REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC APPLICATION NO. 152 OF 2011(JR)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE KENYA CIVIL AVIATION AUTHORITY

BETWEEN

REPUBLIC…..……APPLICANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY…....…….1ST RESPONDENT

KENYA AIRWAYS LIMITED……2ND RESPONDENT

AND

KENYA AIRLINES PILOTS ASSOCIATION,

KALPA……....…….INTERESTED PARTY

AND

PATRICK WAWERU MWANGI……EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By an amended Motion on Notice dated 12th November, 2012, the *ex parte* applicant herein, **Patrick Waweru Mwangi**, seeks the following orders:

1. **The decision made by the Director General, Kenya Civil Aviation Authority, on 26th May, 2011, vide letter dated 26th May, 2011, to the Ex Parte applicant be called into this court and be quashed and/or set aside.**

a. **An order of certiorari do issue, to remove to this Honourable Court for purpose of being quashed, and to quash the decision made by the 1st Respondent, Kenya Civil**

Aviation(KCCA), Director General as contained in the letter dated 26th May, 2011, by the Chief Medical Assessor, Kenya Civil Aviation Authority, suspending the Ex Parte Applicant's medical certificate.

b. **A declaration do issue that the Applicant's right to fair labour practices pursuant to Article 41(1) of the Constitution of Kenya as a licensed pilot has been breached by virtue of the capricious suspension of his Medical Certificate on the basis of the 1st Respondent's letter dated 26th May, 2011.**
c. **A declaration do issue that the 2nd respondent acted in bad faith in indefinitely suspending the salary of the Ex Parte Applicant on the basis of a letter dated 26th May, 2011, by the 1st Respondent suspending the Ex Parte Applicant's medical certificate, without abiding by the terms of the collective Bargaining Agreement set out in the 2010-2012 Agreement between the 2nd Respondent and the Interested Party.**
d. **A declaration do issue that the 1st Respondent's letter dated 26th May, 2011, suspending the Ex Parte Applicant's medical Certificate was extreme, capricious, borne out of bad faith, and was based on biased analyses of the Ex Parte Applicant, in breach of his right to a fair administrative action to Article 47 of the Constitution of Kenya.**
e. **Under the inherent power of the Court to do justice pursuant to Article 159(20 of the Constitution of Kenya, and upon the making of Order (a) above, as amended, and upon the absolving of the Ex Parte Applicant from any medical default, an order of mandamus do issue, compelling the 1st Respondent to issue the Ex Parte Applicant with a current Medical Certificate for purpose of licensing as such pilot.**
f. **Under the inherent power of the Court to do justice pursuant to Article 159(2) of the Constitution of Kenya, an order of Mandamus do issue compelling the 2nd Respondent to forthwith reinstate the Ex Parte Applicant's suspended salary hitherto suspended on the basis of the 1st Respondent's letter dated 26th May, 2011.**

2A. Costs of this case.

<u>Ex Parte Applicant's Case</u>

2. The said Motion was based on the following grounds:

1. **There were no proper grounds to suspend the Applicant's medical certificate.**
2. **The decision of the Director General Kenya Civil Aviation was tainted with procedural impropriety, prejudice, unfairness and was *ultra vires.***
3. **The decision was illegal, unlawful, improper and irregular.**
4. **The accusations or charges leading to the decision were not communicated to the Applicant beforehand.**
5. **The Applicant was not given a chance to be heard and therefore the decision was arbitrary and against the tenets of natural justice.**
6. **The decision was based on unfounded allegations, speculations and hearsay.**

3. The same Motion was also supported by a Verifying Affidavit sworn on 27th June, 2011 by the applicant.
4. According applicant he is a pilot and holder of an Airline Transport Pilot's License Number YK-1854-AL while the Respondent, **Kenya Civil Aviation Authority** is a statutory body established under the ***Civil Aviation Act***, Cap 394 Laws of Kenya with the objective "to plan, develop, manage, regulate and operate a safe, economical and efficient civil aviation system in Kenya". Among the Respondent's functions is the licensing and monitoring aeronautical personnel and it is a requirement of the ***Civil Aviation Act*** (hereinafter referred to as the Act) and the ***Civil Aviation (Personnel Licensing) Regulations*** (hereinafter referred to as "the regulations") that the applicant should be periodically tested and issued with a certificate of medical fitness. According to him, it is also requirement of the said regulations that the applicant's pilot license shall be valid for the period of the validity of the medical certificate.

