**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS NAIROBI**

**PETITION NO 324 OF 2012**

**DR. EDWIN KARANI KARUGA ……...……PETITIONER**

**VERSUS**

**THE REGISTRAR**

**MEDICAL PRACTITIONERS**

**AND DENTIST BOARD .....RESPONDENT/APPLICANT**

**JUDGMENT**

## Introduction

1. This petition concerns the petitioner's endeavour to be registered as a medical doctor in Kenya by the respondent. In his Amended Petition dated 20th February 2013 and supported by his affidavit sworn on the same date, the petitioner seeks the following orders:

1. ***A declaration that it was unlawful and unconstitutional for the respondent to subject the petitioner to internship training in sub-standard institutions.***

2. ***A declaration that it was unlawful and unconstitutional for the respondent to subject the petitioner to the Preliminary inquiry committee on 20/02/2009 and all the health and fitness committees on diverse dates.***

3. ***A declaration that it was unlawful and unconstitutional for the respondent to direct the petitioner to undertake impossible training in unspecified disciplines.***

4. ***A declaration that the respondent's Assessment and registration committees on the 9/10/09 and 22/10/09 were improperly constituted and unlawful and the decisions reached by the committees null and void.***

5. ***A declaration the respondent's purported full board decision of 22/10/09 not to register the petitioner was fraudulent, null and void.***

6. ***A declaration that failure and refusal by the respondent to convene the relevant organ of the board, or the full board to make a decision on the petitioner's registration as promised vide the letter dated 6th April 2010 is unconstitutional and a gross violation of the petitioner's***

***fundamental right to lawful, fair and expeditious administrative action.***

7. ***A declaration that the respondent has infringed on the fundamental rights and freedoms of the petitioner as provided for under articles 19,20,21,22,23,25,27,28,30,43,47 and 50 of the Constitution of Kenya.***

8. ***A declaration that the petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the constitution.***

9. ***General damages, special damages and exemplary damages on an aggravated scale for the irresponsible, malicious, vindictive, capricious, unreasonable, immoral, unwarranted, unfair, unlawful and unconstitutional conduct by the Respondent.***

10. ***Costs of the petition plus interest***

11. ***Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for the purpose of the petitioner's constitutional rights and for the safeguarding of the public interest, welfare and safety.***

2. The basis of the petition is the refusal by the respondent to register the petitioner as a medical practitioner in Kenya before he has undertaken and completed a course of internship as is required of those wishing to practice as medical doctors in Kenya.

3. The respondent opposes the petition and has filed a Notice of Preliminary Objection dated 13th September 2012 as follows:

1. ***That the prayers therein and the entire Petition is res judicata.***

2. ***That the prayers sought are repeated attempt to prosecute the same suit, as the prayers sought by the petitioner are merely steps in a decision making process which decision has already been categorically made and rightly held to be so made in Miscellaneous Civil Application 301 of 2010 and Miscellaneous Application 135 of 2011.***

4. On 6th May 2013, I directed that the respondent's Preliminary Objection should be argued first. It was canvassed before me on 4th June 2013.

5. The respondent's objection to this petition as presented by Mr. Change is threefold. First, the respondent contends that the matter is res judicata as the same prayers as are sought in this petition were sought in **Republic -vs- Kenya Medical Practitioners & Dentists Board ex parte Edward Karani Karuga High Court Judicial Review Application No. 301 of 2010 (JR 301 of 2010)**, in which the petitioner sought orders of Mandamus to compel the respondent to recognise and register him as a medical doctor. The respondent submits that in that matter, the court held that the orders sought could not issue as the Board exercised its mandate properly.

6. The respondent contends that the petitioner did not lodge an appeal against that decision but instead filed another application, **Republic –vs- The Kenya Medical Practitioners & Dentists Board ex parte Edward Karani Karuga Judicial Review Application No. 135 of 2011 (JR 135 of 2011)** in which he also sought orders of Mandamus and only changed his prayers a little to circumvent the issue of res judicata. The court in that matter also held that his claim was res judicata. Although the petitioner gave a notice of appeal, no appeal was ever lodged.

7. The respondent contends that after this, the petitioner then filed **HCCC No 154 of 2012** which is still pending in court. It contends that there has to be an end to litigation and relies on the decision of the court in the case of **Kotak Ltd –vs- Vallabhdas Kooverji Dar-es-Salaam High Court Civil Appeal Number 15 of 1968 (1969) EA 295**.

