



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 70 OF 2015
(CONSOLIDATED WITH JR 79 of 2015)

REPUBLIC..... APPLICANT

VERSUS

THE PHARMACY & POISONS BOARD.....1ST RESPONDENT
CS, MINISTRY OF HEALTH..... 2ND RESPONDENT
PS, MINISTRY OF HEALTH..... 3RD RESPONDENT
THE KENYA REVENUE AUTHORITY..... 4TH RESPONDENT
HON. ATTORNEY GENERAL..... 5TH RESPONDENT

EX PARTE:

KENYA NATIONAL UNION OF CIVIL SERVANTS
KENYA NATIONAL UNION OF NURSES
NATIONAL TRADITIONAL HEALTH PRACTITIONERS
ASSOCIATION (NATHEPA)..... PROPOSED INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion dated 12th August, 2015, **National Traditional Health Practitioners Association (NATHEPA)**, (hereinafter referred to as “the Association”) seeks substantially an order that the Association acting through its officials namely **Paul M. Okibo, Stephen A. Mugambi Mwithimbu** and **Hellen Jelimmo Tanui** be joined to these proceedings as an Interested Party.

Applicant's Case

2. The application was supported by an affidavit sworn by **Paul Matongo Okibo**, the Association's chairman 12th August, 2015.
3. According to the deponent, the Association ought to be enjoined hereof to enable the honourable court to effectually and effectively determine the issues hereof since it has a direct interest in respect of the outcome of this matter hereof.
4. It was deposed that the Applicant is a registered society under Cap. 108 on the 26th March 2010 and is suing through its said officials who are Kenyan citizens and who work and reside in Nairobi. To the deponent, several members will be affected by the outcome of this application hence it is inviting the honourable court to join the Association to the proceedings in the spirit of the law to enable them channel offerings, quality and related issues fall short of the legitimate expectations of this members and patients/customers (sic).
5. According to the deponent, the parties are bound by the constitution and laws of Kenya and must ensure that the provisions and the spirit of the constitution are upheld. Under Article 3(1) of the Constitution of Kenya, the parties have an obligation to respect, uphold and defend the Constitution.
6. It was contended that the parties are instituting these proceedings on its behalf and is acting in the said association's interest hereof and that the proposed Interested Parties have agreed to be enjoined (sic) in this application and it will be in the interest of justice that the said Interested Parties are enjoined hereof.
7. To the deponent, unless the application herein is urgently heard and determined, the Interested Party and its members will suffer irreparable damage and loss.

1st Respondent's Case

8. In opposition to the application, 1st Respondent filed the following grounds of opposition:
 1. **The proposed intended interested Party lacks "locus standi" to be enjoined into these proceedings in its own name.**
 2. **That Applicant is in breach of Section 3 of the Societies Act, Cap 108 which provides that a society can only sue and be used through its officials. The Applicant seeks to be enjoined in the name of the society which is a nullity ab initio.**
 3. **The Applicant is in further breach of Order 1 Rule 1 Civil Procedure Rules, 2010 which provides that only legal personalities or natural persons can be enjoined in a suit. The society as is indicated to be enjoined lacks such locus standi thereof.**
 4. **The application lacks foundation as the reasons for enjoinder are wanting. It is vexatious and only meant to delay the fair trial of this suit.**

Determination

9. I have considered the foregoing.
10. Order 53 rule 3(2) and (4) of the *Civil Procedure Rules* provides:

(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.

11. 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
12. 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***, 9th Edn. page 525 as “straight; undeviating , a direct line, straightforward, immediate.” It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are determined. This was the position in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, where it was held that for the Court to require the alternative procedure to be exhausted where the alternative procedures are more convenient and appropriate prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.
13. 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. 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 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.
14. 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.
15. In this case, apart from disclosing who it is, there is no material at all in the affidavit showing how the Association stand to be directly affected by these proceedings.
16. It is not enough in judicial review to simply cite enabling legal proceedings in an application of this nature but the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings.
17. I have considered the Association’s case and apart from bare allegations from the bar made during the submissions the affidavit sworn in support of this application is clearly unhelpful.
18. 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.

19. In my view, I am not satisfied that the presence of the Association is necessary for the determination of the issues in these proceedings. I am further not satisfied that the applicant are persons directly affected by these proceedings.

Order

20. In the premises I decline to join the Association to these proceedings. Consequently, the Notice of Motion dated 12th August, 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 21st day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Marete for Mr Jaoko for the exp applicant

Mr Kibet for the Respondent

Mr Akusala for the 2nd interested party

Cc Patricia