REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 322 OF 2014

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY VICTOR ODHIAMBO DINDA.

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF: THE MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS ACT, 1999.

AND

IN THE MATTER OF: THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD.

AND

IN THE MATTER OF: THE MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY ACT (210F) LAWS OF KENYA.

AND

IN THE MATTER OF: A DECISION BY THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD TO SUSPEND THE APPLICANT'S REGISTRATION CERTIFICATE OF JUNE, 2007 ON 8.8.2014.

BETWEEN

REPUBLIC……..…… APPLICANT

VERSUS

THE KENYA MEDICAL LABORATORY TECHNICIANS &

TECHNOLOGISTS BOARD……1st RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF HEALTH…….……2ND RESPONDENT

AND

MASINDE MULIRO UNIVERSITY OF SCIENCE &

TECHNOLOGY……INTERESTED PARTY

***EX-PARTE*: VICTOR ODHIAMBO DINDA.**

JUDGEMENT

Introduction

1. In his Motion brought on Notice dated 28th August, 2014 the *ex parte* applicant herein, **Victor Odhiambo Dinda**, seeks principally the following orders:

1. **AN ORDER OF CERTIORARI to remove into this Honourable Court for purposes of the same being quashed the decision of the Respondents contained in the Respondents letter dated 8.8.2014 suspending the Ex-Applicant's KMLTTB Registration Certificate of June, 2007 and from the Register of the Kenya Medical Laboratory Technicians & Technologists in Kenya.**
2. **AN ORDER OF MANDAMUS to compel the Respondents to reinstate the Ex-Applicant's KMLTTB Registration Certificate of June, 2007 and the Applicant's name in the Registers of the Kenya Medical Laboratory Technicians & Technologists in Kenya.**
3. **AN ORDER OF PROHIBITION, prohibiting the Respondents and the Interested Party from barring the Ex-Applicant from training, researching and practicing both in private or public health or educational institutions pursuant to the Respondents decision contained in a letter dated 8.8.2014.**
4. **THAT Costs of this application be provided for.**

Ex Parte Applicant's Case

2. The said Motion is supported by a Verifying Affidavit sworn by the *ex parte* applicant herein on 3rd September, 2014 and a further affidavit sworn on 19th September, 2014.
3. According to the *ex parte* applicant, the 1st Respondent issued a decision vide a letter dated 8.8.2014, suspending his KMLTTB Registration Certificate of June, 2007 for 12 months and from the Register of the Kenya Medical Laboratory Technicians & Technologists in Kenya for no apparent reasons, and or without granting him an opportunity to be heard by the Board thereto which letter was not communicated to him, but only got it from a third party on 14th August, 2014. The said decision, he deposed was published on 15th August, 2014, by the Respondents' in ***The Standard*** Newspaper, together with the applicant's passport photo.
4. According to the applicant, he enrolled and studied for a certificate in Laboratory Technology (medical Option) then the Eldoret Polytechnic from the period, April, 1998 to December, 1998, hence qualifying him for registration into the Register of the Kenya Medical Laboratory Technicians & Technologists of Kenya. On the strength of the said certificate he applied for and sat for the proficiency examination offered by the Kenya Medical Laboratory Technicians and Technologists Board in Kenya ("the KMLTTB") in the year, 2005, upon which he was issued with a KMLTTB Certificate of Registration on 7th June, 2007, Reg. No. B00811 as a qualified Medical Laboratory Technician under the provisions of the ***Medical Laboratory Technicians & Technologists Act, 1999*** Laws of Kenya and his name entered in the Register of the Medical

