



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 130 OF 2012**

**IN THE MATTER OF AN APPLICATION BY MUKHONJE COMMUNITY BASED ORGANISATION**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOUR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI, PROHIBITION AND MANDUMUS**

**AND**

**IN THE MATTER OF THE MINISTRY OF PUBLIC HEALTH**

**AND**

**IN THE MATTER OF THE WESTERN PROVINCE DIRECTOR OF PUBLIC HEALTH AND SANITATION NOTICE DATED 25<sup>TH</sup> MAY 2012**

**AND**

**IN THE MATTER OF THE REGISTRAR OF THE CLINICAL OFFICERS COUNCIL**

**AND**

**IN THE MATTER OF THE CLINICAL OFFICERS COUNCIL ACT, CAP. 260 LAWS OF KENYA**

**RULING**

The Applicant, **MUKHONJE COMMUNITY BASED ORGANISATION**, filed an application by way of chamber summons under **Order 53 Rules 1, 2 & 4** of the **Civil Procedure Rules** seeking the following orders:

(a) That leave be granted to the Applicant to apply for an order of Judicial Review in the nature of Certiorari to remove into the High Court and quash the decision of the Western Province Provincial Director of Public Health & Sanitation contained in his letter to the applicants dated 25<sup>th</sup> May 2012.

- a. That leave be granted to the Applicant to apply for an order of Prohibition directed at the Western Provincial Director of Public Health & Sanitation restraining him from closing down the Applicant's health clinic known as Delinds Medical Centre in Butula District.

- b. That leave be granted to the Applicant to apply for an order of Mandamus to compel the Registrar of the Clinical Officers Council to issue the Applicant with a licence to practice private medicine in its clinic known as **DELINDS MEDICAL CENTRE** in Butula District, Busia County.

The application is supported by the statutory statement and the verifying affidavit which was sworn by Makeya Elphas Okwayo who described himself as a secretary of the Applicant. In the pleadings, the Applicant is described as a community based organization which has interest in the provision of health to the members of the public. The application has been signed by the said Elphas Okwayo Makeya and Elizabeth Ibwaka. According to the Applicant, it was aggrieved by the decision of the Provincial Director of Public Health and Sanitation, who by his letter dated 25<sup>th</sup> May 2012, had directed that Delinds Medical Centre should not be licenced to offer medical services. He further directed that the District Health Management of Butula District and the Provincial Administration close down the clinic. He further ordered that further investigations being conducted by the District Health Management team with a view to ascertaining the allegations that there were malpractices being undertaken at the clinic. It appears that as a result of this letter the clinic was closed down.

It is this closure of the clinic that prompted the Applicant to seek intervention of this court. The Applicant's case is that it is a community based organization which owns a health facility known as **DELINDS MEDICAL CENTRE** in Butula District, Busia County. The Applicants complained that the Western Province Director of Public Health & Sanitation unilaterally decided to close down the Applicant's health facility without any legal justification and without giving the Applicant the opportunity to be heard. The Applicant alleges that the Respondent's conduct was thus ultra vires and against the law. As a result of the Respondent's actions, the Registrar of the Clinical Officers Council has declined to issue the Applicant with a Private Clinic Licence for the year 2012. The Applicant is aggrieved that by the said action, the Western Province Director of Public Health and Sanitation had denied it an opportunity to offer medical services to the members of the public.

In reply, the Respondent in his submissions and affidavit in opposition to the application for the Applicant to be granted leave, stated that the Applicant's constitution does not allow it to operate a medical centre and further that the clinic was in fact being operated by person who were not medically qualified to operate such a clinic.

The test to be applied in deciding whether or not to grant leave to an applicant who is seeking leave to file an application for judicial review was set out in the case of **Njuguna –Vs- Ministry of Agriculture [2001] 1 E.A 184:**

***“Leave should be granted, if on the material available the court considers without going into the matter in depth that there is an arguable case for granting leave”.***

Similarly in the Uganda Court of Appeal case of **Kikonda Butema Farms Ltd –Vs- The Inspector General of Government, Civil Appeal No. 35 of 2002 (unreported)**, Byamugisha, JA held as follows:

***“An application for leave is the first step in the process. The trial Judge is enjoined to look at the statement of facts the accompanying affidavit and any annexures that might be attached to the application before granting leave. It is not necessary at that stage to consider whether the applicant would succeed or not. The applicant has to present such facts that would satisfy court that a prima facie case exists for leave to be granted. In my view, leave is not granted as matter of course. However the court is not supposed to consider the merits or demerits of the application. Such decision can only be taken after hearing the application inter parties.”***

Taking into consideration both tests against the facts set out in the statement and verifying affidavit plus the annexures thereto, this court shall now turn to the case made out by the Applicant and examine whether it is deserving of being granted leave to lodge an application for judicial review. There appears to be allegations of breach of the constitutional right to fair hearing. This constitutes a substantive matter that ought to be investigated by this court through the process of judicial review. However, the Applicant must first establish its bona fides. The Applicant claims that it is a community based organization. This

court perused the certificate issued by the Ministry of Gender, Children and Social Services to the Applicant. The document certifies that the Applicant was registered as a community based organization. In the understanding of this court, such organization is supposed to mobilize members of the community towards the attainment of a certain social objective. Such organization is by its very nature a non-profit making organization. It cannot engage in business. Neither can it engage in such complex undertaking as the operation of a medical clinic.

From the contents of the letter that is the subject of this application, it was clear that the said clinic was being operated by persons who were not qualified to offer medical services. Among the persons is Elphas Okwayo Makeya, who claims to be the secretary of the Applicant. He has no medical training neither does he have any academic qualifications that would make him a suitable person to manage a health facility. It was apparent to this court that it is the said Elphas Okwayo Makeya who infact was operating the medical clinic under the guise that it was owned by the community based organization.

In such circumstances, can this court grant leave to an unqualified person to challenge the decision of an officer mandated by the law to safeguard the interests of the public from acts of unqualified persons? I do not think so. The Applicant has failed to establish that it has a prima facie case to entitle this court grant leave to institute judicial review. The applicant has no *locus standi* to challenge the decision of the Respondent. In fact, it is apparent that the name of the Applicant is being used by the persons who filed this application to enable them engage in medical practice when in actual fact they are unqualified to offer such medical services or to be issued with a licence to offer such medical services. Leave is denied. The Applicant shall pay the cost of the Respondent.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 27<sup>TH</sup> DAY OF JUNE 2013.**

**F. TUIYOT**

**JUDGE**