



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(JUDICIAL REVIEW DIVISION)
J.R HC MISC. APPL. NO. NO. 269 OF 2016
IN THE MATTER OF AN APPLICATION BY THE APPLICANTS
HEREIN FOR JUDICIAL REVIEW UNDER ORDER 53
OF THE CIVIL PROCEDURE RULES
REPUBLIC.....APPLICANT
VERSUS
THE KENYA MEDICAL LABORATORY TECHNICIANS
AND TECHNOLOGISTS BOARD.....RESPONDENT
AND
CHRISTINE INOKOBIA LIMUNGI.....EX PARTE APPLICANT
RULING

Introduction

1. In her Motion brought on Notice dated 23rd June, 2016 the *ex parte* applicant herein, **Christine Inokobia Limungi**, seeks the following orders:

1. **THAT AN ORDER OF CERTIORARI be granted to quash the respondent's decision refusing to renew the applicant's annual registration renewal certificate herein.**
2. **AN ORDER OF PROHIBITION, preventing the respondent, its servants, agents, employees or anybody else whatsoever acting in its behalf from cancelling, harassing, intimidating, blackmailing and or in anyway interfering with the Applicant's certificate SNo. 2895 date 15/8/2015 a qualified medical laboratory technician.**
3. **AN ORDER OF MANDAMUS compelling the respondent to forthwith issue the applicant with a current annual registration renewal certificate for the year 2016.**
4. **That the costs of this application be paid by the respondents in any event.**

Ex Parte Applicant's Case

2. According to the *ex parte* applicant, by a certificate of registration No. 2895 dated August 15, 2015, she was registered by the respondent as a qualified Medical Laboratory Technician upon passing the necessary examinations; making the necessary application and providing the required supporting documents to the respondent. By a letter received by the Respondent on May 25, 2013, the applicant requested for the upgrading of her certificates.

3. It was averred by the applicant that she had been receiving annual registration renewal certificates since the year 2012 until the year 2014. However, in 2015, she was engaged with school activities because she had gone back for further studies but had been paying the necessary charges for the annual licences. She expounded that by a receipt dated May 25, 2016 issued by the Respondent, she paid Kshs 5,500.00 being renewal fees for 2015-2016; a late payment penalty and upgrading fee. However, on the same day, she was requested by a staff of the respondent to wait for sometime at its reception and was later on, requested to see a **Mr. Njeru** who demanded to know how she obtained the certificate of registration which information the applicant gave.

4. The applicant however averred that on the same date, May 25, 2016, and upon instigation by the respondent, she was referred to the Special Crime Police Unit where she recorded a statement explaining how she obtained the certificate of registration and annual licences herein. The officer who recorded her statement informed her that the matter should be handled by the respondent and not the police and she was released unconditionally.

5. The applicant averred that by a demand letter dated June 15, 2016, she demanded for renewal of her annual licences up to the year 2016 but the respondent failed to do so without giving any reasonable reason therefor. The applicant however averred that she was unable to carry on with her professional work without the said annual licences though she had been renewing her annual licences until the previous year.

6. It was the applicant's case that the actions by the respondent were unreasonable, irrational, malicious, illegal, biased, unlawful, capricious and against the rules of natural justice.

1st Respondents' Case

7. In opposition to the application the respondents filed a notice of preliminary objection in which it contended that the application as drawn and filed was bad in law and incompetent and unmaintained and an abuse of Court process as the same was filed out of time without leave of court raised.

8. Apart from the objection the Respondent contended vide its replying affidavit that it is established pursuant to the provisions of section 3 of the **Kenya Medical Laboratory and Technicians Act, CAP 253A** Laws of Kenya (hereinafter referred to as "the Act" or CAP 253A) 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 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.

9. According To the Respondent, pursuant to section 5(2) of CAP 253A it is mandated *inter alia*, to consider and approve the qualifications of Laboratory Technicians and Technologists for the purpose of registration under the Act, to license and regulate the business and practice of registered Laboratory Technicians and Technologists and to take such disciplinary measures as may be appropriate to maintain proper professional standards. In the exercise of the function of supervising and controlling the training of laboratory technicians and technologists, it works closely with the training institutions and indexes the candidates who have been admitted to various training institutions to pursue courses in various fields of medical laboratory sciences and upon completion of their studies, the Board administers Board examination to all candidates who apply for registration as a condition precedent to such registration.

10. It was averred that pursuant to its regulatory mandate and in furtherance of its mission to protect the health of Kenyans, the Respondent conducted a thorough audit of its registration system by reviewing the files of all persons registered by the Respondent and the audit revealed shockingly that some persons had obtained registration fraudulently despite having failed Board examinations.

11. Pursuant to section 17 of Cap 253A, it was averred that the Respondent's Registrar is mandated to remove from the register, *inter alia*, any entries fraudulently or erroneously made. Further pursuant to section 19(5) of Cap 253A any person who in an application for registration, wilfully makes a false or misleading statement or utters a false certificate, commits an offence and is liable on conviction to a fine not exceeding one million shilling, or to imprisonment for a term not exceeding five years or, to both. It was further disclosed that under the provisions of section 19(5) of Cap 253 A when applying for registration the applicant signs a declaration that if on verification it was later found out she had flouted any of the matters she had bound herself in the declaration, the board would refuse her registration, deregister her or subject her to disciplinary action including prosecution in a court of law.

12. According to the Respondent, a review of the file of the ex parte Applicant revealed that she sat for her Board examinations at Shree Leva Cuttchi Patel Samaj Centre in April 2012 but failed key units of blood transfusion and practical and she was required to re-sit the examinations. According to the Respondent, it therefore had reasonable cause to believe that the ex-parte Applicant had obtained registration fraudulently as there was no evidence that she re-sat the said examination.

