REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION . NO. 391 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LICENSING EXAMS FOR NURSES AND MID- WIVES IN KENYA

IN THE MATTER OF LETTER DATED 16TH OCTOBER, 2015 BY THE

OFFICE OF THE DIRECTOR OF MEDICAL SERVICES: "RELEASE OF PROVISIONAL EXAMINATION RESULTS FOR AUGUST, 2015".

IN THE MATTER OF NURSES ACT (CHAPTER 257) LAWS OF KENYA

IN THE MATTER OF ARTICLES: 22(1), (2),(A),(B),(C)

AND

23(1), 27(1), (2), OF THE CONSTITUTION OF KENYA (2010),

BETWEEN

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

VERSUS

CABINET SECRETARY MINISTRY OF HEALTH.....1ST RESPONDENT

THE REGISTRAR, NURSING COUNCIL OF KENYA.....2ND RESPONDENT

DIRECTOR OF MEDICAL SERVICES- (DR.NICHOLAS MURAGURI)…...…3RD RESPONDENT

NURSING COUNCIL OF KENYA ….....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .....5TH RESPONDENT

EX-PARTE MICAH MATIANGI ONYIEGO…..... APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th November, 2015, the *ex parte* applicant herein, **Micah Matiangi Onyiego,** seeks the following orders:

a. **An order of certiorari to remove into this Honourable Court and quash the letter dated 16th October,2015 written by the 3rd respondent with either express or implied authority and/or instructions of the 1st respondent, directing the 2nd respondent to release provisional results of the licensing exams for Nurses and Mid- Wives in Kenya (scheduled to be released on 5th November, 2015) and instead order that the purported release of provisional results be stayed pending the hearing and determination of the substantive application;**
b. **The leave so granted does operate as a stay of the decision and directive of the 1st Respondent as contained in the letter dated 16th October, 2015 written by the 3rd respondent with either express or implied authority and/or instructions of the 1st respondent , directing the 2nd respondent to release provisional results of the licensing exams for Nurses and Mid- Wives in Kenya until further orders of this Honourable Court;**
c. **An order of prohibition directed at the 1st, 2nd and 3rd respondents prohibiting them from releasing provisional results of the licensing exams for Nurses and Mid- Wives in Kenya until the said results are moderated by an Educational Committee and presented to the Nursing Council of Kenya established under Section 3 of the Nurses Act (Revised 2012)(Cap 257) Laws of Kenya, which is the Governing body of the Nursing Council of Kenya after which final results will be officially released or until further orders of this Honourable Court;**
d. **An order directing that in the vent the said Licensing exam results are released any date before any or all of these orders are granted, the said provisional Licensing exam results as released be declared null until further orders of this Honourable Court;**
e. **Costs of and incidental to the Application be borne by the 1st, 2nd and 3rd respondents.**

***Ex Parte* Applicant's Case**

2. According to the Applicant, vide a letter dated 16th October, 2015 written by the 3rd respondent (hereinafter referred to as "the Director") with either express or implied authority and/or instructions of the 1st respondent (hereinafter referred to as "the Cabinet Secretary"), the 2nd respondent (hereinafter referred to as "the Registrar") was directed to release provisional results of the licensing exams for Nurses and Mid- Wives in Kenya contrary to the law and procedure established currently in Kenya. According to him, the said decision was arbitrarily and *ultra vires* their powers since the Cabinet Secretary had no powers to order for release of the results for the examination taken by Nurses and Mid-Wives without approval of the Nursing Council of Kenya

(hereinafter referred to as "the Council") established under section 3 of the ***Nurses Act*** (Revised 2012)(Cap 257) Laws of Kenya (hereinafter referred to as "the Act"), which is the Governing body of the Council.