5. The applicant deposed that on 22nd August 2010, he was was involved in an incident in which the plane which he had control as pilot in-command had a tail strike which tail strike was investigated by the Air Accident Investigation Department, Ministry of Transport and a report issued exonerating the crew and the company of any wrong doing. However, his employer, **Kenya Airways Limited** did not close the matter as recommended by the Air Accident Investigation Department (AAID) but proceeded to insist that the tail strike incident was as a result of the applicant's medical incapacity. Being a member of Kenya Airline Pilots Association (hereinafter KALPA), the applicant involved his association over the matter and after a series of meetings between his employer, and KALPA, the applicant was ungrounded on condition that he consults a competent professional to be agreed between KALPA and his employer.
6. However, without any agreement between his employer and KALPA, the Management of Kenya Airways Limited through **Dr. Jane Munyi**, Head of Medical and Occupational Health referred the applicant to a set of undefined professionals. The applicant deposed that since there was no medical history of his inability to perform and no evidence had been presented to him as to why he required medical evaluation, he wrote to his employer seeking for such evidence wherein his employer responded but has never provided any medical evidence necessitating the applicant being referred for medical evaluation.
7. Further meetings between KALPA and the management, Kenya Airways culminated in KALPA referring the applicant to the applicant's Aviation Medical Examiner (AME) **Dr. J.P. Gatabaki** who examined the applicant and presented his report to KALPA with copy to the applicant's employer employer. However, the employer was dissatisfied and presented the matter to the regulator KCAA, the Respondent herein. Considering the serious issues and allegations raised in the said letter, the applicant duly instructed his advocates who wrote to his employer seeking clarification thereof. In the meantime, the Respondent wrote to the applicant suspending the applicant's medical certificate and insisting that the applicant sees the very professional that had been unilaterally chosen by the said employer. Being aggrieved by the said decision, the applicant wrote to the Respondent through his advocates urging the Respondent to consider the matter and presented to the Respondent the various correspondence exchange between him, KALPA and Management, Kenya Airways Limited which the Respondent however ignored thus provoking these proceedings.
8. According to the applicant, the Respondent is guilty of blatant disregard of its own guidelines as contained in the Advisory Circular of the month of July 2008 relating to suspension and revocation of license, certificate, rating and authorization and in the letter dated 26th May 2011, the Respondent indicated that a renewal of the applicant's medical certificate is premised on the applicant complying with the unilateral demand by the said employer to see the clinicians chosen by the employer, which is clearly against the Respondents guidelines contained in an Advisory Circular of the month of July 2008 relating to issue, renewal or re-issue of a medical certificate for Flight Crew Members and Air Traffic Controller Licenses. The applicant reiterated that the accusations levelled against him by his employer were unsupported in any way and it was therefore illegal and unfair to rely on the same to suspend his medical certificate. Further, the Respondent did not at all call him to explain the intended action or to require him to answer to any charges before making the decision and to-date he has not been presented with any charges.
9. In the applicant's view, the Respondent failed to consider the following:-

    (i) That there was no Human Resources Report against him, from Kenya Airways Limited, relating to the alleged "anger management"

    (ii) That there were no adverse medical report against him relating to the alleged "anger management"

    (iii) That he was never under assessment or treatment by **Dr. Munyi** and she was therefore not qualified to refer him to any medical practitioner.

    (iv) That his usual doctor, **Dr Gatabaki** had not found anything to warrant his being assessed by another medical practitioner.

(v) The mode of choosing the said practitioners by his employer, or the basis thereof in view of the lack of history of any medical impairment was not established.

10. It was further contended by the applicant that the respondent's decision was not premised on any known charges other than the allegations made against him by his employer, as no charges were ever presented to him and none have been shown to him. He therefore averted that in view of the fact that the allegations levelled against him were unsubstantiated, the decision by the respondent was speculative, premised on hearsay and unfair. Further .the decision made by the respondent has far reaching consequences, as it affects the applicant's pilot license and therefore his career and source of livelihood, and indeed unfairly and prematurely ends his career.
11. To the applicant, the respondent was clearly partisan and therefore biased leading to great injustice and was guilty of blatant disregarded of its own procedures, and open bias as manifested in the respondent's condition contained in the said letter relating to the renewal of his medical certificate hence it was clear that the respondent was acting at the behest of the applicant's employer, with the intention of not only causing him damage now (relating to his current license) but also in the future (relating to the renewal of his medical certificate).
12. The applicant also swore a further affidavit on 12th November, 2012 which was filed with the amended motion though I did not see any specific order made by the Court which granted leave for the fiing of the same.
13. In the said affidavit it was deposed that he was a pilot employed by the 2nd Respondent (although his salary remained suspended), and was a member of the Interested Party. Until the occurrence of the events giving rise to the application, he was the holder of Airline Transport Pilot's License Number YK-1854-AL.
14. According to him, the 2nd Respondent had been his employer for 17 years up to the point of the unlawful termination of his employment arising from the unlawful acts of the 1st Respondent.
15. He deposed that on 20th March, 2009, through his then Advocates, **Mbuthi Gathenji & Co. Advocates**, he wrote to the CEO of the 2nd Respondent, **Mr. Titus Naikuni**, reporting to him on pilot recruitment corruption at the Kenya Airways Ltd., while at the same time requesting him to take remedial action. He confirmed that it is a requirement of the Act and the Regulations that he should be periodically tested and issued with a certificate of medical fitness for purpose of my employment with the 2nd Respondent and that his pilot's license shall be valid for the period of the validity of the medical certificate. It is equally a part of the said regulations that the said pilot license be valid for the duration of the period of the validity of the medical certificate issued to him in furtherance of the personnel licensing regulations. While reiterating what he had deposed to in his earlier affidavit he disclosed that on 14th January, 2011, one **Paul Kasimu** wrote to him inviting him for a meeting on January 19th 2011, which was arranged between himself, the Interested Party KALPA, and the 2nd Respondent's Management at which meeting he was shocked and dismayed when it was alleged by the Kenya Airways Limited Management, that he suffered from "anger Management" issues and hence poor performance calling for his "evaluation" without any substantiation on an issue so personal and critical to his welfare, wellbeing, dignity, professional and social standing. He was however given time to respond to these allegations. On January 21st 2011, **Paul Kasimu** then invited the Interested Party and himself for another meeting on January 25th 2011 for him to respond to the recommendations made by the 2nd Respondent in respect to my health and "anger management" issues. However, it was disclosed to him that other than the tail strike incident which had been closed, "other issues' had emerged including confidential hazard reports which he had never been furnished with, whereupon the Interested Party insisted that the tail strike incident ought to be separated from those "other issues". It was then agreed that a further meeting be held on **February 1st 2011,** but the Interested Party noted with concern that the meetings were arranged almost back to back with hardly any time afforded between one and the preceding meeting.
16. Contrary to the agreement between the parties he reiterated that the 2nd respondent appointed **Dr Jane Munyi** to examine him though he was never examined at all hence she had no basis to make any findings on the applicant's psychological or health status of whatever kind and there was no basis of any medical findings in that respect.

