Respondent was carrying out pro bono services at Kenyatta National Hospital. He was initially teaching medical students and he also acquired a work permit. His application was supported by recommendations made by one of the Petitioners, who also confirmed that he was a member of the society. However, the current conduct of the Petitioners and allegations pleaded are rather doubtful and unconscionable as they have taken about 4 years before the Petitioners made a turn-around and are now making serious allegations against the 4th Respondent, a professional colleague, without providing supporting evidence to support the allegations or even showing change of circumstances. I find the new allegations as unfounded, and without justification as no evidence has been tendered in support.

45. Having considered the pleadings and rival submission in support and against the Petition, I find that the Petitioners have failed to tender any plausible evidence to show or prove, the pleaded allegations of violation of the provision of **Section 15 of the Medical Practitioners and Dentist Act**, more so as the 4th Respondent’s application for a temporary license was made pursuant to the provisions of **Section 13 of the Act**. Further, **Section 13 of the Act** permits the Medical Council to issue temporary licenses to eligible foreign medical and dental practitioners. I find the medical council did not act contrary to its mandate nor can it be faulted for undertaking its statutory mandate in accordance with the law. The Petitioners have failed to demonstrate or prove that this discretionary mandate, as provided under the statute to the 1st Respondent, was exercised in an arbitrary manner or the council exceeded its mandate or acted in breach of the law. I find that the medical council undertook its statutory functions within its mandate and for the benefit of the general public in licensing and registering the

4th Respondent. **Section 15 of the Medical Practitioners and Dentist Act** was therefore not violated by the 1st Respondent.

B. WHETHER THE LICENSING AND REGISTRATION OF FOREIGN MEDICAL PRACTITIONERS SHOULD BE LIMITED TO AUTHORIZING PRACTICE OF MEDICINE OR DENTISTRY IN A GOVERNMENT INSTITUTION AND NOT A PRIVATE MEDICAL FACILITY?

46. The Petitioners aver that the foreign medical and dental practitioners should be limited to practice medicine or dentistry in Government institutions. The Petitioners contend that upon analysis of the sample standard Application Form for temporary license for foreign doctors under mandatory requirements has a NOTE stating:

“This license shall not be used for private practice.”

47. The Petitioners have not specifically stated the relevant provision of the law in support of that contention. The law is clear that it empowers the medical council to issue temporarily licences to foreign medical and dental practitioners to practice in institutions, without any discrimination, therefore without limitation, this means it includes mission facilities as well as private hospitals so long as they have followed the requirements as provided under the Act and the Rules.

48. The Petitioners contend that there are approximately 11 medical Training Institutions Countrywide and it’s pertinent to note that the number is an approximate (see paragraph 21 of the Petition). They further aver that there are approximately 30 Plastic Surgeon students at different levels of Medical School Training and its also pertinent to note that the number too is an approximate (See paragraph 21 of the Petition). The Petitioner further avers that there exists a big surplus of Kenyan Medical practitioners that are unemployed. The Petitioners allegations in respect of the above is not only approximate but unsupported by annexed documents or record from various institutions.

49. In the instant Petition there is no dispute that the **World Health Organization (WHO)** recommendations for doctor/patient ratio is **1 doctor for 600 patients** and currently the situation in Kenya has not achieved the said recommendations as the current situation in Kenya is **One (1) doctor for 7,402 patients** and **one (1) dentists for 67,606 patients** as borne out in the annexed copies marked “JK-5” which is annexed to the 1st Respondent’s Replying Affidavit. It is not in dispute that the medical Council is the custodian of the register for medical and dental practitioners in Kenya and the said statistics have not been rebutted or disputed at all.

50. The Petitioners herein allege that there are many unemployed Kenya Citizens who have been trained in medicine but they have not adduced any evidence to support the allegations and other generalized allegations. I find that the said allegations do not meet the threshold for a Constitutional Petition. I find that the allegations herein are generalized and do not meet the threshold for Constitutional Petition to which the Petitioners are required to plead with precision.

