REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION JR NO. 408 OF 2017

(Coram: Odunga, J)

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, THE LAWS OF KENYA

AND

IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS ACT, NO. 10 OF 1999 THE LAWS OF KENYA

AND

IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT, CAP 253 THE LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA MEDICAL LABORATORY, TECHNICIANS AND TECHNOLOGISTS BOARD

REPUBLIC……..…...APPLICANT

VERSUS

THE KENYA MEDICAL LABARATORY TECHNICIANS

AND TECHNOLOGISTS BOARD ….……..……..RESPONDENT

ADPATH LABORATORIES LIMITED…...EX-PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd January, 2017, the ex parte applicant herein, **Adpath Laboratories Limited**, seeks the following orders:

1) THAT the Honourable Court does grant an order for Judicial review in the nature of certiorari to quash the decision of the Respondent purporting to illegally close the ex parte applicant's private hospital without requisite mandate, authority and jurisdiction and without regard to the due process of the law.

2) THAT the Honourable Court does grant an order for judicial review in the nature of Prohibition to prohibit the Respondent from enforcing and/or implementing the purported closure and attendant notices issued in respect of the ex parte applicant's hospital to close the hospital.

3) THAT the Honourable Court do grant an order of Judicial Review in the nature of prohibition to prohibit the Respondent from generally purporting to register, collect fee and/or payment and/or license the ex parte applicant.

Ex Applicants' Case

2. The application was supported by an affidavit sworn by **Dr Waithera Njenga Githendu**, a director of the applicant, a limited liability company.

3. It was deposed that the said deponent is medical practitioner registered under the Medical Practitioners and Dentists Board and a specialist in general pathology having practised as such since 2013. It was his deposition that he had complied with all the requirements of the Kenya ***Medical Practitioners and Dentists Act*** thus the issuance of the retention certificate by the said Board which requirements include payment of the requisite fees necessary for registering and running the applicant as a Pathologist as stipulated in the ***Medical Practitioners and Dentists Act*** Cap 253 as read with the subsidiary legislation thereto.

4. According to the deponent since the applicant already pays fees to its regulatory body a demand for fees of any sort to the Respondent amounts to double licensing hence is punitive. Based on legal advice, it was averred that the purpose of ***The Medical Laboratory Technicians and Technologists Act***, No. 10 of 1999 and the Board created thereunder as stated in the long title solely covers the technicians and technologists. At section 5 thereof the Respondent's role is defined and given as expressly dealing with the conduct and practice of medical laboratory technicians and technologists.

5. However, the pathologists, who are also laboratory workers but of a specialised nature from the general medical practitioner, are expressly provided for in and regulated by the ***Medical Practitioners and Dentists Act*** Cap 253 and the subsidiary legislation thereto together with the institution they run, if any. According to the applicant, section 4 of Cap 253 establishes the **Kenya Medical Practitioners and Dentists Board** whose mandate includes to satisfy itself that courses of study to be followed by students for a degree in medicine or dentistry, including the standard of proficiency required for admission thereto and the standards of examinations leading to the award of a degree, are sufficient to guarantee that the holder thereof has acquired the minimum knowledge and skill necessary for the efficient practice of medicine or dentistry, accept persons as being eligible for registration, and authorize the Registrar to issue to a medical practitioner or a dentist who has applied in the prescribed form and whom the Board considers has had suitable working experience in medicine or in dentistry, as the case may be, a licence to engage in private practice.

6. The applicant therefore was of the view that the allegation by the Respondent that the registration of laboratories is a critical function of the Respondent was incorrect as nowhere in the Act does the law prescribe such a function, the only allusion to the same being in the Schedule to the Subsidiary Legislation, ***Kenya Medical Laboratory Technicians and Technologists (Fees) Regulations, 2006*** at number 2 where it lists the fees for "*Registration of Private Laboratories*". However the Act does not prescribe the mode of classification of the said classes of laboratories, the qualifications or at the very least, the description of private or laboratories. It was further averred that pursuant to the Act at its section 5 the Respondent's role is defined and given its clear and express mandate which are expressly dealing with the conduct and practice of medical laboratory technicians and technologists. The same section establishes the office of the Registrar of Medical Practitioners and Dentists whose mandate is *inter-alia* shall keep a register of medical practitioners and dentists in the prescribed form and issue to every person registered under the Act, a certificate in the prescribed form. The deponent averred that he is a licenced private practitioner pursuant to section 15 of Cap 253 licenced to engage in private practice as a specialist in Pathology.

7, To the applicant, whereas the Act has a whole part dealing with private practice: ***Part IV – Provisions relating to Private Practice***, and thus this would define what the private practice entails, its actors and institutions if any, that part as does the whole Act and its subsidiary legislation covers only laboratory technicians and technologists as private practitioners.

8. The applicant therefore disagreed with the Respondent's Registrar's allegation that the registration of laboratories is a critical function of the Respondent as nowhere in the Act does the law prescribe for registration of laboratories or for institutions. Indeed the only place where there is an allusion of the same is in the Schedule of the Subsidiary legislation ***Kenya Medical Laboratory Technicians and Technologists (Fees) Regulations, 2006*** at number 2 where it lists the fees for "Registration of Private Laboratories."

9. According to the deponent, the applicant was incorporated in August 30th 2016 with himself and **Dr Kamotho Watenga** as its directors and that they are registered medical practitioners under the said Act and with certificates of registration of registration numbers A7814 and A6351 respectively and have both further specialised their medicine discipline in the field of pathology with qualifications as Masters in Medicine in Human Pathology.

10. It was further disclosed that soon thereafter it took into its employ a certified licenced laboratory technologist who was advised to register with the Respondent her work place and apply to be a Laboratory Superintendent at a cost of Kshs 12,000/=. According to the applicant, being under directorship of doctors and specialised pathologists, the applicant was required to be registered and inspected by its Board, The Medical Practitioners and Dentists Board pursuant to its Act, ***Medical Practitioners and Dentists Act***.