Laboratory Technicians**.**

5. **A**fter completing his certificate course at the Eldoret Polytechnic he applied for a mature age University Entrance Examination of the University of Eastern African, Baraton, and thereafter was admitted to study for a degree in Bachelor of Science (BSc), commencing studies at the University in the academic year 2001/2002. In his final academic year, 2006/2007, he applied to the KMLTTB and was issued with a Student's Registration Certificate on 31st October, 2006 expiring on 31st December, 2007 by the **Respondents** herein and as Reg. No. B002/02, recognizing him as a student of the University of Eastern Africa Baraton, undertaking a course within the province of the KMLTTB.
6. According to the applicant, he studied at the University of Eastern Africa Baraton and was awarded a degree in Bachelor of Science (BSc), **(*Magna Cum Laude*)**, with a major in Medical Laboratory Science and a Minor in Chemistry, having studied between the academic years 2001/2002 to 2006/2007 and graduated on 1st July, 2007. In May, 2007 after completing his studies in March, 2007 at University of Eastern Africa, Baraton he applied and was admitted for post Graduate Studies for a degree of Master of Science (Medical Microbiology) (MSc) at Jomo Kenyatta University of Agriculture and Technology and graduated on 13th July, 2010. Subsequently, on 10th April, 2012, he applied and paid Kshs.11, 400.00 to the 1st Respondent being for arrears and renewal for and between the years 2005 to 2012 and upgrading from a Medical Laboratory Technician to a Medical Laboratory Technologist and was issued with an annual Registration Renewal Certificate expiring on 31st December, 2012.
7. The applicant averred that on 7th August, 2014 he applied and paid to the 1st Respondent Kshs 2,600.00 for a penalty for not taking out a Registration Certificate for the year, 2013 and his Annual Registration Renewal Certificate for the year, 2014 and was issued with an Interim certificate thereof from for the year, 2014 pending actual licence in due course by the 1st Respondent on the same date.
8. However, on 5th March, 2014, the Respondents wrote a letter directed to "**To Whom It May Concern"** with the subject as "**Re: Victor O. Dinda, Reg. No. B00811"** and in parts it reads:-

"…. In this regard, you are required to submit to the board original and copies of academic certificate, professional certificates and all payments done to the board before 19th March, 2014."

9. In response to the said letter on 17th March, 2014 the applicant wrote a letter enclosing all his academic credentials and the relevant documents requested from him and on 20th June, 2014 forwarded the same though email to one **Mr. Patrick Kisabei**, a quality assurance officer with the 1st Respondent after he had requested me to do so. However, despite the applicant's qualifications present and past the Respondents on 8th August, 2014, proceeded to unilaterally suspend the applicant's KMLTTB Registration Certificate of June, 2007 for a period of unreasonable Twelve (12) months and subsequently proceeded to publish the aforesaid notice on an unsubstantiated grounds hence injuring and endangering the applicant's reputation, compromising his employment with the Interested Party among other potential employers. In the applicant's view the said decision was unreasonable and was arrived at without observing the Principles of Natural Justice in that:-

a. The Respondents failed to give him sufficient or any reasonable notice of the proceedings (if any) by the 1st Respondent before suspending his KMLTTB Registration Certificate of June, 2007 and from the Register thereof.
b. The Respondents failed to give him a fair opportunity to present his case and to enable him to correct or contradict any relevant statements and/or allegations prejudicial in his view.
c. The Respondents failed to avail to him and/or show him and/or apply any evidence, whether written or oral in support of the allegation made (if any) prior to making their decision to suspend his KMLTTB Certificate of Registration of June, 2007 and from the Register thereof.
d. The Respondents made and reached a decision unilaterally leading to the Suspension of his KMLTTB Registration Certificate of June, 2007 and from the Register thereof, which decision was merely rubber stamped.

10. It was the applicant's case that the Respondents acted *Ultra-Vires* as to the law governing the Registration of Medical Laboratory Technicians and Technologists under the Act more particularly Parts III and V of the ***Medical Laboratory Technicians and Technologists Act*, 1999** in arriving at the decision to Suspend the Applicant's KMLTTB Registration Certificate of June, 2007 and in particular breach of the schedule to the Act on provisions as to conduct of business and affairs of the Board; acting without following the prescribe procedure therein; and failing to adhere to the institutional frame work and or composition and or the conduct of affairs and business of the Kenya Medical Laboratory Technicians and Technologists.
11. It was contended by the applicant that the Respondents' actions were in abuse of power and with improper motive in their decision to condemn him based on non-existent allegations and in suspending his KMLTTB Registration Certificate of June, 2007 and from the Register of the Medical Laboratory Technicians and Technologists in Kenya in that the Respondents acted without substantive fairness, irrationally and without regard to the principles applicable in its decision making process.
12. Based on legal advice, he deposed that the Respondents' decision and actions are in law unreasonable as enumerated in the case of **Associated and Provincial Picture Houses Versus Wednesbury Corporation (1148) I ud 273** in that the Respondents decision and action in light of the material known to it were outrageous and were mere unwarranted allegations and further that the said decision and actions were unreasonable in failing to provide any evidence to support their decision to suspend his KMLTTB Registration Certificate of June, 2006 and from the Register of the Medical Laboratory Technicians and Technologists in Kenya.

