



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTION DIVISION

MISC. JUDICIAL REVIEW CAUSE NO. 118 OF 2015

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF FAIRNESS IN THE DECISION MAKING

AND

**INN THE MATTER OF A DISCIPLINARY ACTION TAKEN DUE BY THE KENYA
PHARMACEUTICAL ASSOCIATION**

AND

**IN THE MATTER OF THE KENYA PHARMACEUTICAL ASSOCIATION CODE OF ETHICS
AND CONSTITUTION AS AMENDED IN 2011**

AND

**AND IN THE MATTER OF A PHARMACEUTICAL TECHNOLOGIST AND CHAIRMAN OF
THE CENTRAL BRANCH OF THE KENYA PHARMACEUTICAL ASSOCIATION**

AND

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

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DISCIPLINARY AND ETHICS COMMITTEE

OF THE KENYA

PHARMACEUTICAL ASSOCIATION.....RESPONDENT

KENYA PHARMACEUTICAL ASSOCIATION..INTERESTED PARTY

EX PARTE: ISSAC NDUNGU KIGURU

JUDGMENT

Introduction

1. By a Notice of Motion dated 18th May, 2015, the ex parte applicant herein, **Isaac Ndungu Kiguru**, seeks the following orders:

1. **That a judicial review order of Certiorari bringing to this court the proceedings and verdict by the respondent rendered on 21/1/2015 arising from the disciplinary proceedings convened vide a letter dated 23/9/2014 and quash the same as the entire proceedings were marred by lack of reasonableness, rationality and unfair administrative action;**
2. **That a judicial review order of prohibition barring the respondent and interested party from relying, utilizing or in any way acting on the verdict rendered on 21/1/2015 arising from disciplinary proceedings conducted on 16/10/2014 vide letter reference number KPA/NEC/2014/084;**
3. **That a judicial review order of mandamus compelling the interested party to reinstate and allow the ex parte applicant to resume his position as the chairman of the Central Branch of the Kenya Pharmaceutical Association;**
4. **That costs of this application be provided for.**

Applicants' Case

2. I have perused the verifying affidavit filed herein and from the outset, I must state that the same was drafted in a very clumsy manner. In fact it was extremely difficult to make head or tail of the message that the same was expected to portray. Advocates who draw affidavits meant for use before Courts ought to take such documents seriously. I will however try to make the best out of such a difficult situation.

3. According to the applicant, he is a pharmaceutical technologist and the central branch chairman of Kenya Pharmaceutical Association (hereinafter referred to as "the Association"), the 2nd Respondent herein, while the interested party is responsible for overseeing the activities of the said Branch. The ex parte applicant averred that the respondent, Disciplinary and Ethics Committee of the Kenya Pharmaceutical Association (hereinafter referred to as "the Committee") on the other hand is the body mandated to deal with all disciplinary issues relating to the Association, to which the Applicant has been a member since 1993.

4. The ex parte applicant averred that he has served as chairman since 2011 and that during the said period he served the members dutifully. The said membership, he deposed, comprises Nyahururu, Kiambu, Kerugoya and Murang'a areas. Since the last elections were held in 2013, and the term of holding office is 3 years, the ex parte applicant averred that the current tenure of the committee for the branch is 2017.

5. He averred that on allegations of the causing loss of funds of the Association the Committee invited him for a disciplinary hearing on 16th October, 2014 which he duly attended and defended himself against allegations of causing loss of funds amounting to Kshs 250,500.00. Apart from the said allegations, there was also an allegation of abuse of office.

6. To the Applicant, prior to this on 14th August, 2014, upon learning that the branch had lost funds amounting to Kshs 250,500.00 arising out of the negligence by the treasurer, he conducted a meeting of the elective committee.

