



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 436 OF 2014

REPUBLIC.....APPLICANT

VERSUS

PHARMACY AND POISONS BOARD.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH...2ND RESPONDENT

AND

MT KENYA UNIVERSITY.....INTERESTED PARTY

EX-PARTE JULIET LIHEMO AGUFA

JUDGEMENT

1. In 2008 the Interested Party, Mt. Kenya University (“the University”) called for applications for admission to pharmacy courses which included a degree course leading to the award of a Bachelor of Pharmacy. The minimum requirement indicated in the advertisement for admission for a Bachelor of Pharmacy course was a mean grade of C+ in the Kenya Certificate of Secondary Education (KCSE). The ex-parte Applicant, Juliet Lihemo Agufa applied and was admitted for the Bachelor of Pharmacy course. She joined the University in early 2009 for the five year course.

2. Sometimes in 2013 the 1st Respondent, the Pharmacy and Poisons Board (“the Board”) communicated to the University its guidelines for admission into pharmacy courses. On 5th August, 2013, the University wrote to the Board stating that it had come to its notice that some of the continuing Bachelor of Pharmacy students did not meet the requirements stipulated by the Board as their admission was based on the criteria approved by the University Senate. The University promised to henceforth comply with the criteria set by the Board and went ahead to seek exemption of the continuing students from the application of the Board’s minimum requirements.

3. The University concluded its letter to the Registrar of the Board by stating that:

“Sir, kindly consider the above appeal for exemption using the set precedence of allowing graduates from foreign universities who do not meet the Board’s minimum requirements so as to enable them undertake the Board’s examination and registration.”

4. The Board replied to the University’s appeal through a letter dated 2nd October, 2013 and stated

that:

“RE EXEMPTION OF MINIMUM REQUIREMENTS IN EXAMINATIONS AND REGISTRATION

We are in receipt of your letter ref. MKU/PPB/11-13/011 dated 5th August 2013 on the above subject.

I wish to inform you that the Board has considered your request and granted exemption, to students admitted to your institution before the current admission criteria was communicated to the Ministry of Education. This only applies to students admitted on or before May 2011 and listed below;

.....

You are hereby advised to strictly adhere to admission criteria issued to you by the Board. The Board shall not consider registration of any other student admitted after May 2011, who does not meet the criteria.”

5. The letter is signed by the Registrar of the Board, Dr. Kipkerich C. Koskei. A total of thirty nine students were exempted through the said letter. The ex-parte Applicant’s name appears as number nine on the list.
6. With the exemption from the Board the exparte Applicant proceeded to conclude her course and was awarded a Bachelor of Pharmacy degree by the University on 6th December, 2013.
7. Upon graduation the ex-parte Applicant applied to the Board for evaluation and assessment so as to be registered as qualified pharmacist. She was given Index Number PPB/1/805/2014 and she sat the Board’s professional examinations on 24th March, 2014.
8. After sitting the examinations, the Board withheld her results and communicated to her through a letter dated 19th May, 2014 as follows:

“EVALUATION AND ASSESSMENT FOR REGISTRATION AS A PHARMACIST

Your application for evaluation and assessment for registration as pharmacist refers.

I regret to inform you that the Board, after scrutiny of your documents, has established that you did not meet the minimum entry requirements and criteria for registration as per the guidelines set by the Pharmacy and Poisons Board.”

The letter was signed by the Registrar of the Board, Dr. Kipkerich C. Koskei.

9. On 18th November, 2014 the exparte Applicant moved this Court and obtained leave to commence judicial review proceedings with a view to overturning the decision of the Board.
10. According to the papers filed in Court, by the ex-parte Applicant, the Respondent’s decision to withhold her results and thus deny her registration as a pharmacist is bad in law for failure to comply with the principles of natural justice. The Applicant’s position is that the Board failed to give her notice of its intended action given the existing commitment to exempt her from the subject criteria. Further, that she was not given an opportunity to correct or contradict any allegations prejudicial to her. It is the ex-parte Applicant’s case that by going back on its exemption, the Board violated her legitimate expectation.
11. Through the notice of motion application dated 19th November, 2014 the ex-parte Applicant

therefore prays for orders as follows:

“1. An order of Certiorari to remove into this Court for purposes of being quashed the 1st Respondent’s decision contained in the letter dated 19th May, 2014 to the effect that the ex parte Applicant did not meet the minimum entry requirements and criteria for registration as a Pharmacist as per the guidelines set by itself (1st Respondent).