17. According to the applicant, at no time did the 1st Respondent call him to explain the intended action or to require him to answer to any charges before making the impugned decision and to-date he is yet to be presented with any charges warranting such a drastic action that so negatively implicates his life.
18. There was yet other further affidavit sworn by the applicant on 21st January, 2014 whose contents I have considered and in my view the same was directed towards the submissions filed by the Respondents and hence contained matters of law rather than factual matter. An affidavit it has been held before only deals with facts and issues of law if any ought to be presented by way of submissions.

Respondents' Case

19. On behalf of the Respondents, three replying affidavits were sworn on 16th August, 2011 by **Cyril S. Wayong'o**, the 1st Respondent's Legal Officer and on 17th December 2012 and 11th April, 2013 by **Dr Stephen N. Karau**, the Chief Medical Assessor ad Aviation Medicine Consultant of the 1st Respondent (hereinafter referred to as the Authority).
20. According to the deponent, **Cyril S. Wayong'o**, the application was fatally defective firstly, as the person who was sued was the Director General of the 1st Respondent rather than the 1st Respondent who made the decision in question, and secondly, no notice was given to the 1st Respondent as mandated under section 7E(a) of the Act.
21. It was averred that in aviation industry the question of safety is of extreme paramount importance hence the several mandatory checks before one is allowed to flu and operate aircraft and before issuance of a licence one of which is the maintenance of medical standards and certification as to fitness as provided under ***Civil Aviation (Personnel Licensing) Regulations*** hence every licence must be accompanied by a certificate showing that the pilot has been medically examined, classified accordingly and the duration of the certificate.
22. It was averred that the Authority is has powers to issue classes of medical assessment either directly or through a designated medical doctor who meets specified qualifications and the Authority is also empowered to suspend a medical certificate for purposes of investigations upon suspected violation of the said Regulations or in the public interest.
23. It was deposed that the Authority received a letter dated 11th May, 2011 from the 2nd Respondent drawing the attention of the Authority to the fact that the ex parte applicant was an unsafe pilot on medical grounds arising from confidential reports. Upon perusal of the documents presented and upon holding a meeting with the applicant, it transpired that there was conflicting positions regarding the applicant's medical condition an in light thereof it was imperative that a third neutral position be sourced in order to resolve the conflict and the applicant was permitted to resume his flying duties pending consultation of a competent professional to be agreed between KALPA and Management. It was averred that the dispute would not have reached the Authority had the ex parte applicant accepted to be referred to one of the several Aviation Medical professionals intimated to him instead of unilaterally opting to sit his family doctor and personal Aviation Medical Examiner.
24. It was averred that the applicant's case had been adequately presented both by the applicant and KALPA and that the issues raised were weighty and on consideration of the safety concerns as well as within the confines and or legal ambit of the Kenya Civil Aviation Advisory Circular of 2008, a decision was made to provisionally suspend his certificate and the applicant was advised to visit one of the Aviation Medical Examiners that he was comfortable with for purposes of undergoing a medical examination upon which the ex parte applicant's medical certificate would be reviewed.
25. It was deposed that since the issue before the Authority was an issue of safety, the mere fact that the applicant had been exonerated in respect of the Tail strike incident as well as related issues was irrelevant as far as the decision to provisionally suspend the applicant's licence was concerned.
26. It was deposed that the applicant's coming to court was premature and had he subjected himself to medical examination there is possibility that he could have been given a clean bill of health and his medical certificate reinstated.