7. According to the Applicant, the scheduled meeting of 16th October 2014 contravened the applicant's constitutional rights as it was composed of the National Chairman of the Association, the National Secretary General of the Association, the representative(s) of the Association in the Pharmacy and Poisons Board, the Chief Pharmaceutical Technologist in the Ministry of Health and some friends of the

National Chairman, that is **Mr. Godwin Kitala** and **Mr. Benjamin Mbugua** who are not *bona fide* members of the Disciplinary Committee. To him, this is contravened the laid down composition of the disciplinary committee as according to clause 2.1 of the Code of Ethics for Members, the composition of the disciplinary committee should consist of, the chairman of the Association, the National Secretary General of the Association, the representative(s) of the association in the Pharmacy and Poisons Board, the Chief Pharmaceutical Technologist in the Ministry of Health, the chairmen of all the branches of the association, one representative of the faculty of the Pharmacy of the Kenya Medical Training College, who shall be members of the association. None of the ten Branch Chairmen was invited not the representative of the faculty of Pharmacy at KMTC. He added that the clause provides that the quorum of the committee at any sitting shall be half of the members, and the chairman of the branch of the Association of which is to have his/her conduct discussed shall be present. In this case the vice chair of central branch should have been invited but this was not to be because of invested interest by the respondent. It was averred that during the alleged disciplinary committee meeting, the chairman of all branches of the association and the representative from Kenya Medical Training College were not invited but rather two unauthorized persons were present and were allowed to contribute in making the decision that amounted to me being forcefully retired from chairmanship.

8. The reason for raising this issue, according to the applicant was to portray the character of the members of disciplinary committee who could not care to follow the laid down procedure as per the code of ethics, they breached the laid down procedure which culminated into biased decision.

9. While confirming that he attended the meeting and responded the allegations levelled against him, the applicant insisted some of the committee members who were present were not impartial and in fact some were total strangers. To him, the whole decision making was unprocedural, irrational and biased as the Respondent's disciplinary proceedings were void having contravened clause 2.1 and 2.2 of the code of ethics which was the guiding principle in making the decision.

10. The Applicant asserted that he had a right to delegate duties to the treasurer which he did when he allowed him to take the money in question to the National Office as per resolution passed in Kakamega Golf Club Hotel at a Central Council Meeting but the money got lost. To him, his conscience was clear since as per resolution reached at Kakamega Gold Club in a Central Council Meeting, Kshs 400,000 was assigned to be contributed by KPA Central Branch to the National office and when he was assigned to deliver the first Kshs. 200,000 he did it on 4th April 2013 and no monies got lost.

11. The Applicant contended that clause 2.5 of the Respondent's Code of Ethics, clearly indicates that the decision by the committee shall be final and even if it provides for application for decision to be reversed, he felt apprehensive that the outcome would not favour him as from the start, the proceedings were not procedural as explained prior. While accepting that it is a good and a common practice to suspend an official whose conduct is in question, the applicant however disagreed with the manner in which his suspension was carried out after explaining how the funds in question got lost and the treasurer having admitted to have lost the same since the treasurer's admission should have absolved him from the blame if the Respondent was really acting in good faith and according to the laid down procedures. In his view, he could not have raised the issue of unfair hearing between the period of hearing and verdict since he would not have known what the outcome would have been. Although he could see that the procedure used was wrong, he gave the respondent a benefit of doubt by waiting for the verdict only to find out that the verdict that was unfavourable to him and that it was signed by the National Chairman who was the Chairman of the Disciplinary Committee leaving him with no other alternative than to come to this Court.

12. The ex parte applicant further stated that the Committee's verdict was communicated in a letter dated 21st January, 2015 though the same was kept from his knowledge. According to him, the decision was to the effect that elections would be conducted upon organization by the national office.

13. The applicant insisted that he had diligently and faithfully served the association for years and as a pharmaceutical technologist with 22 years standing hence the decision amounted to tarnishing his name. He disclosed that once a professional body has made a verdict on one's impropriety the same has a great bearing on one's professional life presently and in future.

14. To the applicant, the import of the decision by the Committee was that he was unreliable, unmerited, unprofessional and morally unqualified to be a leader and that his integrity was questionable. Although the consequential effect of his suspension for 3 terms was as a result of the loss attributed to me, the applicant contended that the verdict was irrational as a decision finding him culpable had been rendered on 21st January, 2015. He further contended that the decision to suspend and bar him from the association's position lacked rationality and was arrived at in haste.

15. It was the applicant's case that the respondent did not accord him a fair hearing more so on allegation of financial impropriety and the loss of money which was not based on cogent, credible and corroborated evidence and was baseless.

