



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION NO 402 OF 2015**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**REGISTRAR, PHARMACY AND POISONS BOARD.....RESPONDENT**  
**AND**  
**PHARMACEUTICAL SOCIETY OF KENYA.....INTERESTED PARTY**  
**EX PARTE**  
**DR. PAUL MWANIKI.....EX-PARTE APPLICANT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 30<sup>th</sup> November, 2015 the *ex parte* applicant herein, **Dr. Paul Mwaniki**, seeks the following orders:

1. **An Order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent to publish on behalf of the Pharmacy and Poisons Board, inviting bids for purchase of land in Eldoret and Mombasa.**
2. **An Order of Prohibition directed to the Respondent, restraining the Respondent from proceeding with performing the functions of the Pharmacy and Poisons Board without the Board's endorsement.**
3. **An Order of Mandamus directed to the Respondent, compelling the Respondent to cancel all actions hitherto undertaken by the Respondent which were not as resolved by the Board.**

**Applicant's Case**

2. According to the applicant, the Respondent's office is a creation of the ***Pharmacy and Poisons Act***, Cap 244 of the Laws of Kenya (hereinafter referred to as "the Act"), which law also creates a Board

known as the Pharmacy and Poisons Board (hereinafter referred to as “the Board”) and that the said Act bears provisions which give the Respondent exclusive powers, while the rest of the acts of the Respondent are in fulfilment of resolutions of the Pharmacy and Poisons Board. To the applicant, the Respondent, under the Act, can only do a handful of duties, while most of the duties are to be carried out with the Board’s [usually minuted] endorsement.

3. It was averred that the Board is currently un-constituted, and there is a Judicial Review cause No. 244 of 2015 wherein an interpretation of the law has been sought as to the constitution of the said Board. However, the Respondent, noting the lacuna, has undertaken to perform the functions of the Board, in clear violation of the law, while openly and manifestly overstepping his mandate. It was explained that the Respondent has, in the latest attempt to usurp the powers of the Pharmacy and Poisons Board, issued out an advertisement in one of the local dailies, effectively inviting tenders for purchase of land in Eldoret and Mombasa while well aware that he is not empowered to do so, but is hell-bent in breaking the law and perpetuating acts of illegality, calculatedly taking advantage of the institutional lacuna *to wit* the Board.

4. According to the applicant, the Interested Party, through the Applicant, have attempted in vain to impede this illegality, but their attempts have been met with covert resistance, thus necessitating this Judicial Review Application as the Respondent has resorted to high-handed methods of administration by empowering himself to assume the powers and duties of the Board, and then goes ahead to grant his office duties which would ordinarily be a preserve of the Board.

5. The applicant asserted that the Respondent, if not restrained, will violate the law and further plunge the Pharmaceutical Industry in a bigger crisis, as the powers so conferred to himself are too ginormous and capable of being abused as they are currently unchecked. The applicant was of the view that the Board is critical in ensuring the quality of medicine and that in absence of a board, no action can be undertaken by the Respondent or any surrogate. In the converse, any function that undertaken in absence of the Board is done unlawfully and the same is *ultra vires*.

### **Respondents’ Case.**

6. On behalf of the Respondent, it was averred that sometimes on 21<sup>st</sup> November 2012 the members of the Board, during a full board meeting amongst other agenda items, received a report tabled by the chairperson of the practice committee for the first quarter of 2012/13 financial year on the same issue of question of decentralization of PPB services through the establishment of regional offices at min 3/21<sup>st</sup> Nov/12. In the said report, the board was advised that it should consider establishing regional offices by leasing and purchasing land for building of offices which would be branded and subsequently have the inspectors, secretaries, accountants and clerks employed in each of the said regional office to facilitate channelling of funds to the said offices. It was contended that the said full Board committee meeting adopted and ratified the practice committee reports together with the recommendations therein and further directed amongst other resolutions that the secretariat of the Board should budget for the purchasing of the land and building or leasing of Pharmacy and Poisons Board regional offices as a long term measure which would ensure that the Board’s presence is felt and found within the country.

7. It was disclosed that the Applicant was by then a board member and was present during the said meeting hence is fully and well aware and became part and parcel of these resolutions as he participated in their ratification and adoption.

8. It was averred that pursuant to a circular duly issued by the National Treasury being circular No.12/14 of 18<sup>th</sup> December 2014 all state corporations are required to submit their budgets for review and approval by the National Treasury. In view of the foregoing, Pharmacy and Poisons Board secretary subsequently prepared a budget for 2015/2016 financial year factoring in the purchase land for purposes of establishing of regional offices amongst other projects in line with the aforementioned board’s resolutions and dully forwarded the budget to the National Treasury for their said review and approval.

9. It was therefore the Respondent’s position that it is really mischievous, misleading and outrageous for

the applicant to be denying an obvious issue which he was party to. The Respondent therefore was of the position that the applicant ought to be stopped by the Doctrine of Estoppel.

10. It was contended that subsequently on 14<sup>th</sup> may 2014 the National Treasury granted approval of the said budget.

