



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 244 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE PHARMACY AND POISONS ACT, CAP  
244 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF THE  
PHARMACEUTICAL SOCIETY OF KENYA**

**DR. PAUL MWANIKI.....APPLICANT**

**VERSUS**

**C S, MINISTRY OF HEALTH.....RESPONDENT**

**PHARMACEUTICAL SOCIETY OF KENYA.....INTERESTED PARTY**

**KENYA PHARMACEUTICAL DISTRIBUTORS  
ASSOCIATION (KPDA).....INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 28<sup>th</sup> July, 2015, Kenya Pharmaceutical Distributors Association, (hereinafter referred to as “the Association”) seeks substantially an order to be made an Interested

- Party.
2. The application was supported by an affidavit sworn by **Dr Kamamia Murichu**, the Association's chairman 28<sup>th</sup> September, 2015.
  3. According to the deponent, the Association's main objective is to safeguard members' interests in pharmaceutical products distribution. According to him, the members of the Association are regulated by the Pharmacy and Poisons Board (hereinafter referred to as "the Board") which has a statutory mandate to regulate the profession of pharmacy and trade in drugs and poisons. He added that the Members of the Association are members of Pharmaceutical Society of Kenya, the interested party herein, and that the members of the Association have interest in the control and trade in drugs and poisons in Kenya which is a direct statutory mandate of the Board.
  4. It was deposed that the stalemate in the appointment of the members to the Board is as a result of deep rooted self-interest of a few members of the interested party. This petition, it was averred, seeks to compel the 1<sup>st</sup> Respondent to appoint specific members of the interested party to the Board without according the Minister the discretion to do so as per the law. However, the Board being a critical regulatory body demands objective membership devoid of self-interested individuals and the Association has an identifiable stake, legal interest and duty in the proceedings before the Court and any decision will directly affect its members hence it ought to be allowed to participate in these proceedings to assist the Court to effectively and completely adjudicate the matter.

### **Ex Parte Applicant's Case**

5. In opposition to the application, the ex parte applicant filed a replying affidavit sworn on 1<sup>st</sup> October, 2015.
6. According to him, the Notice of Motion does not disclose any cause, and is only intent on delaying the wheels of justice. Further, it does not reveal the legal premise wherefrom it obtains legitimacy, and as such is fatally defective and ought to be accorded outright dismissal by the honourable court. It was further contended that the application is brought *mala fides*, as it is instituted when the time of the suit has been well spent, and two days to the hearing of the case, which is definitely intended to delay the course of justice and positive directions issued by this court.
7. According to the ex parte applicant, the Association not in the past participated in appointments to the Board, and cannot thus have any legitimate expectation to do so. Moreover, the Association has not demonstrated its legitimate interest in the matter, and is as such a stranger thereto, and any interest that they may perceivably have, is well represented by the interested Party already in this suit, as is aptly conceded in the supported affidavit.
8. It was contended that pursuant to the main objective of the Association, the Association is concerned with assessment of credit matters of its subscribers, and not in any way eligible to nominate its members to the Board and its Constitution does not permit it to participate in litigation or pursue legal action on behalf of its members, hence this application is *strictu sensu* in itself *ultra vires*. Furthermore, it prohibits the Applicant from pursuing any political and/or quasi-political interests, including canvassing for its members' nomination for appointment and the **Pharmacy and Poisons Act** Cap 244 of the laws of Kenya does not at any point contemplate existence of the Applicants, and as such they do not possess the requisite *locus standi* to be joined in this matter.
9. It was the ex parte applicant's case that this matter is highly imperative, and was brought under certificate of urgency, further underscoring the importance of timely conclusion thereof, and such delay mechanisms would only fetter the health of the nation. To him, the application as well as the appurtenant annexures are incapable of, and cannot possibly demonstrate any interest that the Applicant has over this suit more so as the pharmaceutical practitioners alluded to in paragraph (a) of the application, *to wit* pharmaceutical Distributors, are within the setup of the interested Party already in the suit, and indeed they are well taken care of by the interested Party. Accordingly, the Association has not demonstrated any value that it will add to the quality of the proceedings, hence this is a frivolous attempt to seek endorsement and recognition as a stakeholder in the pharmaceutical industry. It was averred that since equity aids the vigilant and not the indolent, the delay by the Association to put in this application is not only indolent but also strategically timed to disrupt the temporal directions that this court gave over the proceedings of this matter hence the application is an abuse of court process and ought to be dismissed.

## **Determination**

10. I have considered the foregoing.

11. Order 53 rule 3(2) and (4) of the *Civil Procedure Rules* provide:

***(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.***

***(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.***

12. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are “***directly affected***”, subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court’s decision to do so is only subject to ***such terms (if any) as the court may direct***. It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary

13. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word “direct” is defined by ***Black’s Law Dictionary***, 9<sup>th</sup> Edn. page 525 as “straight; undeviating, a direct line, straightforward, immediate.” Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation.

14. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

15. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

16. The ex parte applicant contended that the Associations’ constitution bar it from participating in legal proceedings. I have not seen any such clause in the said constitution. To the contrary clause 11 of the said constitution implies that the Association may incur costs in connection with such actions. In my view that clause contemplates the participation of the Association in legal proceedings.

17. However, in paragraph 4 of the supporting affidavit, the Association readily admit that its members are members of the interested party herein, the Pharmaceutical Society of Kenya. In other words the Association is already represented in these proceedings. It is contended by the ex parte applicant that the Association has no role in the appointment of the members of the Board.

That contention is not denied. The Association on the other hand contends that the decision in this matter will directly affect its members. It is not however contended that the interests of the members of the Association is inconsistent with that of the interested party and hence its interests cannot be properly taken care of by the interested party. Whereas the alleged role of the Association in assisting the Court to effectively and completely adjudicate the matter may be a consideration in an application under Order 1 rule 10 of the ***Civil Procedure Rules***, in judicial review especially where a party's interests can be catered for by another party already a party to the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto. In this case the Association ought to ventilate the issues it intends to espouse herein through the interested party which represents the members of the Association.

18. In the premises I decline to join the Association to these proceedings. Consequently, the Motion dated 28<sup>th</sup> July, 2015 fails and is dismissed but as the Association is not yet a party to these proceedings there will be no order as to costs.

**Dated at Nairobi this 21<sup>st</sup> day of October, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Akusala for the exp applicant and interested party**

**Mr Muturi for the Applicant/intended interested party**

**Cc Patricia**