REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 84 OF 2016

IN THE MATTER OF: AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION BY PRIVATE HEALTH PRACTITIONERS MOMBASA CLUSTER

AND

IN THE MATTER OF: CLINICAL OFFICERS ACT CAP 260 LAWS OF KENYA

AND

IN THE MATTER OF: THE NURSES ACT CAP 257 LAWS OF KENYA

AND

IN THE MATTER OF: MEDICAL PRACTITIONERS AND DENTIST CAP 253 LAWS OF KENYA

IN THE MATTER OF: PHARMACY AND POISONS ACT CAP 244 LAWS OF KENYA

AND

IN THE MATTER OF: ARBITRARY SUPERVISION AND CONSEQUENT ARRESTS OF PRIVATE HEALTH PRACTITIONERS BY THE PHARMACY AND POISONS BOARD

AND

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF PROHIBITION BY WAY OF JUDICIAL REVIEW

PRIVATE HEALTH PRACTITIONERS MOMBASA CLUSTER....APPLICANT

VERSUS

THE PHARMACY AND POISONS BOARD.....RESPONDENT

EX-PARTE: PRIVATE HEALTH PRACTITIONERS MOMBASA CLUSTER

RULING

The Application

1. By the Notice of Motion Application dated 16th December, 2016 brought under Order 53 Rules 1 and 2 of the Civil Procedure Act and Sections 4 and 9 of the Law Reform Act, the Pharmacy & Poisons Act, The Clinical Officers Act, The Nurses Act, Medical Practitioners and Dentist Act, the Applicant prays for the following orders:

(i) That this application be certified as extremely urgent and be heard on priority basis.

(ii) That this honourable court be pleased to issue an order of prohibition against the Respondent from harassing, intimidating, visiting and arresting the Applicant in the guise of carrying out supervisory duties.

(iii) That the cost of this application be provided.

2. The Application is premised on the grounds:

(a) That leave to file this application was granted on 7th December, 2016

(b) That the conduct of the Pharmacy and Poisons Board is ultra vires since the board's powers are only limited to supportive supervision and not arbitrary supervision and arrests.

(c) That the actions of the Respondent disregard the rules of natural justice since the Applicants were not given a chance to put their case.

(d) That the actions of the Respondent are unreasonable and arbitrary in this circumstance.

3. The application is supported by affidavit of Eileen Mwajuma sworn on 16th December, 2016.

The Applicant's case

4. The Applicant's case is that she is a bonafide member and also the chairperson of the Applicant and has the authority to depone to matters herein. The Applicant states that around 3rd November, 2016, the Kenya Pharmacy and Poisons Board members were doing routine supervisory visits of private clinics and in the said visits, some medical practitioners who include nurses, medical officers and clinical officers were arrested and charged for dispensing drugs. This despite the fact that under the Medical Officers Act, Nurses Act and Clinical Officers Act, the Applicant is allowed to dispense essential drugs and the Ministry of Health also supplies them with some of the essential drugs that the board is against. The Applicant states that the move by the board seems like a supremacy battle since their counterparts in public hospitals of the same qualifications do dispense and administer the same drugs and the board has powers for supportive supervision but their actions are not supervision but instead amount to harassment.

The Respondent's Case

5. The Application is opposed by the Respondent vide a Replying Affidavit sworn by Dr. Kipkerich C. Koskei on 24th February, 2017. The Respondent denies the allegations contained in the motion. The Respondent states that its operations, functions and powers are governed by the Provisions of the Pharmacy and Poisons (PPA) Act, (Cap 244) which establishes the Board at Section 3 thereof, and states the function of the Board as

"to make better provisions for the control of the profession of pharmacy and the trade in drugs and poisons."

6. The Respondent's board's mission is to protect the health of the public by regulating the profession of pharmacy and ensuring quality, safety and efficacy of medical products and technologies**.** Under the said Act at Section 5, the office of the Registrar is established who shall as the Chief Pharmacist be empowered to perform such duties and exercise such powers, as the Board may from time to time direct. The Registrar is required to keep a roll of pharmaceutical technologists and issue to every Pharmaceutical technologist whose name is entered in the Roll, a certificate of enrolment (Sections6 and 9(2) of the PPA). The Board issues various types of premise licenses for carrying out the business of a pharmacist which includes the following;

a. Wholesale dealers License (Section 27); and

b. Licenses to sell poisons for mining, agricultural or horticultural purposes(Section 28)