11. It was however averred that on 11th December, 2017, an untitled document, authored and seemingly approved by one **Purity Kimathi**, with a sum of money written thereon under a title Annual Licence Fee, but not stating whether the sum is owed or due, payable by when if at all, payable to whom, but bearing the stamp of the Respondent was served on the applicant's premises. However before the deponent could get a chance to interrogate its source, purpose and many other queries, a public notice of immediate closure, authored by the same person, was placed on the applicant's door with no reasons therefor. It was the applicant's case, based on legal advice, that this action was arbitrary, irrational and illegal. The applicant further contended that the said actions amount to a deprivation of the applicant's right of, among others, fair administrative action pursuant to Article 47 of the Constitution and the natural law (sic) principle of not being condemned unheard.

12. To the applicant its mandate to effect Article 43(1)(a) of the Constitution has been thoroughly curtailed by the Respondent's said action and has led to loss of income by the applicant.

13. In the applicant's view, the Act does not prescribe the mode of classification of the Classes of laboratories, the qualifications or at the very least, the description of private or laboratories, yet it has a whole part dealing with private practice; ***Part IV – Provisions Relating to Private Practice*** and thus this would define what the private practice entails, its actors and institutions if any. However, the said part, as does the whole Act and its subsidiary legislation cover only laboratory technicians and laboratory technologists as private practitioners.

14. It was averred that pursuant to the ***Medical Practitioners and Dentists (Private Medical Institutions) Rules***, Rule 3 the *ex-parte* Applicant must be registered and licenced to operate as a private medical institution. However, prior to that registration and licencing, the Applicant must meet the statutory conditions for grant of licence which include; the premises and its proposed, facilities and equipment are approved by the Board as suitable for the purpose indicated in the application, and the Board is satisfied as to the character and ability of the applicant to run the private medical institution, the medical officer of health of the district where the premises are located submits a satisfactory report on the premises to the Board; the medical practitioners or dentists providing services at the institution is the holder of a valid private practice licence issued under the Act to render medical or dental service at the institution; all professional staff working or intending to work in the institution are qualified and are registered by the relevant registering authority as required; the quality of health care to be provided at the institution shall be such as to comply with the minimum standards acceptable to the Board. Additionally the *ex-parte* Applicant is required pay annually for renewal of the licence.

15. It was contended that on meeting the aforementioned requirements the *ex-parte* Applicant was issued with a licence and is now a registered institution of registration number 008053 and pursuant to the Act the *ex-parte* Applicant is subject to inspection by the Kenya Medical Practitioners and Dentists Board to ensure compliance at all times additionally the Applicant is also to file reports on the its status every six months with the Board which Board has jurisdictional and legal mandate over the Applicant undertakes a very thorough process of ensuring the standard of health care is attained and maintained by all persons and institutions it regulates. According to the applicant, the Kenya Medical Practitioners and Dentists Board duty binds all practitioners registered under it to practise in medical clinics, dental clinics and health facilities approved by it and also requires such institutions to employ duly qualified, licensed and registered personnel.

16. It was therefore the applicant's position that unlike the deposition by the Respondent's registrar that is based merely on conjecture, the legislation regulating the Applicant and its directors is very detailed on not only the practice undertaken by the Applicant but also the people working in the Applicant and that on approval by the Kenya Medical Practitioners and Dentists Board for registration of an institution, the said institution is subject annual renewal of its licence which is contingent on compliance of various rules provided for under the Act.

17. It was therefore the applicant's case that in compelling it to make the alleged payments demanded by the Respondent whereas it is already making annual payments and renewing licences to its own regulatory body is punitive and unfair and a breach of Article 41(1) of the Constitution. The applicant however denied the implication by the Respondent's Registrar, that the *ex –parte* Applicant seeks to be unregulated, but only challenged the unfairness of the dual regulation. Further, mandating regulation of the *ex-parte* Applicant by the Respondent is unfair and unjust as it compels the former to be regulated by a Board of which it cannot contribute whatsoever to its running, for example under the ***Medical Laboratory Technicians and Technologists (Election) Regulations, 2015*** only qualifies persons registered under Act to participate in the election as voters or candidates. Neither the *ex-parte* Applicant nor its directors can do so. To the applicant, there is a clear distinction between different legal persons.

18. The applicant explained that this suit is brought by the *ex-parte* Applicant which is very different and independent of the legal person stated by the Respondent, SkyLab Diagnostics which has not been joined to this suit as party by either the Applicant, Respondent or even sought to join on its own motion. To the deponent, the *ex-parte* Applicant on whose behalf she deposed, has no knowledge of and thus cannot respond to the issues concerning SkyLab Diagnostics and opine that the same are unrelated to this suit. Its case was that allowing the Respondent make allegations against the said legal person not party to this suit is tantamount to contravening the natural law rule that is now enshrined in our constitution of condemning the party unheard.

19. It was submitted on behalf of the applicant that the *ex-parte* Applicant has approached this Honourable Court seeking judicial review orders against the actions of the Respondent and believe it to be firmly in the province of judicial review proceedings based on Article 47 of the Constitution. Further the *ex-parte* Applicant relied also on sections 4 and 5 of the ***Fair Administrative Action Act*** which operationalises the aforestated Article, Part 3 section 7 of the said Act, the cases of **Municipal Council of Mombasa vs. Republic & another [2002] eKLR; Republic vs. Kenya Medical Laboratory Technicians and Technologists Board &another; Ex-Parte Anil Tailor & 4 others [2013] eKLR** where the Court stated.