2. An order of Mandamus to compel the 1st Respondent to issue the requisite authorization that will enable the ex parte Applicant to proceed to internship and on satisfactory completion thereof, registration as a Pharmacist.

3. An order of Prohibition to prohibit the 1st Respondent from barring the ex-parte Applicant from proceeding to internship and on satisfactory completion thereof, her registration as a Pharmacist.

4. Costs of these proceedings be provided for.”

12. The University supported the application through the replying affidavit of its Academic Registrar Dr. Ronald Maathai filed on 27th January, 2015.

13. The 2nd Respondent, the Principal Secretary in the Ministry of Health did not participate in the proceedings.

14. The 1st Respondent/Board opposed the application through the replying affidavit of the Chief Pharmacist and Registrar Dr. Kipkerich C. Koskei. Through the said affidavit the Board’s case is that although the ex-parte Applicant was indeed among those exempted by its letter, upon further scrutiny of her KCSE certificate it was found that she had scored C+ in English, D in Mathematics, C in Biology, D in Chemistry and B- in Kiswahili.

15. It is the Board’s case that according to the guidelines for Evaluation and Assessment for Enrolment as a Pharmacist (2007), for one to qualify as a pharmacist, he/she must have attained an average cluster weight of B- in the cluster subjects provided that no subject in the cluster shall have a grade below C+. It is the Board’s averment that the ex-parte Applicant failed to attain the minimum requirements and had attained grades below the said minimum requirement in subjects that are crucial for entry into Bachelor of Pharmacy course and therefore cannot be eligible to practice the trade.

16. It is the Board’s assertion, that its letter of February, 2013 provided strict guidelines to be met by all candidates to enable them qualify and sit for the evaluation test. Dr. Kipkerich Koskei also pointed out the fact that the guidelines exhibited in the affidavit of the ex-parte Applicant were in respect of the diploma holders (pharmaceutical technologists) and not degree holders (pharmacists). He exhibited the guidelines pertaining to degree holders through his affidavit.

17. As for the exemption issued in response to the University’s appeal, Dr. Kipkerich Koskei avers at paragraph 13 of the replying affidavit as follows:

“THAT the 1ST Respondent admits part of the contents of Paragraph 13 of the Supporting Affidavit only in as far as the 1st Respondent herein indeed wrote a letter to the Applicant dated 19th May 2014 declaring that she had not met the minimum standards in the discipline. The Applicant’s exemption, it is to be noted however, that the exemption was not a blanket cover to the minimum requirements to be met in reference to the cluster.”

18. At paragraph 15 of his replying affidavit Dr. Kipkerich Koskei averred:

“THAT in reply to paragraph 15 of the Supporting Affidavit, the 1st Respondent issued clear regulations of the minimum qualifications for the discipline vide a letter and qualifications dated February 2013 which the applicant was well informed of.”

19. It is not disputed that the ex-parte Applicant holds a Bachelor of Pharmacy degree from Mt. Kenya University. The parties are also agreed that the ex-parte Applicant did not meet the qualifications for enrolment for such a degree as per the Second Edition of the Pharmacy and Poisons Board’s “Competence Requirements for Stage I and Stage II Pharmacy & Poisons Board Examinations & Application Form for Assessment as a Pharmacist” guidelines issued in February, 2013.

20. In the circumstances of this case, the question is whether the guidelines of February 2013 were applicable to the ex-parte Applicant considering the Board’s letter dated 2nd October, 2013.

