



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 15 OF 2016

**IN THE MATTER OF APPLICATION BY ACCRA PHARMACY LIMITED
AND ESTHER WAIRIMU NGANGA, TRADING AS JOSTER MEDICAL
LABORATORY FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF CONSTITUTION OF KENYA 2, ARTICLES 3(1); 50(1),
47(1), 47(2), 73(1), (a) & (b), 159(2) (e) AND 165 (6) & (7)**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015, SECTION
4(3);**

AND

**IN THE MATTER OF THE ARBITRARY DECISION OF NAIROBI CITY COUNTY
GOVERNMENT**

**TO CLOSE THE BUSINESSES OF ACCRA PHARMACY LIMITED AND ESTHER
EIRIMUNGANGA, TRADING AS JOSTER MEDICAL LABORATORY**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT

AND

ACCRA PHARMACY LIMITED.....1ST EX PARTE APPLICANT

ESTHER WAIRIMU NGANGA trading as

JOSTER MEDICAL LABORATORY.....2ND EX PARTE APPLICANT

JUDGEMENT

Introduction

1. The ex parte applicants herein, **Accra Pharmacy Limited** and , **Esther Wairimu Nganga** trading as **Joster Medical Laboratory** by a Notice of Motion dated 26th January, 2016 seek the following orders:

- a. **An order of Prohibition do issued to stop and/or restrain the Nairobi City County, it agents or any person claiming through it, from closing or in any manner whatsoever enforcing its Notice to Stop operation of Business, Reference Number 14704 dated 14/1/2016 issued to Accra Pharmacy Limited.**
- b. **An order of Prohibition do issue to stop and/or restrain the Nairobi City County, it agents or any person claiming through it, from closing or in any manner whatsoever enforcing its Notice to Close the Premises, Reference Number 14702 dated 14/1/2016 issued to Joster Medical Laboratory;**
- c. **An order of Certiorari do issue to remove into his honourable court for purposes of it being quashed, any the decision of Nairobi City County that it takes pursuant to its Notice to Stop operation of Business, reference number 14707 dated 14/1/2016 issued to Accra Pharmacy limited and or its Notice to Close the Premises, reference number 14702 dated 14/1/2016 issued to Joster Medical Laboratory;**
- d. **Costs of this application be provided for; and**
- e. **Such further or other relief as the honourable court may deem just and expedient to grant.**

Applicants' Case

2. According to the Applicants, on 14th January, 2016, without any hearing and in utter disregard of due process of law, the respondent notified the applicants to forthwith close down their business that have operated for well over three years openly with the permission of the respondent, the Pharmacy and Poisons Board and the Kenya Medical Laboratory Technicians and Technologists Board. It was the applicants' case that they regularly sought and obtained permits from the respondent, the Pharmacy and Poisons Board and the Kenya Medical Laboratory Technicians and Technologies Board required of them to run a pharmacy and a medical laboratory in plot Nos. 269 and 270 of Umoja 11 Estate, Nairobi. Annexed herewith and marked SW3 are copies of the licenses and permits.

3. According to the Applicants, they legitimately expected that having been licensed by the Pharmacy and Poisons Board and the Kenya Medical Laboratory Technicians and Technology Board, and permitted by the respondent to run a pharmacy and a medical laboratory in Plot No. 269 and in plot Nos. 270 of Umoja 11 Estate, Nairobi, they would peaceably run their said businesses without arbitrary interference by the respondent. It was averred that the Pharmacy and Poisons Board has licensed the 1st Applicant as the sole distributor of NEVICRA food supplements in the entire republic of Kenya of Kenya, serving millions of Kenya patients and that the applicants have long term contracts with third parties, including suppliers of medicine to them, whom they owe millions of shillings in perishable stock already supplied to them, thus abrupt closure of the applicants' business exposes the applicants to suits by third parties on account of stock ordered and delivered to the applicants. Further, the applicants employ ten persons whom they cannot summarily dismiss upon the abrupt closure of their businesses by the respondent, with suffering

legal consequences.