20. According to the applicant, this application similarly seeks to challenge the actions of the Respondent which is a public body charged with a public duty, but the matter is clearly distinguishable from the aforementioned authority and relied on section 3 of the ***Interpretation and General Provisions Act*** Cap 2 which defines what "public body" means. According to the applicant, the Respondent is established under Cap 253A and pursuant to its long title its scope is limited to medical laboratory technicians and technologists and defines the terms "register" and "registrar".

21. According to the applicant, the registration that is capable of being done under the Act by the Registrar in the statutory register is only of the medical laboratory technicians and technologists since the said Act establishes the Respondent and spells out its functions in section 5 thereof. It was therefore contended that anything out of this scope would be *ultra vires* and illegal. Indeed section 5 has limited the Respondent's functions to medical laboratory technicians and technologists. The applicant's case was that whereas the Respondent relied on section 40 (e) and (g) of Cap 253A, the section specifically refers to regulations made by the Respondent with approval of the Minister (now Cabinet Secretary) these are however in line with and without prejudice to the generality of the Act. To the applicant, the Act in its subsidiary legislation has the regulation envisaged by this section and this is the

22. Curiously the legislation does not talk about the classification of Laboratories or what criteria determines the particular class of a Laboratory. At the very least the *ex-parte* Applicant was never informed as to why it was classed as such. Indeed the classification only came about when the Respondent was demanding for money and curiously that is the most expensive ranked class.

23. It was submitted that the question that begs is whether the *ex-parte* Applicant is a Private Laboratory under the Act. Whereas, the Respondent referred to the *ex-parte* Applicant as a **'Private Health Facility'** it was contended that the parent Act does not talk about a

private health facility, nor does it define a private laboratory but it has a whole part that talks about private practice from whence, the drafters intent can be inferred in section 20 of CAP 253A

24. According to the applicant, the qualification for private practice, but specifically reserves it for the Private practice of laboratory technicians and technologists.

25. According to the applicant, the apprehension of the Respondent that if it abdicated this duty of inspection and licensing of the *ex-parte* Applicant then the public would be exposed to great health risk was unfounded since the *ex-parte* Applicant is guided by the various legislation in exercising its mandate as reiterated in the ***Health Act*** **Cap 21 of 2017** which prioritizes the health of the individual and places the onus of safeguarding this health on the State through health care providers who in this case is the *ex-parte* Applicant and provides in section 89 of Cap 21 of 2017.

26. According to the applicant, stating that the *ex-parte* Applicant has to be licenced to operate and possession of such licence would mean that the said applicant has met all the requisite standards and is now competent to provide the services there licenced. The *ex-parte* Applicant has been annually licenced since its inception and not once has its licence been revoked, withdrawn or suspended.

27. It was however submitted that it is not the Health Act alone that ensures the health status of the public is the priority of the *ex-parte* Applicant. It is not in contention that the Directors of the *ex-parte* Applicant are qualified doctors who are duly registered as such under the ***Medical Practitioners and Dentists Act*** **CAP 253** and that they are duly licenced to practice as such by the Board thereunder being the **Kenya Medical Practitioners and Dentists Board** (hereafter **KMPDB).** In this regard the applicant made reference to sections 14 and 15 of CAP 253.

28. It was submitted that the Act in section 23 further empowers the Cabinet Secretary in consultation with the Board to make rules for the efficacy of the better carrying out of the provisions of the Act and that the subsidiary legislation which are divided into 7 sets of Rules one of which is the ***Medical Practitioners and Dentists (Forms And Fees) Rules*** which law provides for the application for, registration of and licencing of medical and dental practitioners and in rule 9 provides for the recognition and registration of specialists who in this case the pathologist. The regulations however go a step further unlike CAP 253A and also provide for the application, registration, licencing, fees payable and even inspection of institutions in this case the *ex-parte* Applicant as seen in Rules 11-17. It was submitted that the Rules are very specific and indeed cover the *ex – parte* Applicant as seen in Form IX of the First Schedule at No. 2 where it enquires the institution being registered one of the examples is Laboratory. It is also observed that the process is very rigorous and thorough, where there is a checklist (Form IXV) as to what the Inspection Officer is looking out for and even where registration is declined the reasons of the said refusal should be listed in the provided space, unlike under CAP 253A which has no criteria whatsoever on then purported inspection even of the reagents.

29. According to the applicant, if at all the fear of the Respondent is fear of exposure of the public to dangerous conditions then they should have statutory thorough inspection procedure of the facility not only the reagents used as the one the *ex-parte* Applicant is subjected to at registration and whenever the regulatory body comes calling. Schedule Two of the said rules specifically spell out the fees for practitioners including those that are specific to the *ex-parte* Applicant. The fees form again categorises the different medical institutions herein provided for but unlike CAP 253A the CAP 253 at the Schedule to the ***Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000*** clearly categorises the said medical institutions while the Sixth Schedule of the said Rules further categorises specifically pathology laboratories. Further the licence clearly categorises the *ex-parte* Applicant unlike the Respondent who only classified the Respondent in its invoice. It was submitted that the ***Medical Practitioners and Dentists (Private Practice) Rules, 2000*** goes into the specifics and particulars of the workings of the *ex-parte* Applicant which rules beyond definitions go ahead and set the terms for the private practice. It was contended that the regulation of laboratories is very specific as to even the premises where the private practice is practiced and Rule 10 gives very stringent conditions as to the issuance of the licence. That notwithstanding, the Act goes ahead to give even further regulations with regard to private medical institutions the ***Medical Practitioners And Dentists (Private Medical Institutions) Rules, 2000*** of which as per the definition, the *ex-parte* Applicant is one. Under these regulations it provides for *inter alia* the registration, licensing and as earlier stated the categorization of such institutions. The rules further reiterate and even add to the conditions of issuance of licences to such institutions. The *ex-parte* Applicant drew the Court's attention to Rule 11 and submitted that since the *ex-parte* Applicant is under very serious regulations, the Respondent's fear of its actions exposing the public to risk is unfounded and clearly untrue.