51. In the instant Petition, it is medical council position, that it has licensed several foreign medical practitioners, most of whom are rendering good services in Mission Hospitals situated across the Country, wherein the general public is benefitting. It is common knowledge that the mission hospitals are rendering services to the **“common mwananchi”** of the general public within the Republic, more so, those away from the Cities and hence generalized allegations, as pleaded in the Petition, are, with respect, unfounded and without any merit.

52. It is further deponed by the 1st Respondent, that foreign doctors applying for temporary license to practice in Kenya are required to specify the names of their intended employer before they are issued with the temporary license and the eventual license is pegged to practicing in the Medical or Health Facility declared in the application. This fact has not been disputed at all.

53. I find that the law allows the 1st Respondent to license and register foreign doctors in Kenya before they practice in both public, mission and private health institutions and the said functions are empowered by statute. The process requires an applicant to adhere to the process provided under the Act and the Rules passed thereunder and there is no evidence before Court to prove breach by any of the Respondents.

54. It has been demonstrated by the 1st Respondent that Kenya has a deficiency in the number of Medical and dental practitioners as it has not met the required ratio provided by the **World Health Organization (WHO)** and hence there ought to be a balance between the economic and individual benefit of others, say the Petitioners, vis-à-vis, the interest of the patients and the general public. I am alive to the fact that it would be a violation of the right of citizens to health as enshrined by **Article 43 of the Constitution** to prevent the licensing of foreign doctors to practice in Kenya, as it will limit access to health care services, more so wherein there is no dispute on their qualification and credentials and the due process has been followed. In view whereof I find that the licensing and registration of foreign medical practitioners, should not be limited to authorizing practice of medicine or dentistry in a government institution and private medical facility provided the licensing body complies with the provisions set out in the relevant Act and applicants are duly qualified as provided in the relevant Act.

C. WHETHER THE PETITIONER DISCLOSES ANY CONSTITUTIONAL VIOLATIONS AS AGAINST THE RESPONDENTS TO WARRANT THE RELIEF SOUGHT IN THE PETITION.

55. The instant Petition is filed by the Petitioners, as officials of Kenya Society of Plastic and Reconstructive Surgery. The Petitioners urge that they have filed the Petition in their personal capacity and on behalf of all Kenyan trained medical students studying plastic and reconstructive and aesthetic surgery purportedly to protect the locally trained doctors from influx of foreign doctors. They further contend that foreign doctors are denying the local doctors income and job opportunities.

56. The Petitioners further allege that the licensing of foreign doctors is a violation of the right to be free from discrimination under **Article 27 of the Constitution**, Right to dignity under **Article 28 of the Constitution**; the right to fair labour practices under **Article 41**; the right to health under **Article 43 of the Constitution**; right to access to justice under **Article 46 of the Constitution** and fair administrative action under **Article 47 of the Constitution**.

57. The Petitioners challenge the licensing of the 4th Respondent on specific grounds at **paragraph 23 of their Petition** thus:-

“The 4th Respondent initially came into the country and started as a Conference Assistant, then slowly as an external examiner for university of Nairobi but it slowly getting to start working for gain and advertising himself in a manner that appear to disrepute the Kenyan Plastic Surgeons or demean them. He has been describing himself in a misleading and misrepresentative way to mislead the general public that he is more qualified by virtue of being white or a foreigner. He found plastic surgery work going on in Kenya before his arrival and there are many medical procedure he cannot perform contrary to his alleged qualifications.”

58. The 2nd Respondent contend that the main contestation in the Petition with regard to the 2nd Respondent is that the alleged intended employment of the 4th Respondent by the 2nd Respondent is discriminatory to the Petitioners.

59. The 3rd Respondent on its part urge that there is no or no colours about constitutional complaint of violation (actual or apprehended) of any articles of the constitution upon which this honourable Court can grant relief either as sought or at all. It is further stated the Petition does not disclose precisely what alleged constitutional violation is laid at the feet of the 3rd Respondent, or indeed any of the other Respondents.

60. The 3rd Respondents further assert that the Petition falls way short in terms of compliance with **Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (otherwise referred to as **the Mutunga Rules, 2013**) for the manner in which the Constitutional provisions alleged to have been violated are neither specified nor particularized.