7. Further, the Board may issue a licence to sell Part II poisons under Section 32 of the PPA subject on such conditions and limitations as the Board or the person appointed by it may think fit to impose. In order to ensure compliance with the provisions aforesaid with regard to registration, Section 47 of the PPA provides for the inspection of licences and books and that every authorized or licensed seller of poisons shall, on the demand of an authorized officer, produce for inspection, his certificate of registration or his licence. For purposes of compliance the Act also defines an "*authorized officer*" to be the registrar, pharmaceutical analyst, pharmaceutical inspector, a medical officer, an inspector of drugs, an administrative officer or a police officer not below the rank of Superintendent. The Respondent states that the Act also creates several offences for contravening the provisions of the Act as follows. Section 19 provides the general restrictions as to unregistered persons and provides that no person other than a registered pharmacist shall carry on, either on his own behalf, or on behalf of another, the business of a pharmacist, in the course of any trade or business, prepare, mix, compound or dispense any drug except under the immediate supervision of a registered pharmacist, and assume, take, exhibit or in any way make use of any title, emblem or description reasonably calculated to suggest that he is registered as a pharmacist. Section 23 (1) provides that premises are to be registered and particularly that it shall not be lawful for any person to carry on the business of a pharmacist except in premises registered. Section 20(1A) provides that no person shall carry on the business of a pharmaceutical technologist unless the name and certificate of enrolment of the person having control of the business are conspicuously exhibited in the premises in which the business is carried on. Section 33 (3) provides that a person who sells a Part II poison except in accordance with the provisions of section 33 shall be guilty of an offence. Under Section 34 (1) it shall be an offence for any person to supply any poison unless the container of the poison is labelled—

i. with the name of the poison; and

ii. in the case of a preparation which contains a poison as one of the ingredients thereof, with the prescribed particulars as to the proportion which the poison contained in the preparation bears to the total ingredients; and

iii. with the word "*Poison*" or other prescribed indication of the character of the article; and

iv. if supplied on sale (other than wholesale), with the name of the seller and the address of the premises on which it is sold; and

v. if supplied otherwise than on sale, with the name and address of the supplier.

8. The Respondent states further that Rule 3 and 4 of the Pharmacy and Poisons (Control of Drugs) Rules, 1969 provide that no person other than those authorized to import, possess, distribute, sell or purchase Part I poisons under the Act shall import, possess, distribute, sell or purchase any drug and a person who is authorized to import, possess, distribute, sell or purchase drugs shall do so subject to the conditions governing the importation, possession, distribution, sale and purchase of Part I poisons under the Act. The Respondent's case is that the Act also recognizes the role of other medical professionals with regard to dispensing medicines. Particularly Section 32 of the Act provides for the Supply and dispensing of Part I

poisons by doctors, hospitals and the same is limited as follows:-

> ***"(1) A duly qualified medical practitioner, dentist or veterinary surgeon, or a member of the staff of a hospital, dispensary or similar institution who has been authorized so to do by general or special order of the Cabinet Secretary, may supply or dispense a Part I poison for the purpose of medical, dental or veterinary treatment, as the case may be, subject to the following provisions—***
>
> > ***(a) the poison shall be distinctly labelled with the name and address of the person by whom it is supplied or dispensed;***
> >
> > ***(b) the following particulars shall within twenty-four hours after the poison has been supplied or dispensed be entered in a book used regularly for the purpose (but which need not be used exclusively for that purpose), and which shall be called the Prescription Book —***
> >
> > ***(i) the date on which the poison was supplied or dispensed;***
> >
> > ***(ii) the ingredients and the quantity supplied;***
> >
> > ***(iii) the name and address of the person to whom the poison was supplied;***
> >
> > ***(iv) the name and address of the person by whom the prescription was given, and a registered midwife practising domiciliary midwifery may supply or dispense a Part I poison in accordance with the regulations made under the Nurses, Midwives and Health Visitors Act (No. 21 of 1965), if he complies with paragraph (b) of this subsection in relation to the supplying or dispensing of the poison.***
>
> ***(2) An authorized seller of poisons may supply a Part I poison prescribed and dispensed by himself, and in every case in which he supplies a Part I poison on prescription (whether the prescription has been drawn up by himself or not) shall enter the particulars in his Prescription Book in accordance with this section, but shall not in respect of such supply be required to make any entry in the Poisons Book in accordance with section 30 of this Act.***
>
> ***(3) Any person to whom subsection (1) of this section apply who supplies or dispenses any Part I poison otherwise than in compliance with these provisions shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and such imprisonment."***

9. The Respondent states that it is aware that under Section 13 of the Clinical Officers (Training, Registration and Licensing) Act Chapter 260 of the Laws of Kenya which provides for the Limitations of private practice provides that a clinical officer who is licensed to engage in private practice shall only handle and shall only issue prescriptions for the drugs and equipment listed in the Second Schedule of that Act. The Respondent's case is that all practitioners under the Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya, Clinical Officers (Training, Registration and Licensing) Act Chapter 260 of the Laws of Kenya and the Nurses Act, Chapter 257 of the Laws of Kenya are required to comply with the provisions of the PPA with regard to the trade in drugs and poisons.

