



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.346 OF 2013

BETWEEN

JOSEPHAT MWISA.....1ST PETITIONER
JULIAN AKINYI.....2ND PETITIONER
ANTONY KOMU.....3RD PETITIONER
FIDELIS MUSA.....4TH PETITIONER
HANNAH MUNGAI.....5TH PETITIONER
MOSES WEKESA.....6TH PETITIONER
NANCY NJUKI.....7TH PETITIONER
DOROTHY NGEMU.....8TH PETITIONER
FLORENCE MUTHEU.....9TH PETITIONER
JOHN GAKURU.....10TH PETITIONER
AUGUSTINE MWANGI.....11TH PETITIONER
JUDY KIBE.....12TH PETITIONER
BENARD OTIENO.....13TH PETITIONER
ENOCK OBWOCHA.....14TH PETITIONER
TIMOTHY MWANGI.....15TH PETITIONER
COLENCESON MAKANA.....16TH PETITIONER
DELILAH AKAI.....17TH PETITIONER
VINCENT NJAGI.....18TH PETITIONER
JANE MAKENA KIREA.....19TH PETITIONER

GIDEON MUSYOKA.....20TH PETITIONER
AGNES KITHEKA.....21ST PETITIONER
ELIZABETH OWUOR ACHIENG.....22ND PETITIONER
MARY GATHONI KINGORI.....23RD PETITIONER
EDWARD OKETCH ODHIAMBO.....24TH PETITIONER
PHILIP OSEWE25TH PETITIONER

VERSUS

PHARMACY AND POISONS BOARD.....1ST RESPONDENT
THE REGISTRAR, PHARMACY AND POISONS BOARD.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioners have filed this petition challenging the manner in which the 1st Respondent, the Pharmacy and Poisons Board, has treated them by refusing to give them an opportunity to practice as pharmaceutical technologists despite being qualified as required under the law.

Background

2. All the Petitioners are pharmaceutical technologists by profession. Some studied the pharmacy course at Kenya college of Medicine and Related Studies and others at Consolata College and alleged that they all sat and passed the diploma in pharmacy examinations administered by the Kenya National Examination Council (KNEC). They were thereafter issued with certificates indicating that they had passed their examinations and they thus alleged that they were qualified to practice as pharmaceutical technologists within Kenya. However, none of the Petitioners has managed to secure registration by the Pharmacy and Poisons Board, the 1st Respondent, for purposes of being authorized to practice their trade despite their numerous applications to it.
3. They claim that prior to commencing their practice, the Petitioners are required to apply to the Respondents in a prescribed form for issuance with a license that would enable them practice as pharmaceutical technologists. That prior to being licensed, the Board must be satisfied that an applicant holds a diploma in pharmacy from a college approved by the Board.
4. They contended that at no time prior to sitting the examinations set by KNEC did the Respondents indicate to the Petitioners that their preferred institution was not authorized to offer a diploma in Pharmacy, and that they only learnt after graduating that the Respondents did not recognize their Diploma certificates, despite their college being recognized by the Commission for Higher Education and that it was also recognized as an examination center by KNEC and the Petitioners were all registered to sit the KNEC examination at the college.
5. In their Amended Petition dated 15th October 2013, and supported by the affidavit of the 1st Petitioner sworn on the same date, they seek for a declaration that the actions of the Respondents contravene the Constitution and an order directing the Respondents to immediately admit and license the Petitioners to practice as Pharmaceutical Technologists. They have also sought for an order of costs.