61. The 5th Respondent contend that the courts have held that a Petitioner approaching the Court for declarations or other reliefs as regard a violation or threatened violation of their constitutional rights ought to outline with specificity which rights and the manner in which the offending party has violated or threatened the violation of those rights.

62. In the case of **Anarita Karimi v. Republic (1979) KLR 154** Trevelyan and Hancox JJ stated at page 156 that:-

“... we would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed and further state that it is not enough to merely state the particular sections allegedly infringed. The Petitioner must as of necessity explain how the particular sections have been infringed. That has respectfully not been done here...” (Emphasis Added)

63. Similarly in the case of **Peter O. Ngonge v Francis Ole Kaparo & 4 others H.C. Misc. Application No. 22 of 2004** the Court held inter alia that:-

“There mere allegation of contravention of Chapter 5 of the Constitution provisions per se, without particulars of contravention and how that contravention was perpetrated would not justify the courts intervention by way of any an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleading. Indeed, there is a wealth of authorities on this point... Any such inclination to demand an inquiry overtime there is a bare allegation of constitutional violation would clog the court with unmeritorious constitutional references which would in turn trivialize the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where facts are pleaded in this case, do not plainly disclose any breach of fundamental rights or the constitution there cannot be any basis for any inquiry.” (Emphasis Added)

64. The Court of Appeal in the case of **Mumo vs. Trusted Society of Human Rights Alliance (2014) eKLR** the Court stated:-

“ we cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court...the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.” (Emphasis Added)

65. I have perused the Petition and find that even from cursory review of the Petition, it does not show that there is any way the Respondents can have notice of exactly how they had allegedly violated the Constitutional provisions cited nor would it be possible for this Honourable to adjudicate upon those alleged violations. The Petitioners in the instant Petition recites several constitutional provisions including **Articles 3, 10, 22, 23 and 162** whose significance is not readily apparent. The Petition sets the requirement of **Articles 47 of the Constitution** before accusing the Respondents, of not upholding the Constitution. The Petition herein in my view is not pleaded with precision as mandatorily required in constitutional Petitions. The Petitioners did not bother at all to provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya. Accordingly I find the Petition do not meet the standard enunciated in the **Anarita Karimi Njeru case (supra)**.

66. The Petitioners further made various allegations of constitutional violations and/or breaches against the Respondents herein including even that the stakeholders to medical facilities allegedly depriving Kenyan Medical Practitioners of Employment opportunities without providing any evidence in support. The Petitioners have alleged of discrimination against themselves by intended employment of the 4th Respondent yet failed to give particulars of the alleged discrimination in their pleadings. I note from the Petition, as well as the Supporting Affidavit, the Petitioners made more allegations, but without evidence on violation of rights or without attempting to demonstrate of the threatened violation contrary to the well-established principles of constitutional Petition drafts as well as the provision of evidence. The Petitioners failed the test in Constitutional Petition requiring Petitioner to be precise and to the point.

67. In the instant Petition, the Petitioners alluded to various Constitutional violations but failed to avail tangible evidence of violation of their constitutional rights and freedoms. The allegation by mere pleadings or words without evidence or prove cannot be taken as a proof of violation of the Petitioners' Constitutional Rights. Evidence including demonstrating the allegations will play a key role in support of the Petition. This Petition ought to have produced such evidence including even statistics but not to rely on speculation. I therefore find that the Petitioners failed to meet the threshold as set in the *Anarita Karimi Njeru case (supra)* and further failed to discharge the burden of proof as set out in Constitutional petitions. I further find there was no evidence of probative value that was provided before the Court to enable this Court decide the Petition in favour of the Petitioners and grant the reliefs sought.

D. WHETHER THE COURT CAN SUPERINTEND THE STATUTORY FUNCTIONS OF THE 1ST, 5TH AND 6TH RESPONDENTS IN RESPECT OF LICENCING OF FOREIGN DOCTORS?