11. The applicant was accused of not having shown that he had the authority of the interested party to institute these proceedings.

12. According to the Respondent, he is acting in good faith and section 5 of the Act grants the registrar such as powers as the executive officer of the Boards secretariat and secretary the board in addition to those required under the provisions of the Act to be performed and exercised, as the board may from time direct. While admitting that the Board is currently not constituted arising from the fact that there is a Judicial Review case filled by the applicant herein being case No. 244 of 2015 he explained that the confusion in the said application regards the appointment of representatives of the interested party to the Board and the entire appointment of Board members.

13. The Respondent however denied that he has undertaken to perform the functions of the Board or manifestly overstepped his mandate as insinuated by the Applicant but was simply executing the directives of the said Board as earlier elucidated. In his view, by implementing the decision of the Board he was merely executing the directives and decisions of the Board and therefore it was not in any way that the action was calculated in taking advantage of the institutional gaps and lacuna to wit the Board as being alleged by the applicant herein.

### **Determinations**

14. I have considered the application, the affidavits filed both in support of and in opposition application as well as the submissions filed.

15. Section 5(1) of the Act provides as follows:

***The registrar shall perform such duties and exercise such powers, in addition to those required under the provisions of this Act to be performed and exercised, as the Board may from time to time direct.***

16. There is no doubt that there is no provision in the Act that empowers the Respondent to invite bids for the purchase of land. It is however contended by the Respondent that he was just implementing the decisions of the Board undertaken in the presence of the ex parte applicant herein. In support of this contention the Respondent relied on the minutes of the Board of 21<sup>st</sup> November, 2012. According to the said minutes, it was recommended by the practice committee *“that the Board’s Secretariat reach an MOU with KEMSA to provide warehouse space in the regions as a quick measure where possible, and in the long term the Board should establish offices by leasing and purchasing land for building of offices which would be branded, and secretaries, accountants and clerks employed in each regional office to facilitate channelling of funds to this (sic) offices.”* At the said meeting the Board adopted the report of the said committee for the establishment of the said MOU and proceeded to direct the Board secretariat to budget and procure offices or land for building PPB regional offices as long term measure. It was further agreed that the said secretariat must ensure that relevant approval from treasury are obtained and the procurement be done in accordance with the ***Procurement and Disposals Act*** and subsequently the Board would employ accounts officers and secretary for the offices.

17. That this meeting did indeed take place was confirmed by the applicant in his further affidavit who confirmed that he was present at that meeting. It was however his contention that the process of acquisition of the said parcels of land was to follow legitimate tendering and procurement, subject to approval of the Board. In fact in the further affidavit, the Applicant seems to have altered his story by blaming both the Respondent and the Board yet the Board is not a respondent to these proceedings and no leave was sought to challenge its decisions. It is no wonder that the *ex parte* applicant claimed that his

allegations against the Board were “in retrospect”. In the said affidavit, the Applicant introduced the issue of the unprocedural passing of the budget which was not an issue in his statement.

18. I have perused the newspaper advert and there is no express stipulation therein that the award of the tender would be by the Respondent as it is clear that the tenders would be opened in the presence of the candidates or their representatives who chose to attend at the Board’s Room. It is however clear from the minutes of the Board that the Respondent was authorised by the Board which the applicant himself was a party to, to budget and procure offices or land for building PPB regional office as long term measure. It is therefore clear that the Respondent was directed to initiate the process of procurement of the said facilities as long as the budget for the same was approved and the procurement process was adhered to.

19. In my view if the Board abdicated its duties unlawfully to the Respondent the Applicant ought to have challenged the Board’s decision which he was party to. What in effect the applicant is attempting to achieve through these proceedings is to impugn the decision of the Board through the backdoor. I have considered the submissions made on behalf of the applicant and it is clear that the applicant introduced new grounds apart from the allegation that the Respondent acted in excess of his powers which was substantially the ground in the statement of facts. Order 53 rule 4(1) of the *Civil Procedure Rules* provides that:

***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.***

20. Accordingly apart from the issue whether the Respondent exceeded his mandate, the Court cannot delve into the new issues introduced by the applicant in his submissions. The law is clear that the Respondent is obliged to implement the resolutions of the Board and in my view this is substantially what the Respondent set to do in the impugned action. He cannot therefore be faulted to acting in accordance with the directions given to him by the Board to which the applicant himself was a party.

21. It is therefore my view that the Respondent’s view that the applicant may have instituted these proceedings mischievously cannot be completely unfounded. In *Halsbury’s Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270* it is stated that:

***“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.’ [Underlining mine].***

22. It is therefore my view that these proceedings have no merit.

**Order**

23. In the result Notice of Motion dated 30<sup>th</sup> November, 2015 fails and is dismissed with costs to the Respondent.

24. It is so ordered.

**Dated at Nairobi this 29<sup>th</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Akusala for the Applicant***

***Mr Larabi for the Respondent***

***CA Mwangi/Gitonga***