REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 72 OF 2015

REPUBLIC ……..................…………………………..……...APPLICANT

AND

KENYA VETERINARY BOARD ………..……….......…...1ST RESPONDENT

REGISTRAR KENYA VETERINARY BOARD…...........2ND RESPONDENT

INSPECTOR GENERAL OF KENYA POLICE….............3RD RESPONDENT

EX-PARTE

ISAAC KIONDO MUIRURI

STEPHEN GICHURU MAINA

ALEXANDER WAINAINA KINYANJUI

FLORENCE NJAMBI

CHARLES KINYUA WAMBUI

JUDGEMENT

Introduction

1. In their Motion brought on Notice dated 29th July, 2015 the *ex parte* applicants herein, **Isaac Kiondo Muiruri**, **Stephen Gichuru Maina,** **Alexander Wainaina Kinyanjui**, **Florence Njambi** and **Charles Kinyua Wambui** seek the following orders:

1. **That this honourable court be pleased to grant an order of prohibition directed at the Respondents prohibiting them from making unilateral decisions questioning the Board's own issued certificates on the validity of the said certificates and the prohibit the Respondents from instigating criminal charges on the basis of the Board's certificates that it issued to the ex-parte Applicants.**
2. **That costs be provided for.**

Ex Parte Applicant's Case

2. According to the applicants, the 1st Respondent, the Board of Trustees of the Kenya Veterinary Board, (hereinafter referred to as "the Board") gave out certificates to all the Applicants after all due process was followed but the same board has now issued to all the Applicants notices with intention of revoking the same certificates without assigning any reasons thereof.
3. It was the applicants' case that they were living in fear because the Registrar though police and messages on mobile phone continuously threatened them with the use unspecified. In the applicants' view the intention of the Registrar is to use his influence on the Board in order to reap a pecuniary benefit from the Applicants or cause them harm. The applicants averred that the threat by the registrar to withhold and or revoke the certificates genuinely issued will prejudice and affect the livelihood of their families yet they have no pending misconduct or disciplinary actions.
4. They further contended that they were as a result unable to practice their professions. To the applicants, having been issued with the said certificates he Respondent cannot question their validity. Subsequent to the issuance thereof, it was contended that the Applicants who do not work in the Respondents' offices have practiced their professions for over 15 years and their certificates have been recognised by other institutions and are now pursuing further studies.
5. The applicants averred that the annextures to the replying affidavit filed on behalf of the Respondents were manufactured in order to create an impression that the Board did not issue the certificates to the Applicants.

Respondents' Case

6. In response to the application, the Respondents contended that the Board began registration of veterinary paraprofessionals for the first time in April 2013 upon gazettment of regulations operationalising the ***Veterinary Surgeons and Veterinary Paraprofessional Act, 2011*** which allowed for registration of the paraprofessionals. It was disclosed that for the past two years, 5878 paraprofessional have been registered out of which 5300 are animal health certificate holders also referred to as veterinary technicians. Due to the large number of professionals registered within a very short time span coupled with some complaints received by the Board from members of public questioning competence of a few of them, the Board directed that a forensic audit be done to authenticate qualification of those already registered.
7. Pursuant thereto, vide a letter dated 5th February 2015 the Board requested all animal health training institutions to send to the Board the names of all graduates from their institutions categorised as per the year of graduation. In compliance the Board received copies of the said list from various institutions as well as an electronic copy of these trained and have graduated from Kenya YMCA College of Agriculture and Technology being one of the institutions.
8. According to the Respondents, with regard to the instant case, a member of the public called the Board on Tuesday 3rd March 2015 complaining that one **Mr. Charles Kinyua Wambui** who had been registered by the Kenya Veterinary Board had not attended any training in animal health, which call was received by **Dr. Idraph Ragwa** the Chief inspector for the Board.
9. Upon the issue being brought to the attention of the said Charles **Kinyua Wambui**, the latter stated that he had trained at Kenya YMCA College of Agriculture and Technology and had a certificate from the institution. However, when the Board checked the list that had been sent by the principal of the college, his name was missing in the 2014 list of graduates. The said person was therefore informed him to go to the Board's offices the following day with the certificates issued by the college.
10. A process of verification of the names of the graduates already registered who graduated from the college against the list that had been sent by the principal revealed that the following names missing were from the lists for the indicated years:-

a. Wycliffe Odour Okoth – 2013
b. Alexander Wainaina Kinyanjui – 2014
c. Isaac K. Muiruri – 2014
d. Charles Kinywa Wambui – 2014
e. Florence Njambi Muiruri – 2014

f. Stephen Gichuru Maina - 2014

11. According to the Respondents the said **Charles Kinyanjui Wambui** presented a certificate in animal health and production issued by Kenya YMCA College of Agriculture and Technology on Wednesday 4th March 2014 and declared that he had actually attended a one year course at the institution as required by law since he had graduated with a certificate in Range Management earlier. When informed that the program he referred to was not offered at the institution, he insisted and wrote a note to confirm that he attended the course at the institution. The Board then decided to contact the institution in question and in this respect the said **Charles Kinyanjui Wambui** agreed to leave the certificate which been issued to him by the institution behind and to come for it the following day after the institution had been contacted on the matter.
12. However the said institution confirmed that the certificate was not genuine since the signatures for the principal and the registration on it were not theirs. They further confirmed that they did not offer the one year course in animal health and **Mr. Wambui** had never been a student at the institution. The institution further stated that the other five alleged graduates from the institution were not genuine.
13. The Respondents averred that the said **Mr Wambui** then sent someone to collect the said certificate on his behalf instead of collecting it himself as agreed. Thereafter attempts to contact him were futile as he kept disconnecting the calls made to him. Similarly attempts to call the other students whose certificates were disputed similarly did not yield fruits save for **Mr. Wycliffe Oduor Okoth** who promised to go and discuss the issue but did not do so. Consequently, the Board sent only one message to the rest to taken note of the position of the college which had allegedly issued them with the animal health certificates they used to secure registration before the board took any action but none contacted the office up to the time the Respondents received the pleadings in this matter.
14. It was therefore the Respondents' case that the Board had sufficient ground to continue the investigation process concerning the fraud going on within the profession with a view to recommending appropriate action. To the Respondents, the orders sought herein ought not to be granted due to the fact that:

a. That veterinary service normally has direct impact on public health and therefore human health.
b. That the correlation of animal health to human health demands for proper training and registration of the practice as regulated under the Act.
c. That since the five Applicants have not proved that they obtained proper training in animal health, allowing more time to practice veterinary medicine would have serious implications on the general public compared to personal losses they consider.
d. That stay would therefore compound and unnecessarily interfere with the normal execution of the mandate of the board thereby occasioning unbearable loss to the general public.
e. That in any event the contemplated loss to be suffered by the ex-parte applicants, pursuant to the completion of investigation and possible cancelling of the registration certificates can be compensated in monetary terms.

Determinations

15. I have considered the issues in this application.
16. The only order being sought by the applicants is an order of prohibition. 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...."

17. 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."

18. 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.***

19. 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."

20. That the Board has powers and jurisdiction to suspend or nullify the applicants' licence has not been challenged. In particular, section 6(2)(g) of the ***Veterinary Surgeons and Veterinary Para-Professionals Act***, Cap 366 Laws of Kenya (hereinafter referred to as "the Act") empowers the Board to:

regulate the professional conduct of registered persons and take such disciplinary measures as may be appropriate to maintain proper professional and ethical standards.

21. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Section 34(5) of the Act provides as follows:

Any person against whom an inquiry is instituted in terms of this section, shall be entitled, either in person or through a legal representative, to—

(a) be present at the inquiry;

(b) answer the charge;

(c) cross-examine any person who has given evidence at the inquiry;

(d) inspect any book, document or record referred to in subsection (5);

(e) call evidence in support of his defence; and

(f) be heard in his own defence.

22. 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.

23. It is therefore clear that both the Act and the Constitution import the rules of natural justice in the disciplinary proceedings of the Board. In the instant case, the applicants contend that the Board intended to take adverse action against them without affording them a hearing. It cannot be doubted that nullification of a licence already granted to a person to practise his profession amounts to an adverse action under Article 47 of the Constitution. Accordingly, before the Board could nullify the applicants'' already given licences it was under an obligation to afford the applicants a hearing. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, **Lord Mustill** held:

"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."

24. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners;

"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."

25. The Board contends that it called the applicants and the applicants disconnected the calls and did not attend before the Board. It is true that where a person is offered an opportunity of being heard and fails to utilise the same he cannot be heard to complain that he was never heard. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

26. In this case however, the particulars of the telephone numbers which the Board purportedly called have not been disclosed. Nothing would have been easier than for the Board to exhibit copies of the call records from the relevant service providers to prove that it actually made the said calls. Section 109 of the ***Evidence Act*** provides:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. The burden was therefore on the Board to prove that it did actually make the said calls. Since it is a Constitutional obligation on the part of the Board to afford the applicants a fair hearing before a decision adverse to the applicants is made, it was incumbent upon the respondents in light of the denial by the applicants that they were not notified of the intended action to prove that that was in fact not the case. Apart from mere averments that certain phone calls were made, there is no evidence to controvert the applicants’ contention that they were never afforded an opportunity of being heard. It has also not been disclosed what exactly was the content of the telephone calls. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury’s Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.”

28. Mere requirement that a party avails copies of his documents cannot in the circumstances of this case amount to fair judicial process though a fair judicial process ought not to be equated to judicial hearing where what is in issue is a disciplinary proceedings.
29. In **Russel vs. Duke of Norfork [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 **<u>Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:</u>**

"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. Therefore whatever disciplinary method is adopted, the process must be procedurally fair and the person concerned should have had a reasonable opportunity of presenting his case. In this case there is no evidence that the applicants were given an opportunity of presenting their case. That being the case, it does not matter whether the same decision would have been arrived at had he been heard. As was held in **<u>Onyango Oloo vs. Attorney General [1986-1989] EA 456</u>**:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...... Denial of the right to be heard renders any decision made null and void ab initio."

32. The mode of service unless otherwise provided for is stipulated in section 3(5) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya which provides that:

Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

33. Having considered the issues raised herein the decision I come to is that the 1st and 2nd Respondents' threatened action against the applicants was both tainted with procedural impropriety and irrationality.

<u>Order</u>

34. Consequently I hereby issue an order of prohibition directed at the Respondents prohibiting them from making unilateral decisions questioning the Board's own issued certificates on the validity of the said certificates and the prohibit the Respondents from instigating criminal charges on the basis of the Board's certificates that it issued to the ex-parte Applicants unless and until the due process of the law is followed. This Court is now empowered pursuant to section 11(1)(a) of the

Fair Administrative Action Act, 2015 to issue declaratory orders. If an action had been taken by the Respondents nullifying the applicants' licences during the pendency of these proceedings, when an order of stay was in existence, as alleged by the applicants, that decision pursuant to the decision in **Macfoy vs. United Limited [1961] 2 All ER 1169** is null and void and of no effect.

35. The costs of this application are awarded to the applicants to be borne by the 1st and 2nd Respondents.
36. Orders accordingly.

Dated at Nairobi this 25th Day of May, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Mutisya