



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 140 OF 2015

NICHOLAS MWITI1ST PETITIONER
NJERU NYAGA KIVUTI.....2ND PETITIONER
JOSPHAT MATOKE.....3RD PETITIONER
ALEX MWANGANGI.....4TH PETITIONER
BEATRICE ADHIAMBO.....5TH PETITIONER
SHARF MBANI.....6TH PETITIONER
JOSHUA MBIDYO.....7TH PETITIONER
EVERLYN WAIRIMU.....8TH PETITIONER
KENNEDY MIRITI.....9TH PETITIONER
WALTER NYAMACHE.....10TH PETITIONER
GIDRAPH KARUNGE.....11TH PETITIONER
KHADIJA GALDALO.....12TH PETITIONER
IRENE KATUNGE.....13TH PETITIONER
LYDIAH KARIMI.....14TH PETITIONER
MORGAN MUKTHAR.....15TH PETITIONER
CATHRINE NJAGI.....16TH PETITIONER
MICHAEL KIMEU.....17TH PETITIONER
BRENDA OKUTO.....18TH PETITIONER

CONSOLATA OLUKHO MAKOKHA.....19TH PETITIONER

GEZIAH ANDANJE.....20TH PETITIONER

STEPHEN ASWANI.....21ST PETITIONER

JUDITHI ONGERI.....22ND PETITIONER

VERSUS

PHARMACY AND POSIONS BOARD1ST RESPONDENT

REGISTRAR, PHARMACY & POISONS BOARD.....2ND RESPONDENT

JUDGMENT

Introductions

1. The Petitioners are all Pharmaceutical Technologist. They took their studies in various colleges and at the end of their course, sat and passed an examination administered by the ***Kenya national Examinations Counsel*** (KNEC) and were awarded diploma certificates by their respective colleges by virtue of which they hold diploma in pharmacy making them qualify to be enrolled as Pharmaceutical Technologists.

2. In order to embark on the practice of their profession, the petitioners were applied to the respondents for enrolment as pharmaceutical technologists under the ***Pharmacy and Poisons Act***, .Cap 244 (the Act) but their applications were rejected.

Petition

3. In an amended Petition dated 14th September 2015 and filed in court on 15th September 2015, the petitioners sued the ***Pharmacy and Poisons Board***, the 1st respondent, a statutory body established under section 3 of the Act and which is mandated to regulate the practice of Pharmacists and Pharmaceutical Technologists in the country; and the ***Registrar***, the 2nd respondent, who is the Chief Executive Officer of the 1st respondent and the one who receives applications from prospective pharmacists and pharmaceutical Technologists.

4. The petitioners averred that a person who desires to be licensed as a Pharmaceutical Technologists has to satisfy the 1st respondent that he holds a diploma in Pharmacy from a college as required by ***section 8(2)*** of the Act, that on satisfying the Board as to qualifications, one is to be registered and that under section 19, one cannot practice unless registered by the 1st respondent.

5. The petitioners further averred that they underwent rigorous training after which they sat and passed their examinations but when they applied for registration, their applications were rejected by the 1st respondent in a decision communicated to them by letter dated 10th October 2014 on the basis that the colleges they attended had not approved by the 1st respondent.

6. The petitioners stated that the respondents' act denied them an opportunity to practice their profession yet the respondents have been enrolling other persons with similar qualifications. They contended that they had been discriminated against given that they all sat and passed examinations administered by KNEC.

7. The petitioners went on to state that there was no notice either to individuals or public that the institutions they were attending were not recognized by the 1st respondent for purposes of offering

diploma in Pharmacy, and were therefore surprised after applying for registration to receive a response that the respondents did not recognize the institutions they attended. They averred that by licensing some people but declining to enroll them, the respondents acted in a discriminatory manner in violation of **Article 27** of the **Constitution** yet they all sat and passed a standard examination administered by a national examination body.

8. They also averred that they had a legitimate expectation that having attended college and passed an examination leading to the award of diploma in Pharmacy, they would be enrolled to practice their profession. In this regard, they stated that their colleges were approved by the **Commission of Higher Education** which is mandated to approve and license colleges.