8. The second point of law raised by the respondent is that there is no constitutional issue raised in this petition. It contends that the rights guaranteed under the Constitution are subject to limitation as provided under Article 24; that the petitioner violated certain provisions of the law requiring him to undergo internship and that he decided to go and undergo his internship in Tanzania to avoid disciplinary issues he had in Kenya. The respondents submits that the court (Korir J) had looked at the issues raised by the petitioner and held that the court should not assist the petitioner in breaking the law.

9. Finally, the respondent submitted that the petitioner seeks orders that the court has no jurisdiction to grant. It submits that the petitioner is challenging the merits of the decision made by the Board, but the jurisdiction of the court is limited to inquiring into the process.

10. Mr. Change asked the court to consider section 7 of the Civil Procedure Act, Explanation No 4. Any matter which ought to have been a ground of defence should have been brought before the court in the two matters that were before the court at the time. He argued that no explanation has been given why the grounds relied on in this petition were not brought before the court in the previous suits, and he prayed that the petition be dismissed with costs.

11. In his response, Mr. Gachomo for the petitioner submitted that the court has unlimited jurisdiction to investigate a matter such as this. He argued that there is no evidence before the court that the applicant was escaping disciplinary issues in Kenya; that the petitioner is relying on the East African Community Treaty on Mutual Recognition and that since he was registered in Tanzania the respondent was obliged to recognize him and register him as a doctor. Mr. Gachomo contended that these issues were not ventilated before the court in the judicial review application, and consequently, the matter is not res judicata.

12. Mr. Gachomo submitted further that the Amended Petition also questions the composition of the committee that recommended that the petitioner undergoes further internship in Kenya, an issue that was not before the High Court in the two judicial review applications cited by the respondent. He asked the court to consider the petitioner's submissions and find that the petition had merit and should be argued on its merits.

13. In his written submissions, the petitioner contends that the issue before the court is a constitutional issue; that he is seeking determination by the court of whether or not the failure by the respondent to register him, while he has been registered in a foreign country, is discriminatory against him; and that this is a totally new issue which was not before the court in the two judicial review applications.

**Determination**

14. Having read the parties' respective pleadings and submissions in this matter, I believe that the main issue for determination in this matter is whether the issues raised by the petitioner are res judicata. The determination of this issue turns on the provisions of Section 7 of the Civil Procedure Act. This section provides as follows:

> ***7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***
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> ***Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
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> ***Explanation. (2)—For the purposes of this section, the competence of a court***

***shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

***Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

15. I have read the judgments in **Judicial Review Application Nos. 135 of 2011 and 301 of 2010**, (supra) which were determined by Korir and Gacheche JJ, respectively. In both these matters, the petitioner was seeking relief against the Board for its failure to recognise him as a qualified medical doctor and duly register him as such. His claim in those cases is that he was a fully qualified medical doctor registered as such in the Republic of Tanzania and the respondent should be compelled to accept his papers and register him to practice in Kenya without requiring that he completes his internship.

16. In the present case, he is again seeking relief on essentially the same grounds. The difference is that he has now put in elements of the Constitution of Kenya 2010 and alleged violation of its provisions.

17. As correctly argued by the respondent however, the matters that he raises in this petition, whether in relation to the composition of the respondent's Committee or the provisions of the East African Community Treaty on Mutual Recognition, or the alleged violation of constitutional rights, were or could all have been litigated before the court in the two matters preceding this. There is no reason why these matters were not raised before the court that determined the two cases previously filed by the petitioner.

18. In **JR 301 of 2010,** Gacheche J considered the various arguments made by the petitioner, including, at page 3 of her judgment, the question of the Mutual Recognition Treaty relied on in this petition, as well as the law that the respondent followed in its decision not to register the petitioner as a medical doctor until he met the requirements for eligibility set out in the Medical Practitioners and Dentists Board Act Cap 253 of the Laws of Kenya. She then concluded as follows:

***'The fact that Board (sic) has given Karani 'all the necessary opportunities', which 'he has failed to take advantage of' is not disputed, and in my humble opinion, the fact that the decision by the Board was not what he would have expected, would not render it the subject of an application for an order of mandamus, for a court cannot compel a respondent such as this Board, to determine a matter in a particular way. Once it is established that a respondent has failed to perform its duty, all that a court can do is to compel a respondent to perform such a duty, which would not apply, here for the Board fulfilled its mandate and arrived at its decision, unpalatable as it might be, it should however be honoured.***

***Needless to say, this court deals with the process not the merits of the decision; the Board appears to have done all that it reasonably could to fulfil its duty.'***