68. The relevant provisions of the *Medical Practitioners and Dentists Act (Cap 253) (the MPD Act)* as regards the registration of Medical Practitioners and Dentists are *Sections 6, 11 and 11A of the Act* which provides thus:-

“6 (1) Registration of medical practitioners and dentists (1) Every person eligible to be registered a medical practitioner or as a dentist may apply in the prescribed form to the Register for registration in the register, and every such application shall be accompanied by the prescribed fee.(2) Where a person has complied with the provisions of subsection (1) and has been accepted by the Board as being eligible for registration and has satisfied the Registrar that he has been so accepted, he shall be registered.”

69. *Section 11 of the MPD Act* sets out in detail the considerations by the Board in assessing eligibility for registration for registration and provides thus:-

“11(1) Subject to the provisions of this section, a person shall be eligible for registration under this Act as a medical or dental Practitioner if he is the holder of a degree, diploma or other qualification which is recognized by the Board as making him eligible for registration, and –

a) After obtaining that degree, diploma or other qualification, he has engaged in training employment in a resident medical capacity in one or more institutions approved by the board for such period, being not less than one year, as the Board may approve; and

b) He satisfies the Board that, whilst engaged in training employment under paragraph (a), he has acquired sufficient knowledge of, and experience in, the practice of medicine or dentistry, as the case may be; and

c) He satisfied the Board that he is a person of good moral character and a fit and proper person to be registered under this Act.

(2) where the Board does not recognize a degree, diploma or other qualification in medicine or dentistry held by a person as making him eligible for registration, it shall take steps to assess his suitability for registration and for the purpose of so doing may require him to attend an interview and to undergo any oral or written examination.

(3) The Board may, after assessing the suitability for registration of a person under subsection (2), direct that before registration he shall undergo such further period of training or pass such further examination as it may specify.

(4) The Board shall not authorize the registration of a person until it is satisfied that the requirements of subsection (1) have been fulfilled or, in the case of a person referred to subsection (2), that the requirement of paragraphs (1), (b) and 9c) of subsection (1) have been fulfilled and that any further period of training or examination directed by it under subsection (3) has been completed or passed.

(5)The Board may, where it considers it expedient so to do, delegate the assessment of suitability for registration under subsection (2) to a committee of the Board which shall, after making the assessment, make recommendations to the Board accordingly.” (Emphasis Added)

70. It is clear that the above provisions prescribe the criteria for eligibility for Medical Practitioners and Dentist.

71. Further the Licencing requirements of Medical Practitioners are clearly set out under *Section 13 and 15 of the MPD Act*.

72. The Petitioners contend that foreign doctors are prohibited from private practice under a foreign doctor's licence. The Petitioners herein have not specifically cited the relevant provisions of the *MPD Act* making a specific distinction between foreign trained and locally trained medical practitioner and Dentists. I find that it has not been demonstrated that the impending registrations of Dr. Stasch, the 4th Respondent herein, as a private medical practitioner is a breach of any statutory duty of the 1st Respondent or any impropriety by extension of the 3rd Respondent as the Licenses exhibited at pages 15 to 19 (annextures TSS-1) of the 4th Respondent's Affidavit, specifically licenses him to render services to the 3rd Respondent. This is supported and confirmed at paragraph 17 of Dr. Kioko's Affidavit. The Petitioners have not shown or established any failure in respect of Statutory duties by the 1st Respondent in considering a license application and/or issuing the 4th Respondent with license under *Section 15 of the MPD Act* nor has it been shown that the 1st Respondent exceeded its mandate or acted contrary to the statute in issuing license to the 4th Respondent.

73. The Petitioner herein are seeking that the Court do interfere or superintendent the 1st Respondent's statutory functions but have failed to

demonstrate on what basis. This Court has to decline the invite as it is much alive of the cardinal constitutional principle of separation of powers, to respect decision of statutory bodies with clear mandate entrusted upon them by parliament through statutes. This court can only interfere if it is demonstrated such bodies have acted outside their mandate, which has not been shown to be the case herein. I find in such a situation that the court cannot interfere with such discretion nor can it even usurp the statutory given powers; duties and functions bestowed upon the 1st Respondent or 5th and 6th Respondents and substitute the same with its own decision whether as sought by the Petitioners or at all.