9. They contended that **Article 43** on the right to social security was violated and that their desire to earn a living and sustain their social and economic security was thwarted by the respondents' unilateral, illegal and unconstitutional decision. They also contended that their right to fair administrative action and fair hearing was violated in that the respondents contravened Articles 47(1) and 50 (1) of the constitution.

10. The petitioners contended that the respondents' view that the colleges they attended were to be approved by the 1st respondent was without legal basis. They averred that the respondents' action was unreasonable and sought the following reliefs.

i. A declaration that the actions of the respondents set out above contravened the Constitution of Kenya and are unlawful.

ii. An order of Certiorari to bring into the Court for purposes of quashing the decision of the respondents contained in the letters dated 10th October 2014 addressed to the petitioners.

iii. An order of certiorari to bring into this Court for purposes of quashing the decision of the respondents contained in the above paid up newspaper advert.

iv. An order directing the respondents to immediately admit and license the petitioners to practice as pharmaceutical technologists.

v. Any other relief that the court may grant.

vi. Costs of the petition.

Response

11. The respondents filed a replying affidavit by **Dr. Kipkirich C. Koskei**, the CEO of the 1st respondent sworn on 22nd April 2015 and filed on 23rd April 2015. **Dr. Koskei** deposed that the 1st respondent has mandate to ensure that only persons and institutions that meet minimum qualifications and training capacity are allowed to offer pharmaceutical courses training to act and provide such services to the public.

12. It was deposed that the petitioners submitted applications which were evaluated but were not successful and were informed of the results. According to the deponent, the petitioners' application were evaluated but were found to have attended institutions that were not recognized by the 1st respondent pursuant to **section 8(2)** of the Act.

13. **Dr. Koskei** further deposed that the purpose of setting criteria for qualifications and standards was due to the fact that pharmaceutical services and industry is sensitive as it involves life and health of human beings and animals with little room for error. He deposed that **Articles 43(1)(a) and 46(11)(a) and (b)** of the **Constitution** amplify why the 1st respondent has the right to regulate every person and institution wishing to undertake pharmaceutical training in the country and, therefore, those wishing to practice Pharmaceutical Technology have to comply with **section 8(2)** of the Act.

14. It was deposed that the petitioners attended colleges that were not approved by the 1st respondent and that the role of **KNEC** was merely to set and examine subjects approved by the 1st respondent, that the 1st respondent has been assessing and accrediting institutions to train pharmaceutical courses and that the respondents' action of ensuring that only suitable institutions train pharmaceutical technologists is not discriminatory.

15. **Dr. Koskei** further deposed that the mandate of the **Commission for Higher Education** and **KNEC** is to register and regulate institutions of Higher learning and set and conduct examinations on subjects approved by relevant regulatory authority respectively, and that **KNEC** could only register candidates indexed by the 1st respondent from approved institutions.

16. He denied the petitioners' contention that there was a violation of **Articles 27, 46, 47 or 73** of the **Constitution** or that there was discrimination. He maintained that the petitioners are not qualified to be licensed as pharmaceutical Technologists hence the petition lacks merit.

Petitioner's submissions

17. The petitioners submitted through written submissions which were orally highlighted, that they were seeking orders to compel the respondents to enroll them into Pharmaceutical Technologists Profession pursuant to **section 8(2)** of the Act. Section 8(2) provides that every person who satisfies the Board that he holds a diploma in pharmacy approved by the Board of any college in Kenya or any other country should be entitled to have his name entered in the Roll, subject to the Act be.

18. **Mr. Mwangi** submitted that section 8 (2) entitles holders of a diploma in pharmacy to have their names in the roll that the petitioners are holders of diploma in pharmacy from various colleges having sat and passed examinations set by **KNEC** and therefore, they are qualified. Learned counsel argued that the petitioners applied pursuant to **section 7(2)** of the Act but in responses dated 10th October 2014, their applications were declined for the reason that the colleges they attended were not recognized by the 1st respondent but no other reasons were given as to why those institutions are not recognized.

19. Learned Counsel submitted that according to the respondents' replying affidavits, the colleges are to be approved by the 1st respondent. He however argued that this was not the law and that there is no such a requirement. Learned counsel submitted that all **section 8(2)** requires is that one satisfies the Board that he holds a diploma in pharmacy. It was contended that the petitioners having obtained diploma in pharmacy, have a right to be registered as pharmaceutical Technologists. It was submitted that they qualified between 2005 and 2008 hence they should be enrolled. They relied on the decision in the case of ***Josphat Mwiti & Others v Pharmacy and Poisons Board Petition No 346 of 2013*** (Lenaola J as he then was).