27. It was further deposed that as the applicant's medical certificate had since expired on 30th July, 2011 no useful purpose would be served by the success the application for judicial review as the order would be in vain and taking into account the fact that medical certificates are issued based on age, the time taken in determining this matter is likely to have a bearing on the next certificate to be issued.
28. It was therefore denied that the 1st Respondent's decision was tainted with procedural impropriety, prejudice, unfairness, was ultra vires, illegal, unlawful, improper and irregular as alleged since the applicant was fully aware of the reasons culminating into the decision to suspend his licence provisionally hence the question of not being afforded an opportunity to be heard did not arise.
29. On his part, **Dr Stephen N. Karau**, while reiterating the averments of **Cyril S. Wayong'o**, averred that the amended Motion had the effect removal of the Director General of Kenya Civil Aviation Authority and introduced a new party by the name Kenya Civil Aviation Authority which is a body corporate with perpetual succession and a common seal and is capable of suing and being sued pursuant to the provisions of Section 3 of the Act, Chapter 394 of the Laws of Kenya hence it would only be fair and just if costs were awarded to the Director General of Kenya Civil Aviation Authority and the Court was urged to so find.
30. According to him, no margin of error is entertained at all in any decision making process and failure to observe, adhere and or maintain high safety standards and particularly concerning personnel, can lead to disastrous consequences. To him, the significance of the aviation medical standards and certification or generally medical fitness can be attested to by the fact that every pilot's license must be accompanied by a certificate of validity of a pilot's licence showing that he or she has been examined, classified accordingly and the duration of the medical certificate clearly indicated. He added that the aviation medical standards and certification process is very strict and the medical certificates are categorized in three different classes for different durations, depending on a pilot's age and that this is meant to ensure that only medically fit pilots are allowed to operate aircraft and hence ensure some form of guarantee as far as safety is concerned. He deposed that under the provisions of the Civil Aviation (Personnel Licensing) Regulations, the Authority has powers to issue classes of medical assessment that are intended to indicate the minimum medical standards either directly or through a designated medical doctor who meets the qualifications specified for an aviation medical examiner who issues or renews medical licences or certificates after conducting medical examinations and that the 1st Respondent has powers pursuant to the provisions of the Act, provisions of the Regulations as well as Advisory Circulars released from time to time, to suspend a medical certificate in order to allow for investigations upon suspected violation of regulations or public interest safety concerns.
31. According to him, under clause 3.1 of the Advisory Circular number CAA-AC-PEL017A dated July 2008 with respect to the Issue, Renewal or Re-issue of a Medical Certificate for Flight Crew Members and Air Traffic Controller licences, heavy responsibility is placed on a designated medical examiner of medically certifying the flight crew as well as air traffic controllers. It is clearly stated in the said circular that the consequences of negligent or wrongful certification, which would permit an unqualified person to take the controls of an aircraft or control air traffic, can be serious for the safety of air transport, the public and the examiner. Under clause 3.1.4 of Advisory Circular Advisory Circular CAA-AC-PEL019A dated July 2008 on the Suspension and Revocation of Licence, Certificate, Rating and Authorization, safety in air transport is a top priority.
32. It was asserted that it was against the above highlighted background that the Kenya Civil Aviation Authority suspended the Ex- Parte Applicant's medical certificate after receiving a letter dated 11th May 2011 from Kenya Airways the 2nd Respondent herein to the effect that the Ex - Parte Applicant herein was an unsafe pilot due to medical grounds arising out of confidential reports from the said airline's flight safety officer among other reasons extensively highlighted in the letter which letter was accompanied by several attachments which gave the background that culminated in the matter being referred to the Kenya Civil Aviation Authority for appropriate further action and or intervention as the regulator in the aviation industry as far as the Kenyan skies are concerned. In addition to carefully reviewing and or perusing the documents referred to hereinabove, the deponent held a prior informal meeting with the Ex - Parte Applicant herein on 31st March, 2011 in his office located on the first floor of the KAA complex, Jomo Kenyatta

International Airport and discussed the issues as well as circumstances surrounding this matter which meeting according to him, gave him some good background knowledge concerning the matter.