30. Based on the foregoing it was submitted that the question of generality versus specificity begs and reliance was placed on **Republic vs. Council of Legal Education & Another Ex-Parte Mount Kenya University [2016] eKLR** and **Kenya Pharmaceutical Distributors Association vs. Kenya Veterinary Board & 3 Others [2017] eKLR** and it was submitted that similarly the matter before this Court is as regards the licencing and regulation of the *ex-parte* Applicant but as seen in the given legislation **CAP 253** is very specific compared to **CAP 253A**. The *ex-parte* Applicant urged the Court to apply the aforementioned maxim as it is clearly seen that **CAP 253** is extremely specific with regard to the *ex-parte* Applicant especially where the said Applicant is owned and run by pathologists. Similarly based on the same maxim **CAP 253A** is specific to laboratory technicians and technologists**.** To the applicant, based on the foregoing and from the objectives and preambles of both **CAP 253** and **CAP 253A** the objectives of both pieces of legislation the scope of the Acts is very clear and thus the Respondent should not purport to regulate where the law has not legislated for it to.

31. According to the applicant, though the Respondent relied on the authority of **Republic vs. Kenya Medical Laboratory Technicians and Technologists Board &another; Ex-Parte Anil Tailor & 4 Others [2013] eKLR,** that matter is clearly distinguishable from the matter herein since unlike the aforesaid matter, it was submitted that the *ex-parte* Applicant is under the directorship of qualified pathologists.

32. As regards discrimination, the applicant relied on section 12 of the ***Health Act*** and submitted that the actions of the Respondent are clearly discriminatory and punitive where they compel duplex payments of the *ex-parte* Applicant that although it is licenced and regulated by its own regulatory body the Kenya Medical Practitioners and Dentists Board, the Respondent also wants to regulate and more importantly receive payment off the *ex-parte* Applicant.

33. In conclusion, it was submitted that the bottom-line question before this Court is whether the Respondent has jurisdiction over the *ex-parte* Applicant with specific regard to licencing, regulation and inspection. The *ex-parte* Applicant prayed that from the foregoing the Court responds to this question in the negative on account of the jurisdiction of the Respondent as given in the Act, the generality and specification

of the two legislations and account of discrimination prohibited by the constitution.

The Respondent's Case

34. The application was opposed by the Respondent.

35. It was contended that the Respondent is established pursuant to the provisions of section 3 of ***Medical Laboratory Technicians and Technologists Act*** (Cap 253A Laws of Kenya) as a body corporate with perpetual succession mandated by the said provision to be capable of doing or performing all such other acts necessary for the proper performance of the Respondent's functions under ***Medical Laboratory Technicians and Technologists Act*** (hereinafter referred to as Cap 253A). Pursuant to section 5 of the said Act the Respondent's objects and functions is to exercise general supervision and control over the training, business, practice and employment of Laboratory Technicians and Technologists in Kenya and to advise the government in relation to all aspects thereof.

36. The Respondent then proceeded to set out the various provisions of **Cap 253A** which deal with registration and licencing of Laboratory Technicians and Technologists. According to the Respondent, to enable the Respondent exercise its regulatory mandate as specified under **CAP 253A** the Respondent through its officers accesses private Medical Laboratories throughout the Republic of Kenya including that of the Exparte Applicant for purposes of confirming, *interalia* whether the Medical laboratory technicians and technologists working therein have requisite training qualification, their registration status and whether they uphold the professional standards set by the Respondent and the registration status of the medical laboratory. Further, the Respondent through its officers inspects the reagents and equipment in use in those laboratories to confirm whether they are validated by the Respondent in conformity with the **Medical Laboratory (Equipment and Reagents validation) Regulations, 2011.**

37. It was the Respondent's case that the registration of laboratories including private laboratories as that operated by the exparte applicant is a critical function of the Respondent to ensure uniform standards of Medical Laboratory practice in Kenya and the Respondent regularly inspects these facilities to ensure compliance with standards all geared towards protecting health of Kenyan public from unregulated Medical Laboratory practice.

38. The Respondent's case was that the Exparte Applicant's instant application has been made without regard to the applicable law and that it has wilfully omitted, failed and/or neglected to disclose material facts such as the issue as to whether the power to register license and regulate the business and practice of private Medical Laboratories vests in the Respondent or the Medical practitioners and Dentists Board being the basis of the exparte Applicant's application dated 2nd January, 2018 was settled in the case of **Republic vs. Kenya Medical Laboratory Technicians and Technologists Board & Anor Exparte Anil Tailor & 4 others (2013) eKLR** where following a detailed analysis, the Honourable Court held that the regulatory mandate of the Respondent is not limited to public institutions but extends to private Medical laboratories and the Respondent has a regulatory mandate over medical laboratories situate with private health facilities. Also in **Republic vs. Kenya Medical Laboratory Technicians And Technologists Board, Exparte Archdiocese Nairobi, Kenya Registered Trustees (2018) eKLR** the mandate of the Respondent to regulate medical laboratories within 'health institutions, hospital laboratories was confirmed and the court cited with approval the determination in the case of **Republic vs. Kenya Medical Laboratory Technicians and Technologists Board & Anor Exparte Anil Tailor & 4 others (2013) eKLR** where the court confirmed that private laboratories are subject to regulatory mandate of the respondent board.