13. To the applicant, the Respondents acted in breach of the Principle of proportionality and in particular the Respondents in its actions failed to strike a fair balance between the adverse effects their decision and action would have upon him vis-a-vis their decision contained in its letter dated 8.8.2014 to the Interested Party, suspending his KMLTTB Registration Certificate of June, 2007, that risking termination of his employment with the Interested Party.
14. It was the applicant's contention that the Respondents in their decision and actions acted in breach of their duty to act in good faith in my interest in that the Respondents failed to produce any evidence pursuant to arriving at their decision and prior to suspending his KMLTTB Registration Certificate of June, 2007 and from the Register of the Medical Laboratory Technicians and Technologists in Kenya and acted with *mala fide*.

13. It was further averred that that the actions of the Respondents violated the legal principle of Legitimate Expectation since the applicant, like every other holder of a KMLTTB Registration Certificate and whose names are entered in the Register of the Medical Laboratory Technicians and Technologists in Kenya who have satisfied criteria for registration thereto legitimately expected, that the 1st Respondent's Board as established under the ***Medical Laboratory Technicians and Technologists Act, 1999*** (hereinafter referred to as the Act) would comply with the regulations governing the conduct of its business and to fairness and principle of law and honour its assurance to that effect and that they would continue being registered as Medical Laboratory Technician /Technologist in the Registers of the Laboratory Technician and Technologists in Kenya from when he was enrolled as such. According to him, he also had legitimate expectation in the right to an administrative action that is efficient, lawful, reasonable and procedurally fair as espoused under Constitution of Kenya, 2010 was greatly compromised by the Respondents and amounts to condemning him without a hearing thereby departing from the rules of Natural Justice.
14. The applicant asserted that the Respondents owed him a concrete reason for the suspension of his KMLTTB Registration Certificate of June, 2007 and from the Register of Medical Laboratory Technicians and Technologists in Kenya for a period of Twelve (12) months within the meaning of the ***Medical Laboratory Technicians and Technologists Act, Act*.**
15. He averred that based on legal advice, any decision made in breach of the rules of natural justice are *ultra-vires*, irregular, null or void *ab initio* and are amenable to Judicial Review Jurisdiction of this Honourable Court and ought to be removed for purposes of being quashed. To him, the Respondent's decision contained in a letter of 8th August, 2014 to suspend his KMLTTB Registration Certificate of June, 2007 as a Medical Laboratory Technician and from the Register

are a nullity and devoid of legal effect. Further, the Respondents' actions are unlawful, arbitrary, malicious, capricious, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations against my lawful, legitimate and rightful expectations and taken in breach of the rules of Natural Justice.

1st Respondents' Case

16. In opposition to the application the 1st respondents filed a replying affidavit sworn on 4th September, 2014 by **Abel Odhiambo Onyango**, the 1st Respondent's Chairman.
17. According to him, the 1st Respondent is established pursuant to Section 3 of the ***Medical Laboratory technicians and Technologists (MLTT) Act***, Chapter 253A of the Laws of Kenya with a specific brief of, *inter alia*, exercising general supervision and control over the training, business, practice and employment of laboratory technicians and technologists in Kenya.
18. According to him, it is not true as alleged that the 1st Respondent's decision to suspend the Applicant's Kenya Medical Laboratory Technicians and Technologists (KMLTTB) Registration Certificate of June 2007 for twelve (12) months with effect from 8th August, 2014 was made for no apparent reason and without him having been accorded an opportunity to be heard. Neither is the twelve (12) month period of suspension unreasonable nor was the 1st Respondent's action in question *ultra vires* the relevant statute.
19. In his view the genesis of the instant matter was the application by the Interested Party to the 1st Respondent for the official recognition of the former's Degree Course in Medical Laboratory Sciences. As part of the accreditation process, the academic qualifications of the lecturers engaged by the Interested Party to teach in the said discipline necessarily had to be scrutinized. He accordingly sent Inspectors to the Interested Party on the 15th and 16th days of August, 2013 where they, as part of due process, called for all educational certificates by the line lecturers to be availed. In the process, he averred several anomalies emerged from a perusal of the Applicant's documents in that:

    (a) He could not produce his Kenya Certificate of Secondary Education Certificate;

    (b) The certificate in Laboratory Technology secured from the then Eldoret Polytechnic reflects that the Applicant did not undergo the prescribed mandatory two (2) years training that would make him eligible for education as a medical laboratory technician regulated by KMLTTB;

    (c) The academic transcript from the said Eldoret Polytechnic also indicated that the Applicant had not covered two subjects at the very core of the discipline: (i) Haematology, and (ii) Transfusion Sciences; and

    (d) Although a necessary prerequisite, the Applicant did not upgrade his qualifications before enrolling at the University of Eastern Africa, Baraton for the Bachelor of Science Degree.

20. According to the deponent, the 1st Respondent then required the Applicant to present the original and copies of all his academic and professional certificates and all payments in respect thereto to itself for verification so that answers could be found as to the gaps and omission in his academic record. Pursuant thereto, the Applicant did respond and presented the 1st Respondent with the requested documents which however, completely failed to provide answers in respect of the anomalies outlined hereinabove.
21. It was deposed that the 1st Respondent went out of its way to contact the University of Eastern Africa, Baraton to get a direct confirmation that the Applicant had indeed upgraded his qualifications before being admitted for the Degree Course in that institution but none was forthcoming and the 1st Respondent concluded that this was *prima facie* a case of fraud. After failing to get satisfactory answers for the glaring omissions and gap in the Applicant's academic

records from both Applicant himself and the relevant educational institution(s), the 1st Respondent opted to exercise its powers under Section 24(3) of the said MLTT Act and suspended the Applicant's licence.

22. In the deponent's view, the 1st Respondent in acting as it did herein was at all times guided by the express provisions of the law governing its procedures as set out in the MLTT Act and also by the principles of natural justice. He disclosed that the 1st Respondent has further referred the matter to its Disciplinary Committee as required by Section 27 of the MLTT Act and that the Applicant was duly informed that he would be summoned before the said Committee in accordance with due process.
23. It was averred that by striking a fair balance between the risk of the Applicant's employment with the Interested Party being terminated and the real danger and grave consequences faced by the Country were "professionals" who have been "taught" by an unqualified "lecturer" to be release into the unsuspecting general population, the 1st Respondent adhered to the principle of proportionality. It was deposed that even the Interested Party had raised serious concerns about the Applicant's credentials right from the time he was being interviewed for employment and only extended to him the benefit of doubt after he undertook to furnish the relevant information in the due course of time.
24. The deponent contended that Section 24(4) of the MLTT Act is clear that where, as here, any laboratory technician or technologist is aggrieved by the decision of the 1st Respondent exercising its powers under the preceding subsection, he may appeal to the Minister responsible for matters health within thirty (30) days of the receipt of the decision, and that the Minister's decision shall be final. To the deponent, there is a clear distinction between a suspension under Section 24(3) of the MLTT Act and a suspension under Section 30(1)(b) of the same Act and that the Applicant is deliberately trying to muddle that distinction to his advantage.
25. The deponent was therefore of the view that the present application is an afterthought, misconceived, unfounded in law, frivolous, against public policy and a gross abuse of the court process.