10. The Respondent states that in view of the above provisions it is within the Board's mandate to carry out visits on any premises where it suspects that there may be trade in drugs and poisons including the premises owned by the members of the *Ex parte Applicant* to ensure quality, safety and efficacy of the same. Accordingly therefore, the Respondent states that the order of prohibition sought against the Board cannot issue as -

a. The order of Prohibition is an order issued out of this Honourable Court directed to a public authority, which forbids that authority to act in excess of its jurisdiction or contrary to law.

b. The Ex Parte Applicant herein has not adduced any evidence whatsoever to the effect that the Board has acted in excess of jurisdiction or contrary to law.

c. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice

d. The Ex Parte Applicant herein has not adduced any evidence that the Board has in any way breached the rules of natural justice or acted in error of law in charging its members who are not complying with the law.

e. The Ex Parte Applicant herein cannot seek an Order to stop that which is lawful as it is not enough for the Ex parte Applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice as in the present case, the actual sins of a tribunal must be exhibited for judicial review remedies to be granted and in the present case none has been demonstrated.

f. It is in the public interest that the board be allowed to carry out its mandate and ensure that the law is being followed

Issues for Determination

11. The Applicant submitted that the issued for determination are:

(i) Jurisdiction of this court on the order sought

(ii) Whether the Respondent acted Ultra Vires in the exercise of its supervisory duties.

(iii) Whether the Respondent has the mandate to inspect the suit premises.

(iv) Whether the Respondent was biased or unreasonable in its actions.

(v) Whether the court can issue the orders sought.

On the Issue of Jurisdiction

12. The Applicant submitted that Judicial Review is a remedy that plays the role of supervisory Jurisdiction over public bodies by ensuring that those who hold it exercise it lawfully. The purpose of Judicial Review therefore becomes two fold;

a) the definition of principles to govern public administration by the executive

b) the safeguarding of individual interests against illegal or unreasonable action, or administrative action taken without proper procedure. The Applicant submitted that 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. Article 165 (6) of the Constitution of Kenya grants the High court supervisory Jurisdiction over subordinate courts and over any person, body, authority exercising a judicial or quasi-judicial function but not over a superior court.

13. Section 8 of the law reform Act specifically sets out that the high Court can issue an order of Mandamus, Certiorari and Prohibition. The object of Sections 8 and 9 is to provide for the substantive law while Order 53 provides for the procedural law of Judicial Review.

Flowing from the foregoing, The Applicant submitted that there is a rebuttal to the assertion by the Respondent that this Court lacks Jurisdiction to determine on matters of Judicial Review specifically on the order of prohibition.

14. I have considered this issue, and without saying more it is the finding of this court that it has the jurisdiction to issue the orders sought herein if the same are merited.

Whether the Respondent has the mandate to inspect premises operated by the members of the Ex parte Applicant

15. The *Ex parte* Applicant impugns the Board's supervision of its members as being *Ultra vires* and contrary to the rules of natural justice in the course of its duties where it arrested several of its members. Now, having provided the legal foundation for their action under the aforesaid PPA Act, the Board's mandate is to protect the health of the public by regulating the profession of pharmacy and ensuring quality, safety and efficacy of medical products and technologies. It is in this regard that the Registrar is required to keep a roll of pharmaceutical technologist and issue to every Pharmaceutical technologist whose name is entered in the Roll, a certificate of enrolment.

16. The Board also issues various types of premise licenses for carrying out the business of a pharmacist which includes the following;

(i) Wholesale dealers License (Section 27); and

(ii) Licenses to sell poisons for mining, agricultural or horticultural purposes (Section 28).

17. Further, the Board may issue a licence to sell Part II poisons under Section 32 of the PPA subject to such conditions and limitations as the Board or the person appointed by it may think fit to impose.

18. In order to ensure compliance with the requirements for licensing under the PPA, Section 47 of the PPA provides for the Inspection of licences and books and that every authorized or licensed seller of poisons shall, on the demand of an authorized officer, produce for inspection his certificate of registration or his licence.

19. In fact, under Section 2 of the PPA, an "*authorized officer*" is defined to be the registrar, pharmaceutical analyst, pharmaceutical inspector, a medical officer, an inspector of drugs, an administrative officer or a police officer not below the rank of Superintendent.