39. The ex parte applicant was further accused of being guilty of material non-disclosure as the Exparte Applicant has already submitted to the regulatory mandate of the Respondent. According to the applicant, on or about 30th August 2016, the Ex-parte Applicant submitted an application to the Respondent for approval to operate a private medical laboratory. Following the submission of the aforesaid application for approval to operate private Medical Laboratory the Ex-parte Applicant also paid to the Respondent the requisite inspection fees of Kenya Shillings Twelve Thousand**.** Following receipt of the aforesaid application from the Exparte Applicant and payment of the requisite inspection fees on 20th December, 2016 the Respondent sent a team of inspectors to the Exparte Applicant who prepared a detailed inspection report that also included specific areas that the Exparte Applicant was required to address to attain registration and also an invoice indicating the requisite fees to be paid for the relevant class of laboratory and the Exparte Applicant was left with a copy of the said inspection report.

40. It was averred that the team that conducted the inspection report in Machakos town on 20th December 2016 prepared a summarized report indicating the status of other facilities inspected on the said date besides that of the exparte Applicant**.** Despite the exparte Applicant having applied for approval of registration to the respondent on 30th August 2016 and inspection carried out on the said facility and a detailed inspection report left with the exparte Applicant on 20th December 2016 the exparte Applicant did not comply and on 13th December 2017 the Respondent sent another team of inspectors to the exparte applicant. The said team met one **Catherine Chepkemoi** a laboratory technologist regulated by the Respondent who called one **Mr. Kamotho** who requested to be issued with an updated invoice which he promised to clear and ensure the facility was compliant. The exparte Applicant thereafter declined to comply and meet the conditions stipulated in the inspection report prompting the Respondent to issue the immediate closure notice.

41. According to the Respondent, a review of the database of the Respondent has revealed that the Directors of the exparte Applicant are also the proprietors of another Medical Laboratory facility that had also applied for registration with the Respondent. On or about 6th April, 2016 the Respondent received an application for approval to operate private Medical Laboratory for that Laboratory known as Sky-Lab Diagnostics whose listed directors are indicated as **Dr. Waithera Githendu** and **Dr. Kamotho Watenga** who are also listed as directors of the ex-parte applicant herein. Following the submission of the aforesaid application for approval to operate private Medical Laboratory under the name of Sky-Lab Diagnostics payment for the requisite inspection fees of Kshs. 12,000 was made to the Respondent. On 20th April, 2016 the Respondent sent a team of inspectors to Sky-Lab Diagnostics who prepared a detailed inspection report that also included specific areas that they were required to address to attain registration and also an invoice indicating the requisite fees to be paid for the relevant class of laboratory. Sky-Lab Diagnostics was left with a copy of the said inspection report. To date, Sky-Lab Diagnostics has not attained registration and the Respondent has noted with tremendous concern that the Directors of the exparte Applicant are also listed proprietors of Sky-Lab Diagnostics both of which facilities in spite of having been inspected have not complied and attained registration. In carrying out their inspection work the officers of the Respondent are guided by strict guidelines of the Respondent and they do not harass and/or

intimidate any person whatsoever during their conduct of official duties.

42. According to the Respondent, it has a statutory mandate and mission to protect the health of all Kenyans by ensuring compliance with standards in medical laboratory facilities and the Respondent is not permitted by law to compromise this standard by varying the set criteria for standards for a particular Medical Laboratory Facility. Other private medical facilities regulated by the Respondent always comply with the set standards and there is no particular reason to exempt the Exparte Applicant from compliance and as demonstrated hereinabove the Exparte applicant has already applied for registration only that they have not met the registration criteria. It was the Respondent's position that to allow the Exparte Applicant not to comply with standards and to continue to operate the Medical Laboratory Facilities without due compliance the Respondent would not only be abdicating its statutory mandate of regulation of standards but would also be exposing the health of Kenyan public to a great risk.

43. It was therefore the Respondent's case that the ex-parte Applicant's application has no merit whatsoever and is merely calculated at preventing the Respondent from exercising its statutory mandate under the provisions of **CAP 253A**. In its view, to allow the Exparte Applicant to run private Medical Laboratory Facilities without regulation by the Respondent would be to open a Pandora's box and grant an avenue for all private Medical Laboratory Facilities to refuse regulation by the Respondent of Medical Laboratory Practice in Kenya rendering the regulatory mandate of the Respondent irrelevant and exposing the health of the Kenyan Public to serious risk and further seriously undermine the operation of CAP 253A. The Respondent insisted that the statutory mandate of the Respondent under CAP 253A extends to medical laboratory facilities and technicians and technologists working in those facilities irrespective of the mode of registration of those medical laboratory facilities. The Respondent maintained that the statutory mandate of the Respondent over these Medical Laboratory facilities is not whatsoever dependent on the ownership of those facilities or whether the facilities are registered as trusts, companies, sole proprietorship or any other mode of registration but the statutory mandate of the Respondent arises as long as the facility is a medical laboratory notwithstanding how its registered proprietors have registered ownership of such a facility. The Respondent asserted that there is no provision with CAP 253A to exempt a medical laboratory facility from the regulatory mandate of the Respondent merely because such a facility is registered by doctors and in spite of registration of the medical facility, such a facility is still under the regulatory mandate of the Respondent under CAP 253A as long as it trust is running a Medical Laboratory facility. The Respondent contended that technicians and technologists are subject to the regulatory mandate of the Respondent under CAP 253A whether the medical facility they are working for is registered by doctors and the regulatory mandate of the Respondent over the professional it regulates is not dependent or subject to where those professionals work.

44. It was the Respondent's position that the regulatory mandate of the Respondent is conferred by statute and the Respondent cannot oust its mandate as alleged by the ex-parte Applicant. To the Respondent, medical practitioners and dentists board has no regulatory mandate over Medical Laboratory facilities or technicians and technologists working in those facilities and that regulatory mandate is exercised by the respondent pursuant to the provisions of CAP 253A.

45. Accordingly, the Applicants Application is misconceived, incompetent, devoid of merit, bad in law and an abuse of the Court process as the Respondents have not set out and/or demonstrated any reasonable grounds to warrant granting of the orders sought.