21. Before proceeding to consider the import of the letter, I will first look at the law on legitimate expectation as this is what this matter is all about. In **Nairobi H.C. Judicial Review No. 294 of 2010, Republic v Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust**, I summarised the ingredients of legitimate expectation as follows:

“After reviewing various decisions and books, I have come to the conclusion that for one to successfully rely on the principle of legitimate expectation it must be demonstrated that:-

- a. **The representation underlying the expectation is clear, unambiguous and devoid of relevant qualification;**
- b. **The expectation is reasonable;**
- c. **The representation was made by the decision-maker; and**
- d. **The decision-maker had the competence and legal backing for making such representation.”**

22. In the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 2 All ER 935** Lord Diplock stated that legitimate expectation may arise from an express promise **“given on behalf of a public authority”** that **“some benefit or advantage which”** the applicant **“had in the past been permitted by the decision-maker to enjoy”** will continue to be enjoyed **“until there has been communicated to him some rational grounds for withdrawing it on which he had been given an opportunity to comment.”**

23. Turning to the facts of this matter, I find that the letter of the Board dated 2nd October, 2013 gave an express promise to the University and by extension the ex-parte Applicant that the students admitted on or before May 2011 would be granted exemption. According to the said letter the rationale for the decision was that the students were admitted by the University **“before the current admission criteria was communicated to the Ministry of Education.”**

24. The promise is unequivocal and unqualified. The letter does not place any conditions on the exemption. An attempt by the Board to place conditions on the exemption is an afterthought and such acts cannot be entertained by a court of justice.

25. As was stated by Lord Diplock in the **Council of Civil Service Unions case**, (supra) the Board could not withdraw the right which had been granted to the ex-parte Applicant without giving her a chance to make her observations. The letter dated 19th May, 2014 therefore breached one of the ingredients of the doctrine of legitimate expectation namely that a promise made by a public authority cannot be withdrawn without giving the person to be affected a chance to comment on the decision.

26. In the case before me, all the requirements for the grant of judicial review on the grounds of legitimate expectation have been met by the Applicant. The Applicant has demonstrated that an

unequivocal and unqualified promise was made through the letter dated 2nd October, 2013 by a public authority namely the Board exempting her from meeting the qualifications in the guidelines before undergoing evaluation and assessment for registration as a pharmacist.

27. The Board has not demonstrated that the promise made in the letter dated 2nd October, 2013 was not made by an authorised person. In fact the letter of the Registrar of the Board states that the Board has **“considered your request and granted exemption.”** This is enough evidence that the Board deliberated on the matter and came to the decision that an exemption was deserved.

28. There is no allegation by the Board that the decision to exempt the ex-parte Applicant went against the law. The promise given to the ex-parte Applicant was therefore lawful and legitimate.

29. The ex-parte Applicant has satisfied the Court that she relied on the word of the Board and if her application is not upheld she will suffer great loss. She went ahead to complete her studies and graduated based on the promise contained in the letter of the Board.

30. The Court is alive to the fact that the ex-parte Applicant will be dealing with human lives. Any shortcomings on the part of the ex-parte Applicant will always be exposed during evaluation and assessment by the Board. The ex-parte Applicant is however entitled to benefit from the representation made to her by the Board. The Board cannot be allowed to renege on its word for to do so will render it unaccountable for its decision. The principle of legitimate expectation is a tool for holding public bodies accountable for their actions.

31. In conclusion, I find that the application succeeds. I grant orders as follows:

- a. An order of certiorari is issued removing the 1st Respondent’s letter dated 19th May, 2014 into this Court and having the same quashed;
- b. The 1st Respondent is compelled by an order of mandamus to issue the requisite authorisation to enable the ex-parte Applicant proceed for her internship and upon satisfactory completion thereof be registered as a pharmacist; and
- c. The 1st Respondent will meet the ex-parte Applicant’s costs for these proceedings.

Dated, signed & delivered at Nairobi this 18th day of August, 2015

W. KORIR,

JUDGE OF THE HIGH COURT