33. It was deposed that arising out of the said discussion discussion with the *ex- parte* Applicant as well as a comprehensive review of the documents from Kenya Airways referred to herein above, it transpired that there were conflicting positions regarding the Ex - Parte Applicant's medical condition since on the one hand, Kenya Airways, through its head of Medical & Occupational Health, **Dr. Jane Munyi** felt that there were health issues that needed to be assessed and an appropriate recommendation made about the Ex - Parte Applicant while on the other hand, the Ex - Parte Applicant's family doctor as well as personal Aviation Medical Examiner was of the opinion that there was nothing wrong with the Ex - Parte Applicant's medical condition that warranted any further examination. In the circumstances disclosed herein above, it was therefore of utmost importance, in light of the fact that there were conflicting positions that a third neutral position be sourced for purposes of resolving the apparent conflict regarding the Ex – Parte Applicant's medical condition.
34. The deponent averred that from the *ex parte* Applicant's own Exhibits an agreement had actually been reached to the effect that the Ex-Parte Applicant would resume his flying duties after he successfully consults a competent professional to be agreed upon between KALPA and Management. In addition, he was of the view that from the correspondence and documents attached to the pleadings and affidavits herein, the dispute herein would not have reached the Kenya Civil Aviation Authority as the aviation industry regulator had the *ex parte* Applicant accepted to be referred to one of the several professionals intimated to him and instead opted to unilaterally visit **Dr. J. P. Gatabaki**, his family doctor and personal Aviation Medical Examiner.
35. It was therefore his view that from the correspondence and documents presented to him by Kenya Airways as well as from his discussion with the *Ex Parte* Applicant on 31st March, 2011, the *Ex Parte* Applicant's case in the matter had been adequately presented both by himself in writing as well as through the Kenya Airline Pilots Association (KALPA). To him, the issues raised were quite weighty and on consideration of safety concerns as well as acting within the confines and or legal ambit of the relevant laws and regulations including the Act, as well as Kenya Civil Aviation Authority Advisory Circular of 2008, a decision was made to suspend the *Ex Parte* Applicant's medical certificate.
36. It was further deposed that the *ex parte* Applicant was humbly requested to visit one of the specialists and or consultants that he was comfortable with for purposes of undergoing a medical examination whose report alongside his personal Aviation Medical Examiners report dated 3rd May 2011 would form the basis upon which the *ex parte* Applicant's medical certificate would be reviewed.
37. According to the deponent, his main concern and or overriding principle was safety, which he made as the number one priority. Consequently, the decision to suspend the *ex parte* Applicant's medical certificate was aimed at firstly, safeguarding the interests of the public at large, the aviation industry in particular, the *ex parte* Applicant's interests as well as his employer, Kenya Airways which happens to be the dominant player. Secondly, the suspension would serve the purpose of providing an enabling environment for conducting further investigations into the matter through the gathering of case history from the concerned doctors and other specialists for purposes of later holding an Aviation Medical Appeals Board. However, before this could be realized, the *ex parte* Applicant instituted these proceedings.
38. In the deponent's view, what was before the 1st Respondent for redress was an issue to do with safety concerns and the fact that the *ex parte* Applicant was exonerated by the Ministry of Transport with respect to the Tail strike incident involving Kenya Airways Aircraft Boeing 737 Reg. 5Y-KYC Flight Number KQ 714 as well as related issues was irrelevant as far as the decision to suspend his licence is concerned. In any event, the purpose of such enquiries by the Ministry of Transport is to establish what transpires and or causes accidents and not to apportion blame as per the Accident Investigation Regulations and issues arising out of such a case would best be handled between the *ex parte* Applicant and his employer, Kenya Airways.
39. It was deposed that from a purely professional as well as an objective point of view, the letter from Kenya Airways to the 1st Respondent dated 11th May, 2011 as well as the enclosures and other documents then availed and referred to herein above, raises serious issues of safety concern

which if not looked at and addressed by the 1st Respondent, it would amount to a serious failure of duty and or the common law tort of public misfeasance for which the 1st Respondent can be held responsible, if not culpable hence there is just no way, the *ex parte* Applicant expected the 1st Respondent to ignore and or look the other way when the following matters concerning him had been placed before it for appropriate action as the aviation industry regulator:

1. Serious human factors deficiencies – August 2010.
2. Monitoring the cockpit from the cabin with the cockpit door wide open in contravention of the Civil Aviation Regulations as well as Kenya Airways closed door cockpit door policy – March 2008.
3. Alleged sexual assault in - flight on one of the cabin crew members – May 2008.
4. Taking over controls from a First Officer who was the flying pilot, conducting a visual approach and performing a short field landing in Bujumbura in total disregard and or contravention of Kenya Airways' standard operating procedures – September 2009.
5. Performing an auto landing into Kigali to the surprise of the First Officer – September 2009.
6. Several First Officers requesting not to be paired with the Ex – Parte Applicant due to personal issues and alleged death threats
7. Poor Crew Resource Management (CRM).
8. Declaration of the *ex parte* Applicant as an unsafe pilot and that remedial actions to mitigate the shortcomings had not been effective.

40. The deponent reiterated that the question of flight safety cannot be compromised under any circumstances whatsoever and the *ex parte* Applicant cannot just declare himself medically fit and be allowed to operate any aircraft without following the due process as is laid down by the various legal provisions enumerated herein above. He disclosed that there is a lot of pressure being put on the 1st Respondent to clear this matter and in fact the case has since found its way to the National Assembly of the Republic of Kenya through a question by private notice raised by **Honourable Clement Wambugu**, the Member of Parliament for Mathioya Constituency, whom he was made to understand incidentally is a trained pilot and used to be in the employment of Kenya Airways. Further, the Executive arm of the Government of Kenya has also been appealing and or requesting the 1st Respondent to finalize the matter and that he had personally been approached and requested by the Minister for Transport, **Honourable Amos Kimunya** to give an explanation.
41. He further disclosed that the *ex parte* Applicant had also filed a suit against his employer Kenya Airways at the Industrial Court of Kenya, **i.e. Nairobi - Industrial Cause No. 1281 of 2011 – Captain Patrick Waweru Mwangi vs. Kenya Airway**s and that instead of focusing on the substantive issues at hand, the *ex parte* Applicant had further lodged a formal complaint against the deponent with the Medical Practitioners and Dentists Board (MPDB) through Preliminary Inquiry Case Number 15 of 2012 in which it was decided that:

1. The actions by Dr. Stephen N. Karau which were subject before the preliminary Inquiry Committee were undertaken in line with medical practice and the general good of the public.
2. Upon careful examination of the documents presented before the Board, there was no evidence to support allegations that the practitioners were influenced by people who are not doctors in undertaking their professional duties.