46. In support of their case the Respondent relied on the case of **Republic vs. Tanathi Water Services Board & 2 Others Ex parte Senator Johnstone Muthama [2014] eKLR** wherein the Judge relied on the persuasive authority by **Lord Diplock** in ***Council for Civil Service Unions vs. Minister for Civil Service [1985] AC 374 at 401 D***. According to the Respondent, it is established pursuant to the provisions of section 3 of ***Medical Laboratory Technicians and Technologists Act*** **(CAP 253A Laws of Kenya)** as a body corporate with perpetual succession mandated by the said provision to be capable of doing or performing all such other acts necessary for the proper performance of the Respondent's functions under ***Medical Laboratory Technicians and Technologists Act*** **(hereinafter referred to as CAP 253A).** Pursuant to section 5 of the said Act the Respondent's objects and functions is to exercise general supervision and control over the training, business, practice and employment of Laboratory Technicians and Technologists in Kenya and to advise the government in relation to all aspects thereof.

47. To the Respondent, the registration of laboratories including private laboratories as that operated by the exparte applicant is a critical function of the Respondent to ensure uniform standards of Medical Laboratory practice in Kenya and the Respondent regularly inspects these facilities to ensure compliance with standards all geared towards protecting health of Kenyan public from unregulated Medical Laboratory practice.

48. With respect to prohibition the Respondent relied on the case of ***Joram Mwenda Guantai vs. The Chief Magistrate Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170***, and submitted that the parameters of Judicial review and in particular prohibition orders were also considered in ***Republic v The Kenya Medical Laboratory Technicians and Technologists Board ex-parte Christine Inokobia Limugi, Nairobi J.R. Misc. Appl. No. 269 of 2016***. The Respondent asserted that it had not acted in excess of its jurisdiction or in contravention of the laws of the land. No evidence has been availed by the Ex-parte applicant herein that in conducting its business the Respondent in any way exceeded its mandated under CAP 253A. In addition no evidence has been availed to show that the Respondent has departed from the rules of natural justice by denying the ex parte applicant a right to a fair hearing or at all. Rather as demonstrated in the Replying Affidavit by the Registrar of the Respondent, the ex-parte Applicant has been treated fairly by the respondent and has in fact submitted an application for registration with the ex-parte respondent on two medical laboratory facilities. In this respect the Respondent relied on the case of **Republic vs. Kenya Medical Laboratory Technicians and Technologists Board & Anor Exparte Anil Tailor & 4 Others (2013) eKLR.**

49. It was therefore submitted that laboratory technicians and technologists are subject to the regulatory authority of the Board wherever they work or practice their profession. The Respondent also relied in the cases of ***Kings Medical College Limited v The Kenya Medical Laboratory Technicians and Technologists Board & 2 others, Nyeri Constitutional Petition No. 8 of 2017*** *and also the case of* ***Republic vs The Kenya Medical Laboratory Technicians and Technologists, Ex-parte Valley Hospital Ltd, Nakuru J. R. Application No. 22 of 2015*** *where in both cases, the courts underscored the regulatory mandate of the Respondent. The Respondent also relied on* the case of **Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi HCC No. 288 of2004 (HCK) [2006] 2 EA. 117; [2006] 2 KLR 375**.

50. According to the Respondent, judicial review remedies being discretionary the court would not grant them in certain circumstances even if the same are merited and relied on ***Hallsbury's Laws of England 4th Edition Vol 1 (1) paragraph 12 pg 270.***

51. **It was submitted that** the Respondent has a statutory mandate and mission to protect the health of all Kenyans by ensuring compliance with standards in medical laboratory facilities and the Respondent is not permitted by law to compromise this standard by varying the set criteria for standards for a particular Medical Laboratory Facility. Other private medical facilities regulated by the Respondent always comply with the set standards and there is no particular reason to exempt the Exparte Applicant from compliance and as demonstrated hereinabove the Exparte applicant has already submitted its registration application to the Respondent.

52. It is the Respondent's prayer that the Ex parte Applicants Application ought to be dismissed since the reliefs sought in the notice of motion are unsupported and without basis whatsoever as the Respondent has not issued any closure notice for ex-parte applicant's private hospital. The notice issued by the Respondent is clearly in respect of the medical laboratory.

53. To the respondent, the application has not met the prerequisite requirements for the grant of the orders sought and the court was urged to dismiss the application with costs to the Respondent.

Determination

54. I have considered the application, the statement, the verifying and further affidavits, the replying affidavit, the submissions filed and the authorities relied upon. As rightly pointed out by the applicant, the bottom-line question before this Court is whether the Respondent has jurisdiction over the *ex-parte* Applicant with specific regard to licencing, regulation and inspection. The *ex-parte* Applicant prayed that from the foregoing the Court responds to this question in the negative on account of the jurisdiction of the Respondent as given in the Act, the generality and specification of the two legislations and account of discrimination prohibited by the constitution.

55. The scope of purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

56. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

57. The foregoing position reflects the traditional jurisprudence on judicial review. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

58. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

59. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds.**

What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

60. **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

61. **The Court while citing** the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** further stated that:

"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* **and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century…"**

62. The first question for determination is therefore whether the Respondent has jurisdiction over the *ex-parte* Applicant with specific regard to licencing, regulation and inspection. It is not in doubt that the Respondent herein is a creature of ***The Medical Laboratory Technicians and Technologists Act***, No. 10 of 1999 as a body corporate with perpetual succession mandated by the said provision to be capable of doing or performing all such other acts necessary for the proper performance of the Respondent's functions under ***Medical Laboratory Technicians and Technologists Act*** (hereinafter referred to as Cap 253A).

63. It is not in doubt that the long title of Cap 253A provides that it is:

An Act of Parliament to provide for the training, registration and licensing of medical laboratory technicians and technologists, to provide for the establishment, powers and functions of the Kenya Medical Laboratory Technicians and Technologists Board, and for connected purposes.