16. To the Applicant the failure to supply him with documents relied upon in reaching the verdict rendered the process unfair moreso as no one was summoned to explain the loss of fund and for him to ask questions on the authenticity, veracity and existence of the allegations levelled against him. It was his case, that in light of the finding by the executive committee and the admission of misappropriation by the treasurer it was reasonably expected that the treasurer would be found solely liable solely as the loss could not be imputed on the applicant who was never involved.

17. It was submitted that the Committee based its decision on charges which were not reported to them and which had not been raised by anyone hence its actions were unreasonable. It was further submitted that the Committee's decision to suspend the applicant was unreasonable, founded on ill-will, malice and was unfair in light of the admission by the treasurer that he was the one responsible for the loss and offering to repay the money.

18. It was the applicant's case that there was need for fairness in all actions by abiding by the law, the Constitution and principles of equity. Accordingly the applicant prayed for the orders sought herein.

Respondent's Case

19. The Respondent's case was that the applicant in this matter did indeed serve as the chairman of the Central Branch of the interested party since 2011 until his removal as such in January of 2015. Accordingly, he is not the current chairman of the Central Branch of the interested party as alleged or at all since he was relieved of that position following disciplinary proceedings that are the subject of this judicial review.

20. According to the respondent a financial report was submitted to the chairman of the interested party herein for the period between 29th May, 2014 and 9th June, 2014 exposing financial misappropriation in the branch chaired by the applicant and pursuant thereto, a meeting of respondent was scheduled for 16th October, 2014 to deliberate on the allegations raised against the applicant as per the constitution of the respondent and the applicant was invited to make representations and defend himself against allegations of impropriety as a matter of fairness.

21. It was averred that the applicant did attend and respond to the allegations levelled against him which representations were duly considered by the respondent constituted of at least six impartial people drawn from different sectors of practices among the association's members and after considering the representations, a decision was reached which was fair and unbiased. According to the Respondent, as per Clause 2.2 of the Interested Party's code of Ethics for members, the respondent has the power to determine the procedure for the conduct of its business. In so far as the applicant's case was concerned, the procedure cannot be said to be unreasonable or irrational since the rules of the respondent were followed to the hilt and further that those of natural justice were abided to and the decision communicated to the applicant as per its procedure vide a letter dated 21st January 2015. It was disclosed that the said findings were very clear in that it was specified that reasons for the suspension of the applicant as chairman of the central branch of the interested party which were inter alia; ***“failing to carry out his mandate openly and transparency in accordance with the interested party's constitution and good conscience.”***

22. To the Respondent, the applicant has neither denied his oversight role in making sure that funds of the Central Branch were properly used nor being the party responsible to ensure good governance and as such cannot escape liability for a loss of funds in which he was found to be complicit in after due process was followed.

23. The Respondent averred that the applicant did not apply for a review of the respondent's decision as provided for in clause 2.5 of the respondent's rules hence cannot therefore claim that he was denied an opportunity to be heard in his dissatisfaction with the subject decision. To the Respondent, since the issue at hand is on the unreasonableness, irrationality, unfairness or otherwise of decision of the respondent, the averments relating to the length of membership and duration of service do not and cannot absolve one from questionable conduct and were therefore were irrelevant To the Respondent, any person can misappropriate funds and in this case, the same was proved to the satisfaction of the respondent committee, a decision whose merits are not before this honourable court for review. It was therefore contended that the applicant had not demonstrated why or how his suspension was irrational, it is good and common practice to suspend an official whose conduct, especially on financial matters, is in question. It was added that this was a most reasonable practice that is very much in line with the National Values of transparency and accountability as enshrined in the Constitution of Kenya and more particularly at Chapter Six thereof on ethics and integrity. The Respondent reiterated that the suspension from candidature was occasioned by the need for accountability within the Interested Party, a move that puts the members at ease and other officials on notice in the spirit of reforms going on in the public governance sector hence there was nothing irrational about such a move; to the contrary it was in fact most reasonable in light of the gravity of the findings against the applicant.

24. The Respondent asserted that a fair hearing was granted to the applicant as demonstrated by the fact that it is not raised as one of the grounds for this judicial review. If the applicant had been unhappy with the manner of the hearing, then the same would have been raised by a complaint between the hearing date and the verdict hence the allegation of an unfair hearing was clearly an afterthought.