Interested Party's Case

26. On the part of the interested party, a replying affidavit was filed sworn by **Jairus Davidson Owuonda**, its Recruitment and Appointment Manager on 3rd September, 2014.
27. According to him, the Interested Party in the year 2012 put out an advertisement in the daily newspapers seeking to recruit various staff as Senior Lecturers, lecturers and Assistant Lecturers and amongst the advertised posts was the position of Lecturer and Assistant Lecturer in the Department of Medical Laboratory Sciences.
28. It was deposed that the e*x-Parte* Applicant responded to the said advertisement and submitted his application which included his academic transcripts. *T*he *Ex-parte* Applicant also appeared before the Appointments and Promotions Committee and was interviewed and was found suitable and issued with an offer of appointment on 13th March, 2012 and on probation for six months as an Assistant Lecturer Department of Medical Laboratory Sciences. Upon appointment, the *ex-Parte* Applicant was required to regularize his status with the Kenya Medical Laboratory Technicians and Technologists.
29. It was deposed that the applicant's appointment was confirmed on 23rd November, 2012 after successful completion of the probationary period and that the *ex-Parte* Applicant has been conducting his duties of lecturing as well as other functions including being the coordinator of e-learning in the Schools of Nursing and Midwifery and Public Health, Biomedical Sciences and Technology.
30. However, sometime in 2013, when the Interested Party applied for accreditation of its Degree in Medical Laboratory Sciences Course, which accreditation is carried out by the 1st Respondent, the Interested Party received a letter dated 8th August, 2014 from the 1st Respondent stating that pursuant to section 30(1) of the ***Medical Laboratory Technicians and Technologists Act***, the ex-Parte Applicant's registration certificate no. B00811 had been suspended for twelve (12) months until his matter was determined by the Disciplinary Committee of the 1st Respondent.
31. It was deposed that due to accreditation, subjects/units leading to award of the Degree in Medical

Laboratory Services have to be taught by lecturers who meet the minimum requirements as stipulated in the ***Medical Laboratory Technicians and Technologists Act*** and enforced by the 1st Respondent.

32. The deponent therefore deposed the Interested Party will abide by any order and/or directions given by this Honourable Court in the matter.

Determinations

33. I have considered the application, the affidavits, the submissions and authorities cited herein.
34. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

35. In **Municipal Council of Mombasa vs. Republic &Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before

it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

36. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
37. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

38. The reason for saying that these are only broad grounds is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act

contrary to legitimate expectations.....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.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

39. Similarly in **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** the Court of Appeal held that so long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions, and, in view, of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.
40. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century.
41. It is therefore clear that, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary.
42. That the Respondent has powers and jurisdiction to suspend the applicant's licence has not been challenged. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. 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.

43. In the instant case, the applicant contends that the impugned decision was arrived at in breach of the rules of natural justice in that before the said decision was made the applicant was never afforded an opportunity of being heard. The applicant contends that apart from the letter requiring him to avail the original and copies of all his academic and professional certificates and all payments in respect thereof to the 1st Respondent, he was never called upon to defend the allegations made against him before the decision suspending him was made.
44. The 1st Respondent on the other hand contends that when it sent inspectors to the Interested Party anomalies emerged with respect to the applicant's certificates hence the requirement that he produces the above mentioned documents.
45. It is not clear from the affidavits whether on the date of the discovery of the said anomalies, the applicant was given an opportunity to address the alleged anomalies or whether the said anomalies were simply discovered from a perusal of the documents kept by the interested party. The applicant contends he was not aware of the said allegations until the time he was requested to furnish his documents. If that position were correct, it would follow that the applicant was

asserting a negative, that is the omission to be afforded an opportunity of being heard. 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.**

46. 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.
47. Since it is a Constitutional obligation on the part of the Respondents to afford the applicant a fair hearing before a decision adverse to the applicant was made, it was incumbent upon the respondent in light of the denial by the applicant that he was never heard to prove that such an opportunity was in fact afforded. Apart from mere averments, there is no evidence to controvert the applicant's contention that he was never heard. Mere requirement that a party avails copies of his documents cannot in the circumstances of this case amount to fair judicial process though a fair judicial process ought not to be equated to judicial hearing where what is in issue is a disciplinary proceedings.
48. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

49. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs

of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

50. Therefore whatever disciplinary method is adopted, the process must be procedurally fair and the person concerned should have had a reasonable opportunity of presenting his case. In this case there is no evidence that the applicant was given an opportunity of presenting his case before he was slapped with a 12 months suspension of his licence. That being the case, it does not matter whether the same decision would have been arrived at had he been heard. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

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

51. In the letter dated 8th August, 2014, the 1st Respondent indicated that the ex parte applicant's registration certificate had been "suspended for twelve (12) months until the matter is determined by the Disciplinary Committee of the Board". That letter was purportedly written pursuant to section 30(1) of the Act which provides as follows:

(1)

Where on the recommendations of the Committee the Board is

satisfied that a laboratory technician or technologist is in

breach of any of the terms or conditions prescribed by the

Board under section 27, the Board may—

(a) issue the laboratory technician or technologist with a letter of admonishment; or

(b suspend the registration certificate of the laboratory technician or technologist for a specified period not exceeding twelve months; or

(c) withdraw or cancel the practising certificate, or suspend the practising certificate of the laboratory technician or technologist for a period not exceeding three months; or

(d)impose a fine which the Board deems appropriate in the circumstance; or

(e) remove the name of the laboratory technician or technologist from the register.