42. According to the deponent, this suit is not only premature and uncalled for since by rushing to court, in addition to taking the issues in contention herein before various bodies including Parliament, the Executive, Judicial Review Court, Industrial Court as well as the Medical Practitioners and Dentists Board (MPDB), the Ex - Parte Applicant has literally stopped the process of making a decision on him. To him, if the *ex parte* Applicant had allowed the process to continue by agreeing to be subjected to an independent medical examination, there is a possibility that he could have been given a clean bill of health culminating in the lifting of the suspension with respect to his medical certificate.
43. He further deposed that the *ex parte* Applicant's medical certificate has since expired on **30th July 2011** and no useful purpose would be served if the application for judicial review is successful

since court orders are not issued in vain. The *ex parte* Applicant will be required to apply for the medical certificate afresh and he must follow the laid down procedure. As indicated herein above, medical certificates for purposes of validating a pilot's licence are issued on the basis of among other things, the age of the Applicant and consequently, the time it has taken as this case is being prosecuted will have a bearing on the next certificate to be issued to the *ex parte* Applicant. He averred that from 31st July 2011 onwards, after expiry of the *ex parte* Applicant's medical certificate, he will be required to apply for a fresh medical certificate and must follow the laid down procedure strictly which entails thorough medical examination and in light of the safety concerns raised by his employer, Kenya Airways, he must be examined by another accredited as well as neutral Aviation Medical Examiner other than the *ex parte* Applicant's personal doctor.

44. In his view, the allegations that the decision of the 1st Respondent was tainted with procedural impropriety, prejudice, unfairness, was *ultra vires*, illegal, unlawful, improper and irregular have got no basis, factual or legal and must be disregarded. To him, the *ex parte* Applicant knew of the reasons culminating in the decision to suspend his licence and hence the question of not being given an opportunity to be heard cannot arise. This is because all the information and correspondence pertaining to the matter were forwarded to the 1st Respondent by Kenya Airways. According to him, the *ex parte* Applicant had no legitimate expectation to be heard before an emergency decision was made because as explained herein above, the letter by the *ex parte* Applicant's Chief Executive Officer in employment dated 11/05/2011 raised very weighty issues about his conduct, character and performance and given that kind of background as well as the fact that no margin of error is entertained in the aviation industry, the Ex Parte Applicant must have known that unless the question of his medical fitness was substantively and or conclusively addressed, chances of him having his medical certificate renewed were very minimal.

45. Based on legal advice, he deposed that a person exercising discretion must direct himself or herself properly on the law and in this case, the law and proper procedure was properly followed and applied and concluded that in the circumstances disclosed hereinabove, the judicial review proceedings commenced herein by the *ex parte* Applicant amount to a blatant abuse of the process of this Honourable court and the same should be dismissed with costs.

Interested Party's Case

46. The interested party, **Kenya Airline Pilots Association (KALPA)**, filed a replying affidavit sworn by **Ronald Karauri**, its Secretary General on10th December, 2012.

47. According to the deponent, KALPA is the apex professional body for pilots in Kenya, a member of the International Federation of Airline Pilots Association, registered on 6th December 1972 with a membership of over 400 pilots presently and expertise of 40 years in relation to pilots welfare issues and aviation matters generally. He confirmed that aviation matters are regulated by the International Civil Aviation Organisation from whence the 1st Respondent is a member and regulation(s) pertaining to licensing of pilots are thus derived.

48. According to him, the Interested Party undertook all available measures to dialogue, the *ex parte* Applicant and the 2nd Respondent urging respect for procedure relating to Licensing and Medical Certification which is regulated by Kenya Civil Aviation (Personnel Licensing regulations) 2007. In his view, the aviation personnel licensing regime has no reference whatsoever to the 2nd Respondent as an Aviation Operator Certificate (AOC) holder and individual pilots are then expected to comply with the regulations subject which then the 2nd Respondent would validate their employ. He deposed that the regulations mentioned above under regulation 48(g) makes the requirement of medical certification a crucial requirement for licensing absence of which a pilot cannot be licensed. According to him, the aviation medical standard and certification are contained in regulations above which both the 1st and 2nd Respondent ignored and or failed to observe in this instant case and that the parameters and regulation relating to suspension and revocation of licences are contained in regulation 179 and 180 of regulations above.