20. This court believes that it is in this regard that the Board through the authorized officers recognized under the PPA, carries out its necessary regulatory inspections in order to ensure that the relevant licenses and permissions have been obtained by different premises and that there is no danger posed to members of the public. Clearly the law does recognize several Offences which may be committed under the PPA and the role of the Board as a regulator is to ensure that those Offences are not committed

21. It is also clear that the law does recognize the role of other medical professionals being Doctors, Dentists Clinical officers and Nurses who form the membership of the *Ex Parte* Applicant with regard to dispensing medicines.

22. Particularly, Section 32 of the PPA provides for the supply and dispensing of Part I poisons by doctors, hospitals and to a limited extent nurses as follows:-

> **"(1) A duly qualified medical practitioner, dentist or veterinary surgeon, or a member of the staff of a hospital, dispensary or similar institution who has been authorized so to do by general or special order of the Cabinet Secretary, may supply or dispense a Part I poison for the purpose of medical, dental or veterinary treatment, as the case may be, subject to the following provisions—**
>
> > **(a) the poison shall be distinctly labelled with the name and address of the person by whom it is supplied or dispensed;**
> >
> > **(b) the following particulars shall within twenty-four hours after the poison has been**

supplied or dispensed be entered in a book used regularly for the purpose (but which need not be used exclusively for that purpose), and which shall be called the Prescription Book—

(i) the date on which the poison was supplied or dispensed;

(ii) the ingredients and the quantity supplied;

(iii) the name and address of the person to whom the poison was supplied;

(iv) the name and address of the person by whom the prescription was given, and a registered midwife practising domiciliary midwifery may supply or dispense a Part I poison in accordance with the regulations made under the Nurses, Midwives and Health Visitors Act (No. 21 of 1965), if he complies with paragraph (b) of this subsection in relation to the supplying or dispensing of the poison.

(2) An authorized seller of poisons may supply a Part I poison prescribed and dispensed by himself, and in every case in which he supplies a Part I poison on prescription (whether the prescription has been drawn up by himself or not) shall enter the particulars in his Prescription Book in accordance with this section, but shall not in respect of such supply be required to make any entry in the Poisons Book in accordance with section 30 of this Act.

(3) Any person to whom subsection (1) of this section apply who supplies or dispenses any Part I poison otherwise than in compliance with these provisions shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and such imprisonment."

23. Further to the above provision, Section 13 of the *Clinical Officers (Training, Registration and Licensing) Act Chapter 260 of the Laws of Kenya* provides that a clinical officer who is licensed to engage in private practice shall only handle and shall only issue prescriptions for the drugs and equipment listed in the Second Schedule of that Act.

24. Taking into account the foregoing provisions, it is clear that all practitioners under the *Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya*, *Clinical Officers (Training, Registration and Licensing) Act Chapter 260 of the Laws of Kenya* and the *Nurses Act, Chapter 257 of the Laws of Kenya* are therefore required to comply with the provisions of the PPA with regard to the trade in drugs and poisons.

25. Therefore it is the finding of this court that the Respondent's Board does have the mandate to inspect the premises operated by the members of the *Ex parte* Applicant, and so the Respondent's action was not *ultra vires*.

Whether the Board was biased or unreasonable in its action

26. The *Ex parte Applicant* has levelled allegations of bias on the part of the Board in carrying out its mandate with regard to its members *vis-a-vis* practitioners in public bodies. The court did not see any evidence of bias or unreasonableness. The same position applies to allegations that the Respondent has acted unreasonably towards the Applicant. I do not see any evidence of these allegations.

Whether the court can issue the orders sought

27. It is trite law that the remedy of judicial review is discretionary and in deciding whether to grant the relief sought the Court will take into account the conduct of the party applying. . ***See Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270** as quoted by Odunga J in ***Republic v Registrar, Pharmacy and Poisons Board & another Ex Parte Paul Mwaniki [2016] eKLR at paragraph 21.*** The members of the *Ex parte* Applicant having contravened the law they should be allowed to face the

criminal justice system as is contemplated under the PPA.

28. It is now well established that the order of Prohibition is an order issued by this Court directed to a public authority, which forbids that authority to act in excess of its jurisdiction or contrary to law. The *Ex Parte* Applicant herein has not adduced any evidence whatsoever to the effect that the Board has acted in excess of jurisdiction or contrary to law. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice.

Order

29. Pursuant to the foregoing it is the finding of this court that the motion lacks merit and the same is dismissed with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 18th day of May, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Maina for the Respondent

Mr. Kaunda Court Assistant