52. From the foregoing provisions it is clear that before the Board can invoke its powers under section 30(1) it must receive a recommendation from the Committee. Nowhere is it alleged that any such recommendation was received before the impugned decision was made. If there was no recommendation then the action of the Board may well have been premature and unprocedural.
53. The wording of the letter transmitting the information of the suspension was itself ambiguous. It did not state between the 12 months period and the determination of the Board which was the maximum period. Such open ended suspension in my view is unreasonable. In **Republic vs. Cabinet Secretary Ministry of Health & Others ex parte Elizabeth Awino Onyango Misc. Civil Application No. 391 of 2013**, this Court expressed itself as follows:

"In my view, to keep an employee on interdiction for a period of nearly 4 years before making a decision either way, is not only a violation of Article 47 but is an abuse of power. Such action ought not to be countenanced by any Court of law. As was aptly held in Royal Media Services (Ltd) vs. Commissioner of Customs & Excise Nairobi H.C. Misc. Application No. 383 of 1995 [2002] 2 EA 576, any judiciary worth its salt should grasp and uphold the letter and spirit of the constitution of its country and stand as a strong wall against any action of the officials of the Government which is irrational, capricious or arbitrary and term the same as unconstitutional. Whereas there is no specific timeline within which disciplinary actions ought to be commenced and concluded such proceedings ought to be considered in light of Article 259(8) of the Constitution which provides that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. Four years delay in determining disciplinary proceedings is prima facie unreasonable. It was submitted that since the applicant's case is now scheduled for consideration by the Public Service Commission, this Court ought not to grant the orders sought as to do so would amount to usurping the powers of the 1st and 2nd Respondents. In the Respondents' view the Court can only compel the Respondents to hear and conclude the applicant's case. However, as the said order is not sought such an order is similarly incapable of being granted. In other words the Respondents would wish this Court to fold its arms and leave the applicant, who the Court has found has had her constitutional rights under Article 47 violated, without a convenient, beneficial and effective remedy. It is however well recognised that there cannot be a wrong without a remedy unless there is an express prohibition by statute or otherwise. It is therefore my view that to decline to give an effective remedy to the applicant and leave her at the mercy of the Respondents who has shown lethargy in expeditiously determining her case would be to abet injustice and this Court cannot allow itself to be used as an instrument of perpetuating injustice."

54. Having considered the issues raised herein the decision I come to is that the 1st Respondent's decision was both tainted with procedural impropriety and was irrational.

Order

55. Consequently the orders which commend themselves to me and which I hereby grant are as follows:

1. **An order of certiorari removing into Honourable Court for purposes of the same being quashed the decision of the Respondents contained in the Respondents letter dated 8th August, 2014 suspending the Ex-Applicant's KMLTTB Registration Certificate of June, 2007 and from the Register of the Kenya Medical Laboratory Technicians & Technologists in Kenya which decision is hereby quashed.**
2. **An order of Mandamus compelling the Respondents to reinstate the Ex-Applicant's KMLTTB Registration Certificate of June, 2007 and the Applicant's name in the Register of the Kenya Medical Laboratory Technicians & Technologists in Kenya.**
3. **An order of prohibition, prohibiting the Respondents from barring the Ex-Applicant from training, researching and practicing both in private or public health or educational institutions pursuant to the Respondents decision contained in a letter dated 8th August, 2014.**
4. **The costs of this application are awarded to the Applicant to be borne by the Respondents.**

Dated at Nairobi this day 20th of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzaku for the ex parte applicant

Mr Omulama for the 1st Respondent

Miss Cherono for Mr Malebe for the interested party

Cc Patricia