3. The applicant contended that if this directive was implemented, it would compromise examination results release procedures for Nurses and Mid- Wives in Kenya and bring down the credibility of the qualifications of the Nurses and Mid-Wives who are currently being registered in Kenya particularly to the International Council of Nurses and the International Confederation of Mid-Wives and also violate chapter 7 of the Nursing Council Examination Policy, which outlines procedure for declaring licensing examination results for Nurses and Mid-Wives in Kenya. It was further contended that such action would result in professional crisis for the 3000 candidates who sat the Licensing exams for Nurses and Mid-Wives and risk opening avenue for quacks and brooding a swarm of semi-qualified or un-qualified Nurses and Mid-Wives who would endanger the lives of those patients they serve in the Republic of Kenya or elsewhere and hence violate Articles 26(1),(2) and (3), and 43(1)(a) of the Constitution of Kenya.
4. It was the Applicant's case that the said decision was wrong, unjust, unreasonable, illegal and was made in bad faith and contrary to the law. In his view, there was an error of law and fact on the face of the record and the said decision was *ultra-vires* the powers donated to the Respondents by the statutes or any other law currently in force.
5. According to the applicant, section 2 of the ***Nurses Act*** (Cap 257) Laws of Kenya (hereinafter referred to as "the Act") defines "*Nurse Educator General*" as "*a registered Nurse who holds a teaching diploma or degree in general nursing approved by Nursing Council"*. In his view, there is no Nurse who would hold provisional qualification and the same would apply to "Nurse Educator Midwifery" and "Nurse Educator Community Health Nursing", since one is either qualified to be a Nurse or not, meaning there is nothing like provisional qualification.
6. It was disclosed that the said results (National Licensing Exams for the Nurses and Mid-Wives in Kenya for about 3000 candidates who sat the said exam) were supposed to have been released by the Council on 28th October, 2015 which Council, though elected was yet to be Gazetted. According to him, once a candidate sits for this Licensing exam, one either passes of fails, hence there is no provisional results known in law for this kind of exam. Similarly, a candidate cannot pass on provisional basis and finally fail when the final results are released.
7. The applicant explained that the procedure for the release of this exam in accordance with the Nursing Council Examination Policy is that once the results are marked, there is an Educational Committee nominated by the Nursing Council of Kenya established under section 3 of the ***Nurses Act*** (Revised 2012)(Cap 257) Laws of Kenya (commonly referred to as "the Board") whose duties involve vetting and moderation of those results and then presenting them to the Council for release as the final results and not as provisional results.
8. It was therefore contended that the purported directive by the Cabinet Secretary to the Registrar through the Director amounted to total interference tainted with vested interests which was illegal and procedurally improper. In addition, the action taken by the Respondents was not anchored on any known law within the Nursing fraternity and was therefore null and void.
9. It was further contended that the powers of the Cabinet Secretary (Cabinet Secretary Ministry of Health) pursuant to Article 152 as read with 153 of the Constitution does not extend to ordering for release of the Licensing exams from Regulatory bodies such as the Nursing Council of Kenya which has its own statutorily created body with powers over the same. The Applicant position was therefore that the decision as contained in the letter dated 16th October,2015 written by the 3rd respondent with either express or implied authority and/or instructions of the Cabinet Secretary directing the Registrar to release provisional results of the licensing exams for Nurses and Mid-Wives in Kenya was either in excess and/or without jurisdiction.
10. Although the applicant appreciated that there were other remedies, his view was that those other remedies were less convenient beneficial and effective hence it was only the intervention of this Court that could bring sanity in the subject matter.
11. In the submissions filed in support of the application the aforesaid grounds were reproduced and it was emphasised that under sections 13 and 15 of the Act, there is no provision registering a person as a Nurse based on provisional results.
12. According to the applicant, being a Kenyan, he has the *locus* pursuant to Articles 3, 22 and 258 of the Constitution to institute these proceedings.

Respondent's Case

13. In response to the application, the Respondent filed the following grounds of opposition:

1. **The ex-parte applicant has not been appointed by the Minister as a council member, as the elections are yet to be validated as provided for under section 15 of the Nurses (Nominations and Election to the Council) Regulations, 2012-09-21, as such he lacks locus to file the instant application.**
2. **The ex-parte applicant has not been appointed by the Minister as a council member, as he is yet to meet the requirements provide for under section 16(2)(b) of the Nurses (Nominations and Election to the Council) Regulations, 2012-09-21, as such he lacks locus to file the instant application.**
3. **In authoring the letter dated 16th October 2016 the 1st and 2nd Respondent herein acted in accordance with the Nurses Act Cap 257 in particular but not limited to Section 9(f) ". . . with the approval of the minister, to prescribe and conduct examinations for persons seeking registration or enrolment under this Act."**
4. **The role of the council is as provided for under Section 9 (k) is ". . . to advice the minister on matters concerning all aspects of nursing."**
5. **The policy document relating to examinations annexed by the ex parte applicant has not been approved by the Ministry as provided for under section 26 of the Act in particular that the council may, with the approval of the ministry make regulations generally for better carrying out of the provisions of this Act... (e) (f).**
6. **It is in the public interest that the provisions results be released to facilitate the candidates proceed with their career, in any event the ex-parte applicant seems to have a problem with release of the results and not the content and/or conduct of the examination.**
7. **The Nurses Act has no provisions for moderation of examination results by the council as such non have been offended by the Respondents.**
8. **The application is misconnected, scandalous, vexatious, unmerited and an abuse of the court process.**

14. In the submissions filed on behalf of the Respondent the foregoing grounds were regurgitated and the Respondent averred that it was in the interest of those who sat for the examinations that the results be released and that it was in the wider public good that more nurses be availed to the public.

Determinations

15. The first issue for determination is whether the applicant has the *locus standi* to bring these proceedings.
16. In this application, the applicant's position was that he is a Kenyan Citizen, an adult of sound mind and disposition, and currently heading a Nursing and Midwifery training institution in Nairobi as well as an elected Nursing Council Member awaiting gazettement. As no replying affidavit was filed by the Respondents, there is no basis upon which this Court can find that these factual averments are incorrect.
17. I, on this issue wish to quote the holding in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, in which the Court expressed itself as follows:

> **"over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action**

for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy… In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi.* Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"

18. The Court continued:

"In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able

to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

19. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

20. Article 258 of the Constitution provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

21. Long before the promulgation of the current Constitution, it was held on 11th March, 1970, in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that:

"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is

included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."

