REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTION PETITION NO. 8 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 (LEGAL NOTICE) NO. 117 OF 2013)

AND

IN THE MATTER OF ARTICLES 1,2,3,20,21,22,23,165 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHST AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27,28,35,47,48,49 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS ACT –CAP 253A (ACT NO.10 OF 1999)

AND

IN THE MATTER OF THE TECHNICAL AND VOCATIONAL EDUCATIONAL TRAINING AUTHORITY

AND

IN THE MATTER OF THE NATIONAL EXAMINATIONS COUNCIL

AND

IN THE MATTER OF SECTION 8 THE FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

KINGS MEDICAL COLLEGE LIMITED.....PETITIONER

VERSUS

THE MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD…1ST RESPONDENT

THE INSPECTOR GENERAL KENYA POLICE SERVICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS….....…3RD RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 13th October 2017 brought under Article 23(1) of the Constitution of Kenya 2010.

2. The application seeks the following orders that;

i. The court be pleased to certify the application as urgent, dispense with the service in the 1st instance and grant conservatory orders

ii. Pending the hearing and determination of the petition the court be pleased top grant the petitioner applicant conservatory orders and specifically stop, stay and/or suspend the effecting of the medical training program closure notice served on the 11th October 2016, order that the status quo to be maintained and preferably the applicant may continue running the affected programmes pending the final determination of the petition.

iii. The court be pleased to stop, injunct, and /or interdict the police from arresting any of the officers of the petitioner applicant, and the DPP from preferring criminal charges against them in connection with the issues at hand pending the hearing and final determination of the application.

iv. The costs of the application be borne by the respondents.

The application is supported by the grounds on the face of the application and the affidavit of Dr. Moses Njue Gachoki sworn on the 13th day October 2017.

The application is opposed by both respondents. The 1st respondent vide a replying affidavit sworn by Abdulatif Ali and filed on the 6th November 2017, and the 2nd and 3rd respondents vide the affidavit sworn by Inspector of Police Dickson Mwenda the officer in charge Naromoru Police Station.

The background to this application is that in the course of fulfilling its statutory mandate under the Medical Laboratory Technicians and Technologists Act Cap 253 A of the laws of Kenya, the 1st respondent inspected the petitioner in 2004 and issued it with a NOT APPROVED notice. As a Medical Laboratory Science Training institution *'due to lack of the necessary standards of infrastructure, human resource and teaching and learning materials including the quality of the students who did not meet the minimum entry requirements. '*. Thereafter the petitioner changed premises and continued with the same impugned practices. It was inspected and re inspected severally, following disputed inspection reports. The last inspections were done in 2016 and 2015 on the compliance checklist of *'four standards namely governance, academic profile, human resource and infrastructure and failed to meet the minimum threshold'*.

The petitioner's failure to comply led to the issuance of the closure notice of 11th October 2016, which provoked this application.

The applicant contends that it was opened in the year 2003, and the 1st respondent purported to close it on the 26th October 2016 for non-compliance with registration and accreditation requirements. That all the allegations made are not true and the 1st respondent did not give them notice or a hearing contrary to the provisions of the constitution of Kenya and the rules of natural justice. In addition, that the 1st respondent instigated the arrest and prosecution of the petitioner's member of staff for no reason at all.

The 2nd and 3rd respondents position is that when the 1st respondent went on an inspection tour of the institution on 4th October 2017, they sought the assistance of the police. Upon arrival at the institution they found the same to be in operation in violation of the closure notice of 11th October 2016. That it was on the basis of that closure notice that the administrator and a lecturer were arrested and charged in court.

In arguing the application Mr. Muthoni for the petitioner submitted that the petitioner was complaining about the closure notice and the arrest of its officers ostensibly for non -compliance. He submitted that the petitioner had complied with the check list, that there were continuing students, and it would be unfair to stop them midstream, that the petitioner and the board enjoyed a cordial relationship, but no reasons had been given for closing the college. Further that the 1st respondent carried out impromptu inspections accompanied by the police to harass the petitioners staff.

The application was opposed. Mr. Mwangi for the 1st respondent pointed out that the applicant was seeking conservatory orders and was required to establish that it had a prima facie case. He submitted that the 1st respondent acted within the law and it had not been shown that it had acted arbitrarily. That the audit reports on the petitioner had clearly demonstrated that the petitioner had failed to meet the requisite standards as set out in the law. In addition, the petitioner had continued to operate despite the closure notice hence the involvement of the 2nd and 3rd respondents as offences had been committed.

It was also argued that the applicant had not exhausted all the available remedies provided for in the law Cap 253A.

He argued further that the orders sought by the petitioner were final in nature yet no exceptional circumstances had been established.

He relied on the following cases

1. JR HC Misc Application no. 269 of 2016 R vs Kenya Medical Laboratory Techniciansand Technologists Board ex parte Christine Inokobia Limungi on the meaning of fair hearing and the need to exhaust other existing remedies.