Respondents' Submissions

20. **Mr. Lerabi**, learned counsel for respondents, on his part submitted, highlighting their written submissions, that the petitioners are not qualified to be enrolled as pharmaceutical technologists under **section 7(2)** as read with **section 8(2)** of the Act. He contended that the petitioners attended colleges that were not approved or recognized by the 1st respondent hence they do not have necessary qualifications.

21. Learned counsel argued that although the petitioners applied for enrolment, their applications were declined due to lack of qualifications. In learned counsel's view under **section 8(2)** one has to satisfy the 1st respondent that he holds a diploma in pharmacy from a college approved by the 1st respondent Board. He contended that the Board under section 8(2) is the Pharmacy and Poisons Board, which must approve the institution or college that offers diploma in pharmacy. He contended that in so far as the petitioners are concerned, they attended colleges that had not been approved by the 1st respondent hence their qualifications are not recognized.

22. **Mr. Lerabi** argued that a reading of **sections 7(2) and 8(2)** and the **preamble** to the Act is clear that the 1st respondent has wide mandate including assessing, recognition, accreditation, approval of colleges and enrolment persons who qualify as pharmacists and pharmaceutical technologists. He contended that if the Court were to allow the petition, it would set a dangerous precedent in that it will be compelling the 1st respondent to enroll unqualified persons to practice as pharmaceutical technologists thus open a flood gate of more petitions. He urged that the petition be dismissed.

Determination

23. I have considered this petition, response thereto; submissions by Counsel for the parties and authorities relied on. This petition raises one question for determination, that is; whether the 1st respondent violated the petitioners' right to be enrolled as pharmaceutical technologists.

24. The petitioners attended obtained diploma in pharmacy from various colleges between 2005 and 2008 after they sat and passed an examination administered by the KNEC. Their diploma certificates show that they sat an examination conducted by the Kenya national Examination Council. Their certificates attached to the petition show that they have 2421/3 Diploma in pharmacy but from various colleges.

25. According to the certificates, the subjects taken leading to the award of diploma in Pharmacy were: **Pharmaceutics I, Pharmaceutics II, Pharmacology I, Pharmacology II** (Applied Therapeutics), **Pharmaceutical chemistry, Drugs supply management** and **project**.

26. The petitioners then applied to the 1st respondent through the 2nd respondent for enrolment to practice as pharmaceutical technologists under section 8(2) of the Act but their applications were turned down on grounds that they attended colleges that were not approved by the 1st respondent.

27. The responses to the application by **Adhiambo Beatrice Okoth**, the 5th petitioner, **Joshua Mbindijo**, the 7th Petitioner, **Everlyn Wairimu Muya**, the 8th petitioner and **Kennedy Kimathi Mithithi**, the 9th petitioner just to mention a few, dated 10th October 2014 explained that their applications were unsuccessful because they did not meet the 1st respondent's **eligibility criteria for evaluation and assessment** for enrolment as pharmaceutical Technologists, that is; the institutions they attended were not recognized by the Pharmacy and Poisons Board to offer diploma in Pharmaceutical Technology. That means the petitioners' applications were not evaluated.

28. Counsel for the petitioners submitted that the respondents were wrong in denying the petitioners an opportunity to enroll as pharmaceutical technologists on flimsy grounds, yet they were qualified and that when they attended college there was no such requirement.

29. The respondents' counsel on his part contended that the petitioners were not qualified because they did not attend colleges approved by the 1st respondent as required by **section 8(2)** of the Act. In counsel's view, **section 8(2)** requires that anyone pursuing a diploma in pharmacy must do so only in colleges that are not only recognized but also approved by the 1st respondent.

30. This petition turns on the interpretation of sections 7(2) and 8(2) of the Pharmacy and Poisons Act. The primary and important rule of statutory interpretation is that statutes be interpreted according to the intention of the law maker; that is the legislature. That is to say, if the words of a statute are clear, precise and unambiguous, no more should be done except to give those words their natural and ordinary meaning. The Court should follow words of a statute where they are clear and give intention of the legislature.