74. In support of the above proposition the Respondents rely on the case of *Kenya Deposit Insurance Corporation v. Richardson & David Limited & Central Bank of Kenya (unreported) Civil Appeal No. 67 of 2016*, adopting and applying a decision of Odunga J, held:

“...the orders issued by the Court clearly show that the court took up the role of CBK and KDIC. That is not the province of a Judge. As correctly held by Odunga J. in *Republic v. KRA ex parte Interactive Gaming and Lotteries Ltd, Misc. Civil Application No. 251 of 2014* “specialized bodies created by statute ought to be given leeway to conduct their proceedings freely...where such bodies act within their jurisdiction the Court only ought to be step it to ensure that the proceedings are conducted fairly.” Their Lordship further held that “... in construing the KDI Act (or any other Act of Parliament) sight must not be lost of the fact that Parliament is elected and represents the people of Kenya. The statutes it enacts constitute law by and for the benefit of the people of Kenya. If therefore, a statute such as the KDI Act gives the CBK as institution the mandate to manage the financial sector and if litigation ensues as a result of CBK’s actions which are challenged in court, the roles of the Court is to examine whether the impugned act was done within the law and whether it was reasonable. A court of law is not entitled to do what it thinks the authority concerned should have done.”

75. Further it is the 3rd Respondents contention, even if, which is not the case herein, the 1st Respondents fell short of its statutory obligations, it is well settled that a statutory violation does not make a constitutional violation. In support where the 3rd Respondent rely on the three Judge bench decision in *Turkana County Government & 20 OTHERS V Attorney General & others [2016] eKLR* where it was held:-

“In that regard the words of the Court in *Harrkinson v Attorney General of Trinidad and Tobago [1980] AC 265*, hold true that; “The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.”

76. In view of the provisions of the *MPD Act* and the authorities in support of the Respondents position I find that this court cannot superintend the statutory functions of the Respondents in respect of licensing of foreign doctors as the Petitioners have failed to demonstrated that the Respondent did not act fairly or the decision was made outside the Respondents’ mandate as entrusted to it by statutes. I find that the Court is bound in view of the circumstances of the Petition not to interfere but exercise restraint.

E. WHETHER COURT HAS JURISDICTION TO INTERFERE WITH RECRUITMENT PROCESS OF THE 2ND AND 3RD RESPONDENTS?

77. The Petitioners allege that the 2nd Respondent is a potential employer of the 4th Respondent and that it has not carried out interview or survey to establish that no local plastic surgeon doctors are available to offer the required services. Looking at the Petition and affidavits by the Petitioners it turns out that there is no evidence in support of such allegations.

78. The Petitioner herein is a voluntary Association registered under the Societies Act and has not shown that it has any legal authority to regulate the manner in which a private hospital such as the 2nd and 3rd Respondents recruit their staff. There is no single statute that has been recited by the Petitioners directing on how private hospital should recruit their staff or giving the Petitioners Association mandate to interfere with recruitment process in the 2nd and 3rd Respondents private hospitals. The 2nd and 3rd Respondents are private hospitals, which are expected and required to exhibit high level of professional and technical services. As an employer therefore they are required to go for the very best professionals, hence that justifies a restricted selection to be made as long as there is no discrimination against a particular candidate or group of candidates; considering all the parameters set out under *Article 27 of the Constitution* which provides:-

“27. Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

79. The 2nd Respondent in support on the criteria to be applied in recruitment of staff in private hospital referred to the case of *Stanley Ominde Khaing v Aga Khan University Hospital [2017] eKLR* where the Court held as follows:-

“My under of the Claimant’s complaint in this application is that the Respondent has opted to employ a foreigner to occupy a position that could be filled by its members.

There are many lawful ways of sourcing employees including; open or restricted advertisement, selection or heard hunting. A recruitment process swill not be termed as unfair merely because a public advertisement has not been made.

For high level professional and technical positions, an employer may justify a restricted selection made as long as there is no discrimination against a particular candidate or group of candidates. The Claimant has not provided any particulars to support

its general allegations of discrimination. The person selected has previously occupied the position and is therefore tested.
(Emphasis Added)

80. In absence of evidence in support of the Petitioners complaint to justify this Court's interference with the recruitment process in the 2nd and 3rd Respondents' private hospital; I find that this court has no basis to interfere neither any legal basis to regulate the manner in which the 2nd and 3rd Respondents' recruit its staff. I further find the Petitioners have no legal authority to similarly seek to regulate the manner in which the two Respondents can recruit their staff. The Respondents, I find are justified to employ anyone including a foreign medical practitioner provided that they have the requisite qualifications and licenses from the 1st Respondent in accordance with the **MPD Act**.