4. In support of its case the applicants relied on Article 47 of the Constitution, section 4(3) of the *Fair Administrative Action Act*, Republic vs. Kenya School of Law & 2 Others exp Juliet Wanjiru Njoroge & 5 Others [2014] KLR, Keroche Industries Limited vs. Kenya Revenue Authority & 5 Ors [2007] KLR 240 and Royal Media Services Limited vs. Attorney General & 8 Ors [2014] eKLR.

Respondent's Case

5. The Respondent on its part opposed the application.

6. While admitting that it had issued the applicants with closure notices No's 14704 and 14702 in respect of their business, the Respondent averred that this was due to the applicants having not complied with the statutory provisions i.e. Change of user from residential to commercial and approved plans for the premises they are using for the business. It was however contended by the Respondent that this action does not bar the applicant from complying with other statutory provisions and the respondent's by laws.

7. The Respondent however asserted that it carried its mandate with due regard of the law and asserted that the applicant's application is bad in law and ought to be dismissed on the following grounds:-

- a. The applicant has not approached the court with clean hands
- b. That the application is vexatious, premature and devoid of merit
- c. The applicant before coming to court ought to have exhausted the appeal procedures under the Physical Planning Act.
- d. The respondent discharged its statutory duty by issuing the said closure notices.

Determination

8. I have considered the application, the affidavits in support of and in opposition thereto, thereof and the submissions made on behalf of the respective parties herein. The gravamen of the applicants' case is that they were never afforded an opportunity of being heard before the impugned decision was made. The Respondent in the replying affidavit has however failed to address this crucial issue. I appreciate that under Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya, "*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*" I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda Case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence...The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson at Para 95.

9. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA No. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

10. 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.

11. Section 4(3) of the *Fair Administrative Action Act, 2015*, (hereinafter referred to as “the Act”), a statute enacted pursuant to Article 47 of the Constitution, provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

12. Since it is a Constitutional obligation on the part of the Respondent to afford the applicants a fair hearing before a decision adverse to them was made, it was incumbent upon the respondent in light of the denial by the applicants that he was never heard to prove that such an opportunity was in fact afforded. No attempt whatsoever was made by the respondent to satisfy this burden.

13. *Halsbury’s Laws of England*, 5th Edn. Vol. 61 page 539 at para 639 states:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge.”

14. 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.”

15. 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.”

16. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**, it was held that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board [2005] 4 IR 217*). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272*, notes that, ‘Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision’...Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information’...Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission [1994] 2 IR 439*)...In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See *Charkaoui v Canada [2007] SCC 9, Alberta Workers’ Compensation Board v Alberta Appeals Commission (2005) 258 DLR (4th), 29, 55* and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750*).”

17. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies ex parte Githungo [2001] KLR 299**, where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

18. In **Republic vs. Kenya School of Law & 2 others Ex-parte Juliet Wanjiru Njoroge & 5 Others [2014] eKLR**, this Court cited with approval the decision in **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moiwo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** where it was held that:

“Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to

consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence...Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a canon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated....”

19. Similarly, the Court cited where Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553 where the High Court expressed itself as follows:

“The Court observes firstly that the rules of natural justice *“audi alteram partem”* hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”

20. Since the Respondent has not expressly disputed the applicants' contention that the rules of natural justice were flouted in the decision making process, it is clear that the Notices to Close the applicants' premises cannot stand. Accordingly I find merit in the applicants' application.

Order

21. I the premises I issue the following orders:

- a. **An order of Certiorari removing into this Court for purposes of it being quashed, the decisions of Nairobi City County titled Notice to Stop Operation of Business, reference number 14707 dated 14th January, 2016 issued to Accra Pharmacy Limited and Notice to Close the Premises, reference number 14702 dated 14th January, 2016 issued to Joster Medical Laboratory which decisions are hereby quashed.**
- b. **An order of Prohibition restraining the Nairobi City County, it agents or any person claiming through it, from closing or in any manner whatsoever enforcing its Notice to Stop operation of Business, Reference Number 14704 dated 14/1/2016 issued to Accra Pharmacy Limited and Notice to Close the Premises, Reference Number 14702 dated 14/1/2016 issued to Joster Medical Laboratory.**
- c. **The costs of these proceedings are awarded to the applicants.**

22. It is so ordered.

Dated at Nairobi this 23rd day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okoth for the Applicant

CA Gitonga