25. To the Respondent, the summons contained in the letter dated 23rd September 2014 as read together with the decision contained in the letter dated 21st January, 2015 make it very clear that the applicant failed to carry out his duties as the chairman of the Interested Party's Central Branch which led to the loss and misuse of the Association's funds. It was further demonstrated to the satisfaction of the respondent that the applicant was acting in cahoots with his branch Treasurer to the exclusion of other officials of the said branch, an allegation that the applicant has not denied and one that further shows the lack of transparency and accountability on the part of the applicant which led to the subject verdict. As chairman of the central branch, it was his duty to ensure that the funds of the association were well applied and safeguard and that it was this failure to account that led to his removal and due process was followed before said removal was effected.

26. According to the Respondent, it duly considered all the representations made by the applicant in his defence during the disciplinary hearing before reaching its verdict and that the Respondent's mandate was to find if the applicant had abdicated his oversight role and whether he was liable for the loss (which loss is not denied) of funds of the association. To the Respondent, the applicant has not shown/stated which rules of the association were flouted in suspending him or finding him liable for loss of the association's funds. According to the Respondent a forensic audit was scheduled to ascertain the extent to which the association lost funds through the said branch. The applicant failed in his duty as gatekeeper and trustee and as a result money was lost, hence the removal and subsequent suspension.

27. In the Respondent's view, the Applicant appears to be asking the court to review the order of the Respondent which is not in the ambit of judicial review. To the Respondent, this honourable court is not the means by which the Applicant may salvage his image and reputation since judicial review is concerned with reviewing administrative action which in this case was procedurally and substantively fair and in accordance with the constitution and rules of the Interested Party. It was therefore contended that no reason has been given to show why the activities of the Interested Party should be disrupted pending the determination of the present reference and hence the application ought to be rejected.

Determination

28. I have considered the issues raised herein.

29. Order 53 rule 4(1) of the *Civil Procedure Rules* provides as hereunder:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

30. In this case, according to the grounds on which the reliefs are sought, the application is substantially based two grounds. The first ground was that the decision made by the Respondent was irrational in so far as it purported to find the applicant culpable for the actions of the interested party's treasurer which actions the said treasurer had owned up to. The second ground was that the proceedings leading to the impugned decision were unprocedurally unfair and irregular in that no documents to support the assertion of impropriety or persons alleging the same were summoned by the Respondent.

31. With respect to unreasonableness, it was held by **Lord Greene** in **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation** [1948] 1 KB 223 (at page 229) that:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

32. In my view, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

33. Therefore the courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475:**

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority

which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

34. In this case, it is contended that the Respondent ought to have taken into account the fact that the interested party’s treasurer had admitted that the loss of money was due to his fault hence the Applicant had nothing to do with the same. It must however be noted that the action which was taken against the applicant was not on the basis that it was the applicant that orchestrated the loss of the money. The fault of the applicant according to the Respondent was that the applicant had failed in his oversight authority to put into place mechanisms through which such loss would not have occurred. Whereas this conclusion may, based on the evidence, have been incorrect on its merits, the Respondent heard the parties before it without any of them raising any issue as to the procedure and after doing so made its decision based on that material. This Court exercising its judicial review jurisdiction cannot interfere with the said decision unless the same was irrational. Had the applicant been penalised on the basis that he was the one responsible for the loss of money, the Court may well have found that the said decision was irrational based on the treasurer’s admission. However that was not the decision made by the Respondent

35. Accordingly the ground that the Respondent’s decision was unreasonable must fail.

36. With respect to unfairness in arriving at the decision based on lack of documents in support of the decision or witnesses, the said ground challenges the veracity of the evidence adduced before the Respondent. For this Court to embark on an inquiry on the sufficiency of the evidence before the Respondent and whether the same could sustain the allegations made against the Applicant would amount to this Court acting as an appellate Court on the decision of the Respondent and that is not the role of a judicial review court as opposed to an appellate Tribunal. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“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.”

37. I have considered the other grounds expounded in the submissions and it is my view that those were not the grounds upon which this application was based as the same do not appear in the statement filed herein. Accordingly, this Court is barred from considering the same.

38. Consequently, this Motion fails and is dismissed with costs.

Dated at Nairobi this 24th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onyango for Mr Wangai Wanjugi for the Respondent

Cc Mutisya