22. The issue of standing was also dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"……..Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them…The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then

colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

23. It is therefore clear that over time the issue off standing particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has *bona fide* grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person hold *bona fide* grounds for believing that the Constitution is under threat ought to be most welcome.
24. Therefore based both on authority and the Constitution, the Applicant clearly has standing to agitate the prayers sought in these proceedings. In this case the applicant cannot be faulted for instituting these proceedings and I hold that he was within his right to commence these proceedings.
25. It was contended that the Cabinet Secretary had no powers to, through the Director, direct the Registrar to release the provisions results the subject of these proceedings. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.
26. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**
27. Sections 13 and 15 of the Act provide as follows:

13. Except as otherwise provided in this Act or in any regulations made thereunder, every person shall be entitled to registration on the appropriate register who satisfies the Council that he is of good character and has paid the prescribed registration fee, and who—

(a) has undergone a prescribed course of instruction and has passed the appropriate examination conducted or prescribed by the Council; or

(b) has undergone a course of training and passed an examination, elsewhere than in

Kenya, which the Council recognizes as equivalent to the training and instruction required in the case of persons trained in Kenya and as equivalent to the qualification by examination required under this Act.

15. Except as otherwise provided in this Act or in any regulations made thereunder, every person shall be entitled to enrolment in the appropriate roll who satisfies the Council that he is of good character and has paid the prescribed enrolment fee and who—

(a) has undergone a prescribed course of instruction and has passed the appropriate examination conducted or prescribed by the Council; or

(b) has undergone a course of training and passed an examination, elsewhere than in Kenya, which the Council recognizes as equivalent to the qualification by examination required under this Act.

28. It is clear that the powers under sections 13 and 15 of the Act can only be exercised by the Council and section 3 of the Act provides that:

There is hereby established a Council to be known as the Nursing Council of Kenya which shall be a body corporate having perpetual succession and a common seal with power to sue and be sued and to purchase, hold, manage and dispose of land and other property, and to enter into such contracts as it may consider necessary or expedient.

29. In my view, where a statute establishes a particular body and entrusts it with exclusive powers to exercise certain powers, it is only that body that ought to exercise the same. Section 4 of the Act provides for the membership of the Council and some of the said members hold their positions by virtue of their election by various bodies. Accordingly, the Council is specialised in its composition, hence the Cabinet Secretary who is largely a political appointee cannot be the proper person to exercise such powers. For the Cabinet Secretary to purport to do so would amount to usurping the powers of the Council hence he would be acting in excess of or without jurisdiction.
30. The Respondents purported to rely on section 9 of the Act being the source of his authority. The relevant subsections of the said section 9(1) provides the functions of the Council as inter alia:

(c) with the approval of the Minister, to make provision for the training and instruction for persons seeking registration or enrolment under this Act;

(d) with the approval of the Minister, to prescribe and regulate syllabuses of instruction and courses of training for persons seeking registration or enrolment under this Act;

(e) to recommend to the Minister institutions to be approved institutions for training of persons seeking registration or enrolment under this Act;

(f) with the approval of the Minister, to prescribe and conduct examinations for persons seeking registration or enrolment under this Act;

31. It is clear that under none of the said provisions is the Cabinet Secretary empowered to direct the release of provisional results. In the letter dated 16th October, 2015, the Director purported to convey the decision of the Cabinet Secretary by which the latter directed that "the 2015 results be released as 'Provisional Results' awaiting ratification once the Nursing Council is constituted." With due respect the Cabinet Secretary had no such powers and it was improper for him to have arrogated to himself the powers which the law had given to the Council.
32. In this case, it was contended that since the Council has now been gazetted, the orders sought herein were nolonger necessary. It is true that the decision whether or not to grant judicial review reliefs is no doubt an exercise of discretion. As is stated in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

33. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."

34. In this case despite the fact that the Court gave the parties an opportunity to address the Court further on the issue, not further material was disclosed to the Court on the basis of which the Court could factyually find that the orders sought herein were nolonger efficacious. To find so would be speculative and amount to a decision based on conjecture.
35. In the premises I find that the Notice of Motion dated 10th November, 2015 is merited.

Order

36. Consequently I hereby issue an order of certiorari is hereby issued removing into this Honourable Court for the purposes of being quashed the decision expressed in the letter dated 16th October, 2015 written by the 3rd respondent directing the 2nd respondent to release provisional results of the licensing exams for Nurses and Mid- Wives in Kenya which decision is hereby quashed. In the premises, it is not necessary to issue an order of prohibition in the manner sought.
37. The Applicant will have the costs of these proceedings to be borne by the 1st Respondent.
38. Orders accordingly.

Dated at Nairobi this 19th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Mutisya