31. A statute should also be looked at both textually and contextually as both are necessary interpretive tools in an attempt to understand what the legislature intended to achieve through that legislation. In this regard, the **supreme Court of India** state observed in **Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1** that;

“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

32. The other principle advanced in the above decision is that a statute should also be given a holistic interpretation, reading the whole statute first then narrowing to sections, clauses and finally phrases. A holistic reading of a statute aids in avoiding distortion of the legislative intent. This was emphasized by the **Court of Appeal** in the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013 when it stated;

“One of the canons of statutory interpretation is a holistic approach.... no provision of any legislation should be treated as ‘stand -alone’ An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”

33. The Court should look at the whole statute to decipher the true intention of the legislature. This is preferred against the reading and interpreting a single provision of a statute which may not only destroy but also distort the true intention of the legislature in enacting that particular legislation.

34. Applying the above principles to the present case, one must look at the Pharmacy and Poisons Act holistically in order to understand whether the legislature intended what either of the parties has held to be the legal position in this petition thus helps in resolving the dispute before Court.

35. The 1st respondent is established under section 3 of the Act while section 5 provides for a **Registrar** who is the Chief Pharmacist. Section 6(2) provides that the **Registrar**, the 2nd respondent herein, **shall keep a Roll of Pharmaceutical Technologists**. Section 7(2) requires applications by persons wishing to be entered on the Roll of pharmaceutical technologists to be sent to the **Registrar** in a prescribed form.

36. Section 8(2) which is on enrolment of qualified Pharmaceutical Technologists provides that ***“Every person who satisfies the Board that he holds a diploma in pharmacy approved by the Board of any college in Kenya or any other country, shall subject to this Act, be entitled to have his name entered on the Roll.”***

37. The petitioners have contended that they all have diploma in pharmacy and are therefore, qualified to be entered in the **Roll** under section 8(2) of the Act. The respondents have on their part maintained that the petitioners went to institutions that were not recognized or approved by the 1st respondent and are therefore not qualified. As I said earlier, the petition revolves around interpretation of section 8(2) of the Act. The respondents have interpreted section 8(2) to mean that the 1st respondent must approve institutions that intend to train diplomas in pharmacy.

38. Section 8 (2) by providing that ***“Every person who satisfies the Board that he holds a diploma in pharmacy approved by the Board of any college in Kenya or any other country shall, subject to this Act, be entitled to have his name entered in the Roll.”*** must be looked at on the basis of the word **“Board”** as used in that section. The word **“Board”** appears twice in section 8(2). First, a person must satisfy the **“Board”** that he holds a diploma in pharmacy. The first word **“Board”** refers to the

Pharmacy and Poisons Board, the 1st respondent herein. Up to the end of the first part of that sentence it means an applicant has to satisfy the **Pharmacy and Poisons Board** that he holds a diploma in pharmacy. The second word “**Board**” used in the second part of that section means the diploma should be approved by the “Board” of any college in Kenya or any other country.

39. In that case, an applicant must satisfy the **Pharmacy and Poisons Board** that he holds a diploma in pharmacy approved by the “Board” of a college in Kenya or any other country. That is; the Board of the college awarding the diploma in pharmacy, must have approved that diploma. Taken in that context, there is no statutory requirement at least not in **section 8(2)** that the Pharmacy and Poisons Board must have approved the institution offering diploma in pharmacy

40. The respondents have argued that the petitioners are not qualified because the diploma in pharmacy they hold is from institutions that were not approved and or recognized by the 1st respondent; the Pharmacy and Poisons Board. This is also clear from the letters of regret sent to the petitioners declining to consider their applications on grounds that the colleges they attended were not approved or recognized by the 1st respondent Board.

41. I have carefully read **section 8(2)** which is the foundation of the respondents’ decline to consider the petitioners’ application for enrolment as Pharmaceutical Technologists on grounds that the institutions they attended were not recognized or approved by the 1st respondent. Such a view is not discernible from the reading of section 8(2) of the Act. The sub section was introduced by **Act No 2 of 2002** while the petitioners completed their studies between 2005 and 2008 a time when the section was in force. A proper and holistic reading of section 8(2), and giving words therein their plain and natural meaning, does not in any way bring out any intention by the legislature that a college intending to train diploma in pharmacy must seek approval and or recognition from the Pharmacy and Poisons Board.