64. It was therefore the applicant's contention that since in the long title the Act solely covers the said technicians and technologists, it does not apply to the licensing of the ex parte applicant which is an entity run by pathologists, who are also laboratory workers but of a specialised nature from the general medical practitioners and who are expressly provided for in and regulated by the ***Medical Practitioners and Dentists Act*** Cap 253 and the subsidiary legislation thereto together with the institution they run, if any. According to the applicant, under section 5 of Cap 253A, the Respondent's role is defined and given as expressly dealing with the conduct and practice of medical laboratory technicians and technologists.

65. The position adopted by the Respondent on the other hand was that pursuant to section 5 of Cap 253A the Respondent's objects and functions is to exercise general supervision and control over the training, business, practice and employment of Laboratory Technicians and Technologists in Kenya and to advise the government in relation to all aspects thereof.

66. Since the parties herein, though relying on section 5 of Cap 253A but are unable to agree as to its application and import, it is necessary to set out what the said section provides. According to the said section:

(1) The object and purpose for which the Board is established shall be to exercise general supervision and control over the training, business, practice and employment of laboratory technicians and technologists in Kenya and to advise the Government in relations to all aspects thereof.

(2) Without prejudice to the generality of the foregoing, the Board shall—

(a) prescribe, in consultation with the College and such approved training institutions as the Board may deem appropriate, the courses of instruction for laboratory technicians and technologists;

(b) consider and approve the qualifications of laboratory technicians and technologists for the purposes of registration under this Act;

(c) approve institutions for the training of laboratory technicians and technologists;

(d) licence and regulate the business and practice of registered

laboratory technicians and technologists; and

(e) regulate the professional conduct of registered laboratory technicians and technologists and take such disciplinary measures as may be appropriate to maintain proper professional standards.

67. It is clear that section 5 of Cap 253A refers throughout to laboratory technicians and technologists. Nowhere in the said section does it refer to laboratories. In my view all aspects of the exercise of general supervision and control over the training, business, practice and employment of Laboratory Technicians and Technologists in Kenya cannot be expanded to include general supervision and control over the medical laboratories.

68. The Respondents however relied on the case of **Republic vs. Kenya Medical Laboratory Technicians and Technologists Board & Another; Ex-Parte Anil Tailor & 4 Others [2013] eKLR**. In that case the Court clearly appreciated that the dispute would not have been before the court if the Ministry responsible for both bodies had ensured adequate legislative and administrative guidance was brought to bear on the two Boards which seemingly have an overlapping oversight in the medical sector with respect to medical and clinical laboratories. The Court however appreciated, rightly in my view that:

"Article 159(2) of the Constitution binds the courts and tribunals when exercising judicial authority to protect and promote the purposes and principles of the Constitution. The import of Article 10 (i) is that a judicial officer is expected to uphold national values and principles of governance when interpreting the law. The national values and principles are enunciated as including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
Although not argued on a constitutional pedestal, I am acutely aware that the matters before me touch on two key constitutional rights. One is the right to the highest attainable standard of health care services (Article 43 (i) (a)) and the other the right to consumer protection including the right to goods and services of reasonable quality (Article 46 (i) (a)). The purpose of the regulation under scrutiny in the present case is undoubtedly to protect the public from sub-standard medical or health services that would negate their right to health espoused in the Constitution. The court is therefore duty bound to interpret the law in a manner that upholds the constitutional rights aforestated."

69. The Court found that the purview of the operation of the Act appeared from the preamble to be laboratory technicians and technologists on the one hand and the operation of the Board on the other. The Court also found that from a cursory reading of section 5(1) one would readily agree with the Applicants' submission that these provisions point to regulation of personnel namely, the laboratory technicians and technologists; and, focus more on their training, professional qualifications, and professional conduct; and that the same provisions do not give the Board the jurisdiction to regulate private laboratories. It is not in doubt that section 25 and section 40 of Cap 253A gives the Board the power to make regulations for the better carrying out of the provisions of the Act. Section 25(1) and (2)(a) thereof provides as follows:

(1) The Board shall, in regulations, prescribe the terms and conditions of the business and practice of laboratory technicians and technologists engaged in private practice.

(2) Regulations under subsection (1) shall in particular provide for—

(a) the equipment and reagents to be provided in private medical laboratories;

70. It is therefore clear that section 25(2)(a) is a departure from what appears in the long title and the object and purpose of the Board. By empowering the Board to make regulations providing, not only for terms and conditions of the business and practice of laboratory technicians and technologists but also providing for the equipment and reagents to be provided in private laboratories, the Act empowers the Board to actually regulate the manner in which private laboratories are to be stocked and equipped. That in my view is an extension of the power of the Board to not only regulate technicians and technologists but to an extent, private laboratories.

71. Section 40 of Cap 253A on the other hand provides that:

The Board may, with the approval of the Minister, make regulations generally for the better carrying out of the provisions of this Act, and, without prejudice to the generality of the foregoing, such regulations may provide for—

(e) forms and fees;

(f) ……..

(g) the inspection of medical laboratories.

72. Again it is clear that the Regulations contemplated by section 40 are not limited to those that regulate technicians and technologists but encompass those that deal with inspection of medical laboratories themselves. The Applicant has however made references to several related legal provisions in an attempt to show there are sufficient legal mechanisms which regulate the applicant even in the absence of regulation by the Respondent which in their view amount to double regulation. However as was held by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others [2005] 2 KLR 317**:

"It is elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention…. It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

73. In other words, it is necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

74. My view in respect of this matter is informed by the position adopted in ***Halsbury's Laws of England, 4th edition, Butterworths 1995, Vol 44(1),*** Para 1484 to the effect that:

"It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…"

75. In **Amalgamated Society of Engineers vs. Adelaide Steamship (1920) 28 CLR 129 at 161-2 Higgins J** rightly observed thus:

"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable."