19. In his decision in **JR 135 of 2011**, Korir J stated as follows on the issue of res judicata with regard to the petitioner's application:

***'One can clearly see that the grounds for seeking relief are similar in the two applications. The applicant has not placed any material before the court to show that the status that prevailed when he made the application in case No 301 of 2010 has***

***changed. He has for example not demonstrated that he has successfully completed internship as directed by the respondent. As matters stand, the applicant's application is res judicata.'***

20. Despite his finding that the issue is res judicata, the learned judge went on to examine the facts before him on the issues raised by the petitioner and observed as follows:

> ***'The applicant prays that the respondent be directed to receive his application for registration as a medical practitioner.***
>
> ***The respondent's case is that for one to be recognised or registered as a medical practitioner he has to fulfil the requirements of Section 11 of the Medical Practitioners and Dentist Act, Chapter 253. The respondent submits that successful internship is one of the requirements for registration. The respondent says the applicant has refused, neglected or failed to undergo internship. The applicant does not dispute this fact. This court cannot direct the respondent to receive the applicant's papers knowing well that the applicant has not complied with the requirements of the law. The only way the applicant can have the door to the medical world opened to him is by following the rules for registration that have been put in place. The applicant can knock the judicial review door as many times as he desires but the answer will always remain the same.'***

21. The Learned judge then went on to cite the words of Gacheche J which I have quoted above, then concluded as follows:

> ***'The applicant for reasons best known to him has refused to undergo internship. He has formed an impression that this court can help him to bypass the requirement for internship. He is however reminded that this is a court of law and its fidelity to the laws of this country is undebatable. The court cannot aid a party in a case to break the law.'***

22. I believe I can say no more with regard to this matter. Two courts of concurrent jurisdiction have considered the petitioner's claim, and have come to the conclusion that there is no merit in his claim. All the issues that the petitioner has raised in the matter now before me were substantially in issue, or could have and ought to have been in issue, in the matters which have already been determined. As the court observed in **Kotak Ltd –vs- Vallabhdas Kooverji (Supra)** relied on by the respondent:

> ***"The purpose of the doctrine of res judicata is that there should be an end to litigation. Where a court has investigated an application and has concluded that whatever be the merits, the law provides no remedy, it cannot really be said that the application has not been determined on its merits. Re-filing the application is a way of seeking a different ruling from a court of equal jurisdiction, and avoiding her mechanism of an appeal. Any other view would make nonsense of the doctrine. There would be no end to litigation as one could continue filing identical applications until one found a magistrate prepared to hold that the Act was not retrospective. Once it is decided that a particular rule of law is applicable to a particular factual situation between the parties then as far as these parties are concerned in the identical factual situation, the fact of applicability of the rule is res judicata and can be challenged only on appeal."***
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> (Emphasis added)

23. I am also guided by the words of the court in **Samuel Njau Wainaina –vs- Commissioner of Lands and Others Nairobi Petition No 46 of 2012 (Unreported)** where the learned judge observed as follows

> *[22] In this respect, I would do no better than quote the case of* ***Edwin Thuo v Attorney General & Another Nairobi Petition No 212 of 2012 (Unreported)*** *where the court stated,* ***"The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.*** *In the case of* ***Omondi v National Bank of Kenya Limited and Others [2001] EA 177*** *the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of* ***Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)*** *where he stated,* ***"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata …"*** (Emphasis added)

24. It is incumbent on the petitioner and his legal advisor(s) to now think soberly and put this matter to rest. The petitioner has expended considerable energy and doubtless expense in his attempt to compel the respondent to register him as a medical practitioner in Kenya without his having to comply with the law as it relates to internship for those seeking to be registered as medical practitioners in Kenya. I note from the pleadings before me that the respondent has bent over backwards to accommodate the petitioner, even reducing the period of internship to 13 weeks. It is time the petitioner realised that he too is bound by the law, and he cannot obtain the assistance of the court to avoid legal requirements.

25. The upshot of my findings is that the respondent's preliminary objection succeeds. This petition is struck out as being res judicata, and the petitioner shall pay the costs thereof to the respondent.

**Dated Delivered and Signed at Nairobi this 23rd day of August 2013.**

**MUMBI NGUGI**

**JUDGE**

**Mr. Change instructed by the firm of Rachier & Amollo & Co. Advocates for the Respondent**

**Mr. Gachomo instructed by the firm of Ngugi Mwaniki & Co. Advocates for the Petitioner**