42. Had Parliament intended that the Pharmacy and Poisons Board enroll pharmaceutical technologists from only institutions approved or recognized by that Board, it would have stated so either by clear words of the statute or by necessary implication rather than leave approval of the diploma in the Board of the college concerned.

43. On the other hand if the interpretation adopted by the respondents was to stand that the Pharmacy and Poisons Board must approve institutions intending to offer courses leading to a diploma in pharmacy, it would present yet another problem. **Section 8(2)** states that the applicant should hold a diploma in pharmacy approved by the Board of a college in Kenya or any other country. The question then would be; how would the Pharmacy and Poisons Board approve colleges in other countries in order for them to offer diploma in pharmacy in those countries? That is simply not possible and there can be no doubt that the 1st respondent would not perform such a task in foreign countries...

44. A plain reading of **section 8(2)** is in my view, clear that what an applicant should do is to satisfy the **Pharmacy and Poisons Board** that he holds a diploma in pharmacy that is approved by the **Board of the college** he attended. I have looked at the **preamble** to the Act; it is an Act of Parliament to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons. The control referred to in the preamble with regard to pharmaceutical technologists must be that of being satisfied that an applicant has a diploma in pharmacy from a college either in Kenya or any other country approved by the Board of that college.

45. I have carefully gone through the Pharmacy and Poisons Act but I have not come across a single provision, and none was pointed out by counsel for the respondents that confers mandate on the 1st respondent to approve, recognize or accredit institutions that offer diploma in pharmacy. In the circumstances, I am unable to agree with the respondents that institutions that offer diploma in pharmacy must have been approved by the Pharmacy and Poisons Board, the 1st respondent herein.

46. That notwithstanding, I am aware of the important role the Pharmacy and Poisons Board plays in the Health sector by ensuring that the sector is not infiltrated and flooded by “Quarks”. In doing so the Board

must do everything possible to prevent such an eventuality. In that regard, the 1st respondent came up with some **Guidelines** a copy of which was attached to the 2nd respondent's further affidavit sworn on 25th September 2015. I have perused the attachments and it is clear that the 1st respondent was concerned with ensuring that there is quality in training and the eventual service rendered by pharmaceutical technologists. It did so pursuant to its wide mandate under the Act to control the profession of pharmaceutical technologists and for the public good. Viewed from that perspective, the 1st respondent would have mandate to ensure that there is proper training in that field.

47. In exercising its mandate under section 8(2) therefore, the 1st respondent would have to consider whether the diploma an applicant holds was approved by the Board of the college that applicant attended. And in doing so the 1st respondent will also have to consider the position as at the time the applicant obtained his/her diploma in pharmacy. I say this because having perused the Guidelines I note that they were issued in 2013 while the petitioners completed their studies between 2005 and 2008 before the policy was adopted. Could they apply to the petitioners who completed their studies before adoption of the **Guidelines**?

48. Having considered the petition, the response and submissions by counsel for the parties and applied my mind to the law, I am satisfied that the petitioners have a case. Looking at the reply to the petitioners' application for enrolment, it is clear that the 1st respondent did not evaluate their suitability to be enrolled as Pharmaceutical Technologists. That is; the 1st respondent did not make a decision on whether the petitioners have a diploma in pharmacy approved by the Board of the colleges they attended and whether the guideline applied to them then.

49. For the above reasons, this petition must succeed and is hereby allowed. I make the following orders;

i. An order of Certiorari is hereby issued quashing the respondents' decision contained in the letters dated 10th October 2014 addressed to the petitioners declining to consider their applications for enrolment as pharmaceutical technologists.

ii. The Pharmacy and Poisons Board, the 1st respondent herein, is hereby directed to consider each of the petitioners' application for enrolment as a pharmaceutical technologist within SIXTY (60) DAYS from the date of this judgment and render a decision within the said period of sixty days.

iii. Costs to the applicant.

Dated, Signed and Delivered Nairobi this 9th Day of March 2018

E C MWITA

JUDGE