F. WHETHER THE PETITION IS VEXATIOUS AND AN ABUSE OF THE COURT PROCESS DUE TO MATERIAL NON-DISCLOSURE?

81. A vexatious case was defined in **Civil Appeal No.4 of 2018 Kenya Power and Lighting Co. Ltd v. Balozzi Kenga [2019] eKLR** in which the case **Paka Road Development v. Kana [2004] 1 EA 161** was cited with approval thus:-

"a matter would only be scandalous, frivolous or vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. For example, imputation of character where character is not in issue... it would be vexatious if it annoys or tends to annoy. It is not serious or contains scandalous material, irrelevant to the action or defence. A scandalous and/or frivolous pleading is also ipso facto vexatious." (Emphasis Added)

82. Upon perusal of the Petition and considering the Affidavit evidence, it is clear, that the Petition has made numerous unsubstantiated remarks and allegations in respect of the 4th Respondent, personally and professionally, his family and marital status and his race. Further the Petition is steeped in generalisations with respect to foreign medical practitioners of which the 4th Respondent is intended to be a scapegoat for general unwarranted frustrations harboured by the Petitioner's officials.

83. This Court is much aware that the 4th Respondents race, character and family life are not in issue and as such, the pleadings are vexatious in keeping with, the holding hereinabove as the 4th Respondent's race character and family is not an issue for consideration in this Petition. The Petition is scandalous and intended to annoy and demean the 4th Respondent.

84. It is settled law that where a Petitioner moves to the Court for judicial redress, and makes allegations say Constitutional violations, such a person is required to be acting bona fide and the burden of proof squarely lies on him/her to prove. In **Civil Appeal No. 290 of 2012 Mumo Maemu V. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where the Petitioner moved the court for redress on behalf of its members with respect to constitutional violations of their rights, the Court held as follows:-

"We must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bon fide with a view to vindicating the cause of justice. Where a person acts for other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at this threshold." (Emphasis mine)

85. In the Instant petition the Petitioners places emphasis on the allegation that the 4th Respondent's qualifcators are falsified or otherwise inadequate. However, the Chair of the Petitioner, Professor Khainga has severally personally recommended the 4th Respondent with respect to its applications to the 1st, 2nd, 3rd and 5th Respondents. In all instances, the Professor has unequivocally supported the 4th Respondent's qualifications.

86. From the affidavit evidence and annexures by the Petitioners and the 4th Respondent as well as the 1st Respondent it turns out that the 4th Respondent's credential, and vast professional qualifications and experience are unquestionable. In addition, it is clear that the 5th Respondent has been joined to the suit for the sole reason of frustrating the 4th Respondent's pending application for renewal application for work permit. No prayers have been sought against the 5th Respondent, further illustrating the vexatious nature of this suit, as one intended to assault the 4th Respondent's reputation as opposed to a Petition, that properly seeks to address constitutional violations.

87. The 4th Respondent in submitting that the Petition herein is vexatious and an abuse of the Court sought reliance from case of **Karuri & others vs. Dawa Pharmaceuticals Company Limited and Others (above) to the extent the Court held that:**

"In an originating application to the High Court, the mere allegation that a human right of fundamental freedom of the application has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court if it is apparent that allegation is frivolous or vexatious or an abuse of the process of the court." (Emphasis Added)

88. Having considered the Petition herein and upon consideration of the submission by the Petitioners and the Respondents generally, I find that the Petition herein to be based on malice and on trivial matters. The same no doubt is vexatious, frivolous and an abuse of the Court process.

89. **The upshot is that the Petition herein is without merits and is bound to fail. I accordingly dismiss the Petition with costs to the Respondents.**

Dated, Signed and Delivered at Nairobi on this 26th day of November, 2020.

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J. A. MAKAU

JUDGE