13. It was contended that the ex parte Applicant visited the Board offices and was treated fairly by being given an opportunity to be heard and was asked to explain the circumstances under which she obtained registration without having passed Board examinations but she was unable to give a satisfactory answer and when she was asked to re-sit the said examinations she declined consequent whereof the Board was constrained to refer the matter to the police for investigations and the matter was still under police investigations.

14. It was the Respondent's position that it has a statutory mandate and mission to protect the health of all Kenyans by ensuring compliance with standards in training in medical laboratory sciences and the Respondent is not permitted by law to compromise this standard by varying the set criteria for registration for a particular candidate. It was its case that to allow the Ex-parte Applicant to continue to practice inspite of her having failed Board examinations the Respondent would not only be abdicating its statutory mandate of regulation of standards of training of technicians and technologists but would also be exposing the health of Kenyan public to a great risk.

15. The Respondent therefore contended that the ex-parte Applicant's application had no merit whatsoever and was merely calculated at frustrating police investigation of the Ex-parte Applicant for offences under section 19(5) of Cap 253A.

Determinations

16. I have considered the application, the affidavits, the submissions and authorities cited herein.

17. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It

lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

18. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

19. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60*.

20. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural

impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

21. It is therefore clear that, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be a ground for quashing a decision if there was material on record which would have warranted a finding to the contrary.

24. Section 24(3) and (4) of the Act provides that:

(3) The Board shall have the power to renew any practicing certificate and may refuse to renew, cancel, withdraw or suspend any certificate if satisfied that the laboratory technician or technologist is guilty of professional misconduct or is in breach of any provisions of this Act or any regulations made thereunder, for a period of 12 months.

(4) Any Laboratory technician or technologist aggrieved by the decision of the Board in the exercise of its powers under subsection (3) may appeal to the Minister within thirty days of the receipt of the decision and in every such case, the decision of the Minister shall be final.

23. Section 30(1) of the Act on the other hand provides as follows:

(1) Where on the recommendations of the Committee the Board is satisfied that a laboratory technician or technologist is in breach of any of the terms or conditions prescribed by the Board under [section 27](#), the Board may—

(a) issue the laboratory technician or technologist with a letter of admonishment; or

(b) suspend the registration certificate of the laboratory technician or technologist for a specified period not exceeding twelve months; or

(c) withdraw or cancel the practising certificate, or suspend the practising certificate of the laboratory technician or technologist for a period not exceeding three months; or

(d) impose a fine which the Board deems appropriate in the circumstance; or

(e) remove the name of the laboratory technician or technologist from the register.

24. It is therefore clear and it has not been challenged that the Respondent Board has powers and jurisdiction to refuse to renew a practicing certificate of a laboratory technician or technologist. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

25. In the instant case, the applicant's case seems to be hinged upon the failure by the Respondent to afford her a hearing. However it is admitted by the applicant that on 25th May, 2016, she was requested to see a **Mr. Njeru** who demanded to know how she obtained the certificate of registration which information the applicant gave. Thereafter the matter was referred to the police and according to the applicant, the police declined to deal with the matter as the matter ought to have been dealt with by the Respondent. The Respondent however contended that the matter was still under investigations.

26. The scope and nature of hearing in disciplinary matters has been dealt with not only in this Country but in other jurisdictions as well. As is stated by **Michael Fordham** in *Judicial Review Handbook*; 4thEdn. at page 1007:

“procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case”.

27. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, the Court of appeal delivered itself as follows:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”

28. In **R vs. Aga Khan Education Services ex parte Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

“On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each scale must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.”

29. In **Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.”

30. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009**:

“The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything

similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc.”

31. In Pearlberg vs. Varty (Inspector of Taxes) [1972] 1 WLR 534, it was stated that:

“Fairness does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too easily sacrificed.”

32. In this case the applicant concedes that she was called and asked to explain how she obtained her qualifications an explanation which she duly gave. However despite giving the same the matter was still referred to the police. What has however aggrieved the applicant is the decision by the Respondent not to renew the applicant’s practicing certificate. That decision according to section 24(4) of the Act should have been challenged by way of an appeal to the Minister within thirty days of the receipt of the decision which decision is said to be final. Whereas the finality of the decision does not necessarily bar this Court from exercising its supervisory jurisdiction over executive decisions, it is clear that the applicant had an alternative remedy and the Court has not been told whether resort thereto was made.

33. Section 9(2), (3) and (4) of the **Fair Administrative Action Act**, No. 4 of 2015 provides:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

34. It is however my view that the onus was upon the applicant to satisfy the Court that she ought to be exempted from resorting to the available remedies. This was the position adopted by the Court of Appeal in Republic vs. National Environment Management Authority [2011] eKLR, where the Court held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in t he statute with respect we agree with the judge.”

35. Therefore as was stated As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...”

36. This Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 held that:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”

37. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”

38. It is now a ‘cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

39. In the absence of the evidence that the ex parte applicant resorted to the alternative remedy before commencing these proceedings and in the absence of an explanation as why this was not done, it is my view and I hold that this Court ought not to exercise its discretionary powers in favour of the applicant.

Order

40. In the result the Notice of Motion dated 23rd June, 2016 fails and is struck out but with no order as to costs.

41. It is so ordered.

Dated at Nairobi this 27th of October, 2017

G V ODUNGA

JUDGE

Miss Kaburu for Mr Kurauka for the applicant

NA for the Respondent

CA Ooko