49. It was deposed that the 1st Respondent has designated and certified a number of medical practitioners as Aviation Medical Examiners (AME) in line with Regulation 132(2) of the said regulations and that pursuant to the laid down medical standards and certification regulations the interested party at all times contended that such designated medical practitioners were by law

mandated to examine the *ex parte e* Applicant and make appropriate recommendations including referrals to specialists. However, the 1st Respondent and 2nd Respondents sought and operated on medical opinions of persons not certified, designated and/or authorised as AME's and that the 2nd Respondent cast aspersions and suspicion on the professional competence of the 1st Respondent authorised and designated AME's an issue apparently ignored by the 1st Respondent. It was as a consequence of this insistence by the 2nd Respondent and communication to the 1st Respondent on the 11th May 2011 that led to the suspension of the *ex parte* Applicant's Medical certificate by the 1st Respondent.

50. It was therefore averred that the suspension of the *ex parte* Applicant's Medical Certificate by the 1st Respondent was not on recommendation of any AME but rather historical claims made by the 2nd Respondent without reference to the Interested Party and /or the Ex-parte applicant and that the aforesaid suspension of medical certificate by the 1st Respondent contravened the Kenya Civil Aviation (Personnel Licensing regulations) 2007 and its Advisory Circular dated July 2008 referenced CAA-AC-PEL019A relating to suspension and revocation of licence, certificate, rating and authorization. He averred that an indefinite suspension of a medical certificate without provisional suspension to set up due process guarantees and inquiry not only violates the rules of natural justice but all the tenets and practice in aviation regulation.
51. It was deposed that despite in numerous medical examinations by various AME's and other specialist the Interested Party finally referred the *ex parte* Applicant for an exhaustive medical examination by a medical board of experts at the Aga Khan University hospital on the 7th November 2012 whose report maintains the *ex parte* Applicant fitness and vindicates his position and that of the Interested Party.
52. To the deponent, the *ex parte* Applicant can perform other functions and duties other than flying whilst in the employ of the 2nd Respondent if his medical certification is in dispute and the unilateral action the 2nd respondent allegedly pursuant to the 1st respondent action to suspend the medical licence is not only illegal but manifests malice on the part of the second Respondent.
53. It was therefore contended that following the actions by the 2nd Respondent in paragraph 19 above, the *ex parte* Applicant has remained in a state of limbo, having his salary suspended, being looked upon with suspicion and disdain following the unwarranted claim, being subjected to pecuniary and social embarrassment hence it is in the interest of justice that the honourable court critically examines the actions by the 1st and 2nd Respondent as to whether rules of natural justice were applied? Whether the decision affords the *ex parte* Applicant Legitimate expectation? Whether such a decision by the first respondent was in excess of its powers within the law.

Determinations

54. I have considered the Motion on Notice, the affidavits filed by the various parties, the submissions and authorities cited therein.
55. The first issue for determination is whether this Court has jurisdiction to hear and determine the matters before this Court. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is

given.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

56. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

57. Therefore, I wish to deal with the issue of jurisdiction since its determination may well dispose of this application.
58. Article 165 (5)(b) of the Constitution provides that the High Court has no jurisdiction to deal with matters falling within the jurisdiction of the courts contemplated in Article 162(2). Article 162(2) (a) on the other hand empowers Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and to determine their jurisdiction and functions.
59. Section 12 of the ***Industrial Courts Act***, 2011 provides:

> ***12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—***
>
> ***(a) disputes relating to or arising out of employment between an employer and an employee;***
>
> ***(b) disputes between an employer and a trade union;***
>
> ***(c) disputes between an employers' organisation and a trade unions organisation;***
>
> ***(d) disputes between trade unions;***
>
> ***(e) disputes between employer organizations;***
>
> ***(f) disputes between an employers' organisation and a trade union;***
>
> ***(g) disputes between a trade union and a member thereof;***
>
> ***(h) disputes between an employer's organisation or a federation and a member thereof;***
>
> ***(i) disputes concerning the registration and election of trade union officials; and***

(j)disputes relating to the registration and enforcement of collective agreements.

60. In my view since the Industrial Court is a Court with the status of the High Court, it has powers to issue orders in the nature of judicial review.
61. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,** where it was held that

"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."

62. It is therefore my view that for the High Court to be stripped of jurisdiction, the dispute must fall exclusively within the jurisdiction of the Courts established under Article 162(2) of the Constitution. Where for example the issues in dispute fall within the jurisdiction of the High Court and Courts of the same status, it would be unjust to compel a party to sever its case and file the same in different Courts.
63. In the instant case, whereas the relationship between the applicant and the 2nd Respondent may be that of employer employee, the issue between the applicant and that of the 1st Respondent is an alleged wrongful exercise of statutory power since such relationship does not exist between the said parties. Accordingly, I do not agree that this Court has no jurisdiction to entertain the instant matter.
64. The other issue which was raised was with respect to whether judicial review orders may apply to the 2nd Respondent, a limited liability company. In In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, **Nyamu, J** (as he then was) held:

"What does an order of prohibition do and when will it issue? It 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 herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange 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 ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land Registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual."

65. The said case restates the general rule that judicial review orders are only available against public bodies as opposed to private ones. However, it is now recognised that such orders may also issue against private bodies clothed with the exercise of statutory powers whose actions may affect the public generally.