76. Whereas the Applicant's case is that since the applicant already pays fees to its regulatory body a demand for fees of any sort to the Respondent amounts to double licensing hence is punitive, to my mind the issue ought to be determined in light of the proposition in the Uganda Supreme Court decision of **Attorney General vs. Silver Springs Hotel Ltd and Others SCCA No. 1 of 1989** that:

"...unless the earlier Act and the later one are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. It is well settled that the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act."

77. This position reflects the reasoning in **United States vs. Borden Co 308 US 188, (1939)** that:

> **"It is a cardinal principle of construction that repeals by implication are not favoured. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest'. It is not sufficient as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy'..."**

78. It is in this respect that I agree with the Learned Judge in **Republic vs. Kenya Medical Laboratory Technicians and Technologists Board & Another; Ex-Parte Anil Tailor & 4 Others [2013] eKLR** that:

> **"It is clear from this definition that a hospital and laboratory are regarded as separate institutions. It cannot therefore be said that to inspect a medical laboratory is equivalent to inspecting the hospital and neither can it be said that the regulations made under the Act are *ultra vires* the Act as they are made pursuant to Section 25 and 40 of the Act. Further, from the provisions I have set out above and my extensive reading of the Act, I have found no provision in either the Act or the Regulations made thereunder that exempt the private medical laboratories from the operation of the Act. It is also clear from the provisions of Act No. 10 of 1999 which I have quoted in *extenso* that the Act confers on the Medical Laboratory Technicians and Technologists Board the power to regulate not only the personnel in the field of medical laboratory but the clinical/medical laboratories that offer the services as well."**

79. I agree with the learned Judge that the object of the Act does not expressly state the regulations of clinical laboratories, and for that matter laboratories under private hospitals, and that the want of express inclusion of the regulatory function in the objections of the Act is a product of poor drafting. However considering sections 25 and 40 of Cap 253A, I associate myself with the views of the Learned Judge that the said omission ought not to be construed as amounting to lack of intent by Parliament to have all facilities whether public or private which offer medical laboratory services regulated and more so by one body.

80. In those premises I agree with the learned Judge that:

> **"a contrary interpretation of the Act would lead to the undesired result that persons seeking medical laboratory services from private institutions would be left exposed to the perils of an unregulated practice and service delivery. That would not only be discriminatory but go against the public interest and make nonsense of the principle that law should serve the public interest."**

81. What I understand the learned Judge to be saying is that the powers of the **Kenya Medical Practitioners and Dentists Board** to regulate clinical laboratories in particular private ones may similarly be challenged on the same grounds that the law does not expressly empower that Board to regulate the same, a situation which would obviously be contrary to public interest.

82. While the applicant has referred to several provisions which in its view sufficiently regulate the applicant, it is clear that Cap 253 does not expressly provide in the substantive provisions for the regulation of laboratory services. The applicant has therefore opted to rely on ***Medical Practitioners and Dentists (Private Practice) Rules*** made under the Act. It is however my view that to uphold those rules in priority to the rules made pursuant to Cap 253A, an Act of Parliament, would amount to nullifying substantive provisions of the Act at the expense of subsidiary legislation and that is not permissible.

83. Judicial review remedies, it is trite, being discretionary the court would not grant them in certain circumstances even if the same are merited and as is stated in ***Hallsbury's Laws of England 4th Edition Vol 1 (1) paragraph 12 pg 270***:

> **"The remedies of quashing orders (formerly known as order of certiorari), prohibition orders (formerly known as orders of prohibition) mandatory orders (formerly known as orders of mandamus) are all discriminatory. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.**
>
> **Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decisions to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders."**

84. It is therefore my view that both on the merits and in terms of the exercise of discretionary powers, the orders sought herein ought not to be granted in the manner sought. However what has caused me concern is rule 2 of the ***Kenya Medical Laboratory Technicians and Technologists (Fees) Regulation 2006,*** which seems to classify laboratories for the purposes of prescribing fees. The Respondent has not explained the manner of the said classification. This scenario can easily lend itself to abuse when the classification is not expressly provided and the manner of determining the same hence lend itself to arbitrarily prescription.

85. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006, [2008]**

2 EA 311, **Rawal, J** (as she then was) held on 2/02/07 that:

> **"The Courts, generally, while hearing applications under the process of judicial review, may it be under the Constitution or under Order 53 of the Civil Procedure Rules are faced with serious issues involving Civil and Constitutional rights and liberties of a person and that is why it is elevated as a special jurisdiction even under the Civil Procedure Rules. While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal.** See **Gaily vs. Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520…The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, specially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361."**

86. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.

87. Section 11 of the ***Fair Administrative Action Act***, 2015 provides as follows:

> ***(1) In proceedings for judicial review undersection 8 (1), the court may grant any order that is just and equitable, including an order***
>
> ***(a)declaring the rights of the parties in respect of any matter to which the administrative action relates;***
>
> ***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***
>
> ***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***
>
> ***(d) prohibiting the administrator from acting in a particular manner;***
>
> ***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***
>
> ***(g) prohibiting the administrator from acting in a particular manner;***
>
> ***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(i) granting a temporary interdict or other temporary relief; or***
>
> ***(j) for the award of costs or other pecuniary compensation in appropriate cases.***

88. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6:**

> **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."**

89. In order to prevent the arbitrary imposition of fees, I hereby direct the Respondent to immediately commence the process of express classification of laboratories, which process must be completed in 90 days. In default the Respondent will not be permitted to charge any fees thereunder.

90. Save for the foregoing, this application fails and is dismissed but considering that the problem was caused by poor draftsmanship, there will be no order as to costs.

91. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of January, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for the ex parte applicant

Mr Murithi for Mr Githinji Mwangi for the Respondent

CA Geoffrey