2. R vs. JSC ex parte Pareno [2004] eKLR on the role of the court in a case like this- where the court cannot act as a 'court of appeal' from the body concerned or interfere with the exercise of any power or discretion which has been conferred on the body, unless the body has acted ultra vires.

3. JR 22 of 2015 R vs Kenya Medical Laboratory Techniciansand Technologists Board ex parte Valley Hospital Limited which was similar to this one, and the applicant was found wanting just like in this case. The court in discussing the balance between the competing interests of the applicant right to its business and the right of the public to proper and safe medical care, found that the latter far outweighed the former.

Counsel for the 1st respondent also responded to the prayers regarding the police and the office of the DPP. He pointed that upon perusal of the affidavit by the 2nd and 3rd Respondent, he realised that the Petitiner had served them with an order that emanated from a matter that had been struck out by this court (Mshila J) on 88th June 2017.

He pointed out that the administrator and the lecturer who were arrested and charged were not parties to the application and therefore the orders sought on their behalf could not be granted. Relying on the case of **Uwe Meixner and Anor vs the AG [2005] eKLR** and **R vs Chief Magistrate Kibera Law Courts & 2 others ex parte Qian Guo Jin and 2 others [2013] eKLR** he submitted that this court could not interfere with the exercise of the powers of the 2nd and 3rd respondents in the exercise of their statutory duties unless it was demonstrated that that exercise of power resulted in the violation of the fundamental rights and freedoms of the petitioner.

Mr. Muranga for the state submitted that the ODPP could not be directed by anyone on what to do, as provided by Article 157 of the constitution. That all the actions taken by the police and the ODPP were taken under legal cover in view of the fact that the college was found to be functioning after the closure notice.

I have carefully considered all the rival submissions, affidavits and authorities cited. I pose the question posed by the judge in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR** *"68. What then are the circumstances under which the Court grants conservatory orders? "*

And in response, agree and take up the response he wrote:

> It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**,Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.**

Similarly, in the case of **Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR** the judge stated;

> 20. This court is urged to grant a conservatory order within the framework of Article 23 of the Constitution, suspending the implementation of the legal notice subject matter of this Petition. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.
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> 21. The tenor, import and scope of a conservatory order was defined by the Supreme Court of Kenya in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others eKLR** as follows:
>
> > "Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, *bearing in* mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes"
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> (All emphasis added)

The first issue then is whether the petitioner herein has established a prima facie case. From the material before me, and especially the two audit reports for 2015 and 2016, the petitioner was found to have fallen so short of the statutory requirements for training. Under section 18 of Cap 253A which provides for the approval of training institutions in the following terms;

> (1) No person shall, being in charge of a training institution in Kenya—
>
> > (a) admit persons for training with a view to qualifying for registration under this Act; or

(b) conduct a course of training or administer the examinations prescribed for the purposes of registration under this Act; or

(c) issue any document or statement implying that the holder thereof has undergone a course of training or passed the examinations prescribed by the Board for purposes of registration, unless such institution is approved by the Board for that purpose in accordance with this Act.

Having upon inspection, returned a verdict of NOT APPROVED based on two audit reports the only option left for the 1st respondent was to close the college.

Secondly the two members of staff were arrested and charged under section 18(2) which provides; *A person who contravenes any of the provisions of subsection (1) commits an offence and is liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or to both,* because there was evidence that the college had been closed and the same was being run without the authority of the authorising institution, the board under Cap 253A. In addition, the petitioner purported to rely on an order issued in matter that was non- existent having been struck out. And further to that the petitioner Hence on the face of it the petitioner has not established a prima facie case.

On the second limb, as to whether the petitioner will suffer any prejudice.

The closure notice was issued on the 11th October 2016, one year before the filing of this application. There was nothing to 'conserve' in situ pending the hearing of the petition. The petitioner appears to be seeking judicial review orders through this petition after the earlier one was quashed. This is not tenable. It is not like the petitioner is left without remedy. The only thing that the petitioner was required to do was to comply with the recommendations in the audit reports. The remedy is there. To comply with the recommendations.

However, it is also in the public interest that the petitioner admits persons qualified to train in the requisite filed and to provide them with the best training available. From the materials before me the petitioner was found wanting of the standards, and the grounds set out in the closure notice viz;.

"Not approved by the KMLLTB

Not renewed approval licence

Admission of students without minimum requirements

Non adherence to curriculum approved by KMLTTB

Lack of Human resource capacity

Lack of adequate infrastructure as approved by KMLLTB

Lack of recognition by TVETA"

All the above point to a situation where the risk posed by keeping the petitioner running before the full hearing of the petition would pose danger to the public by having persons getting substandard training and ending up dealing with Kenyans in the public space as lab technicians. There are no exceptional reasons to warrant the orders sought.

The application is disallowed, and the same is dismissed with costs to the respondents.

Dated, delivered and signed this 18th Day of January 2018

Teresia M Matheka

Judge

In the presence of;

Court Assistant: Hariet

Ms. Mwangi holding brief for Mr. Githinji Mwangi for 1st respondent

N/A for other parties.

Mr. Muranga for the 2nd and third respondents