66. It must be emphasised that the only prayers which fall for determination in this judgement are prayers 1(a) and 2A in the amended Motion since all the other prayers were correctly in my view abandoned in these judicial review proceedings.
67. The first issue for determination is whether the application is fatally defective or incompetent for the failure to comply with section 7E(a) of the ***Civil Aviation Act***, Cap 394 Laws of Kenya which require that any action or legal proceedings can only be instituted on giving of one month's notice. Section 3 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya, defines "action" as meaning "any civil proceedings in a court and includes any suit as defined in section 2 of the ***Civil Procedure Act***"
68. In my view the use of the words "legal proceedings" after the word "action" does not elevate the section to include judicial review applications. Under the *ejusdem generis* rule, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. To invoke the application of the rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply, but the mention of a single species does not constitute a genus. See **R vs. Edmundson [1859] 28 LJMC 213 at 215; *Cries on Statute Law*, 6th Edn at 181.**
69. It follows that the words "legal proceedings" must be confined to the words similar to "action" in which case, "legal proceedings" under the said section must of necessity be in reference to civil proceedings. Since judicial review are neither criminal nor civil in nature, it follows that section 7E(a) of the Act is inapplicable hence the failure to issue the notice before commencement of these proceedings was not fatal to the application.
70. It was contended by the applicant that he was never afforded a hearing before the decision to suspend him was made.
71. It must however be appreciated that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. However, where witnesses are to be called, the applicant ought to be afforded an opportunity to cross examine the said witnesses. Here it is clear that there was no question of any witness being heard before the decision to suspend the applicant's licence was made. I agree with ***Michael Fordham*** in ***Judicial Review Handbook***; 4th Edn. at page 1007 that:

    "procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

72. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

    "In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."

73. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

    "On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for

example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

74. 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."

75. 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."

76. In this case it is clear that correspondences were exchanged between the parties and meeting were held at which the issue of the applicant's "anger management" was discussed. The 1st respondent considered the matter and was of the view that in light of conflicting views in respect of the *ex parte* applicant's medical suitability it was necessary that a third neutral opinion be considered. The applicant's view was that since the report prepared by the 2nd Respondent's examiner showed that he was medically fit there was no justification for his suspension. It must however be appreciated that all the parties agreed that it was the 1st respondent who was empowered "to plan, develop, manage, regulate and operate a safe, economical and efficient civil aviation system in Kenya". It is therefore my view that the 1st Respondent was not bound by any report that was arrived at as a result of the 2nd Respondent's own investigations as the 1st Respondent's legal obligations could not be delegated to the 2nd Respondent. I in the circumstances do not agree that the 1st Respondent was precluded from taking the action it took simply because the 2nd Respondent's examiner had arrived at a different decision. As long as an opportunity was given to the applicant to explain himself, the 1st respondent had the powers to either believe or disbelieve the applicant's explanations and if there was no sufficient evidence upon which it could arrive at a decision either way, that would be a matter for ordinary civil litigation rather than judicial review.
77. It must always be made clear that that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
78. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"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."

79. 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.***
80. It follows that the issues whether the 1st Respondent's medical examiners were qualified as such are matters which cannot be determined by way of affidavit evidence as is the procedure in these kinds of proceedings.
81. It was further contended and not denied that the subject applicant's licence had expired hence the applicant would be required to apply for a new licence taking into account his age. In ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270** it is stated:

"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 all 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."

82. Judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
83. It follows that it would be futile to grant the orders sought herein as the said orders would not be efficacious in light of the time lapse. To grant the order of certiorari as sought herein without a corresponding order of mandamus would not have the effect of renewing the licence which has already lapsed. To grant an order whose effect would be to automatically breathe life into the

lapsed licence would amount to directing the 1st Respondent on how to exercise discretion.

15. However as was held in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR**:

> **"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*."** [Emphasis mine]

84. In this case, the applicant has not sought an order compelling the Respondent to renew his licence. Therefore to compel the 1st Respondent to lift the applicant's suspension without the medical certificate being renewed would amount to compelling the Respondent to commit an act of illegality and the Court cannot by an order of mandamus compel the taking of an illegal act since mandamus only compels the taking of an action which the Respondent is legally bound to perform. In any case even if an order of mandamus was sought the Court could only grant an order compelling the Respondent to consider the applicant's application for renewal or issuance of medical certificate taking into consideration all the relevant factors. That however, is not the application before me.
85. It follows that even if the application was merited the orders sought herein would not in the exercise of the Court's discretion have been granted.

Order

86. In the result the amended Notice of Motion dated 12th November, 2012 fails and is dismissed but as the application has failed partly due to the time lapse between the commencement of these proceedings and the determination, there will be no order as to costs.
87. The 1st Respondent ought in the interest of justice and fairness proceed to determine the issues raised herein in order to bring to a finality the disputed issues which gave rise to these proceedings.

Dated at Nairobi this day 14th of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyangayo forMr Njanja for the ex parte applicant

Miss Wasonga for Mr Mohochi for the interested party

Mrs Ogalo-Omondi for the 2nd Respondent and holds brief for Mr Simiyu for 1st Respondent

Cc Patricia