Case for the Petitioners

6. The Petitioners submitted that the Respondents acted in excess of their statutory mandate in purporting to accredit colleges to offer training in pharmacy and in purporting to administer examinations on applicants prior to being licensed to practice as pharmaceutical technologists. They claim that the mandate of the Respondents is to regulate the practice of pharmacy and administration of drugs and poisons in Kenya and licence those who desire to practise as pharmacists and pharmaceutical technologists in Kenya. That the only thing that the Respondents are required to consider in granting or refusing to grant licenses is whether the qualifications held by the applicants are recognized. They alleged that the power to accredit colleges has been given to the Commission of Higher Education and not the Respondents.
7. They thus submitted that once the Board had approved a diploma in pharmacy by approving the content of the curriculum, it could not dictate which college would offer the course as that was the sole mandate of the Commission of Higher Education. That the Respondents could not approve one certificate and disregard another while all are issued by KNEC and further claimed that section 8(2) was clear and did not require an interpretation beyond the literal meaning. They relied on the case of *Amalgamated Society of Engineers v Adelaide Steamship (1920) 28 CLR 129* where it was held that a statute was to be interpreted by according it the intent of Parliament in enacting it. They also relied on *Jesse Waweru Wahome & 2 Others v Kenya Engineers Registration Board & 3 Others (2012) eKLR* where it was held that accreditation was a rigorous exercise and that **Section 22** of the **Engineers Registration Act** does not make reference to accreditation or recognition of degree courses offered by public universities.
8. They further submitted that the duty to administer examinations was on KNEC and having administered the examination on the Petitioners and certifying that they all had qualified for award of diploma in pharmacy, the Respondents had no authority to overrule what KNEC had done in executing its statutory mandate. They therefore claimed that by purporting to discredit the diploma issued by KNEC, the Respondents acted in bad faith and against their own mandate and objective thus usurping the mandate of KNEC.
9. They submitted that the Respondents did not give them a chance to make an application as stipulated under **Section 7** of the Act and therefore the decision not to admit them was made without them being heard and in violation of **Article 47** on right to fair administrative action. That the Respondents are in any event mandated to communicate any decision to them in writing and they relied on the case of *Geothermal Development Company Ltd v Attorney General & 3 Others (2013) e KLR*, where it was held that the right to be heard is an important tenet of fair administrative action.
10. They submitted that while the Respondents have denied the Petitioners the opportunity to present their applications for licensing, they have allowed applications by other persons with similar qualifications as the Petitioners and they consider that treatment to be discriminatory. Further, that in all the institutions which the Respondents have allowed their graduates to practice as pharmaceutical technologists, all of them take their students through the standard examination by KNEC with the exception of Kenya Medical Training College whose students sit an internally moderated examination.
11. The Petitioners submitted that they had a legitimate expectation that the college in which they studied in, having been given the required certification by the Commission for Higher Education to offer the course leading to a diploma in pharmacy then their, the Petitioners qualifications would be recognized by government agencies such as the Respondents. Further, that, they had legitimate expectation that having attained the qualification offered by KNEC, a public body tasked with administering examinations, the same would be valid and recognised by other public bodies, which legitimate expectations had been thwarted by the Respondents' unilateral decision.
12. It was their submissions that the 2nd Respondent being a public officer had failed to uphold the leadership and integrity standards required by **Article 73** of the **Constitution** since he failed to act objectively and impartially. They alleged that while the Respondents were aware that Consolata

College was not authorized to offer a course in pharmacy, it failed to inform the members of public of that fact.

13. They claimed that after undergoing rigorous training and spending huge resources on their education, the Petitioners had the legitimate expectation that they would be licensed to trade as pharmaceutical technologists in order to achieve social and economic security to sustain themselves and their Dependants. That a violation of their constitutional rights under **Article 43** had been committed by the Respondents by their action to the contrary.
14. Lastly, they claimed that they cannot secure any meaningful and gainful employment or pursue business interests within their field of training without getting their licenses and continue to remain jobless and hopeless unless they undertake other training, which they claimed is impossible due to economic hardships. They thus urged the court to find that their constitutional rights have been violated by the Respondents who have acted discriminatorily, in breach of rules of natural justice and in excess of their statutorily duties.

Case for the Respondents

15. In response to the Petition, the Respondents filed a replying affidavit sworn by Dr. Kipkerich Koskei, the Registrar of the Pharmacy and Poisons Board, the 1st Respondent herein. They also filed written submissions dated 12th September 2013.
16. The Respondents case is straightforward; they submitted that under **Section 3 of the Pharmacy and Poisons Act Cap 244**, (herein after the “Act”) the 1st Respondent is mandated to regulate and oversee all pharmaceutical services, operations and functions in the Country and that includes vetting and regulating public and private individuals offering pharmacy training. It was also its duty to issue prescribed applications forms for persons interested to register as pharmacists.
17. In regard to the Petitioners' contention that they were not heard, the Respondents submitted that it was the responsibility of the Petitioners to certify to the Board that they had met the threshold set out under Section 8(2) of the Act before forms for registration are handed over to them. That the Petitioners had not satisfied that requirement.
18. They submitted further that the Respondents could not simply license the Petitioners because they had passed KNEC examinations although they were admitting other students who had been examined by KNEC. They relied on the case of ***Republic v Council of Legal Education Ex Parte Keniz Otieno Agira, HC Misc Aplic No. 395 of 2012***, where the court held that even if students from Busoga University had in past been admitted into the school, that did not estop the council from rescinding its decision, if it was satisfied that subsequent events made admission of students from that university untenable so long as the decision was not irrational, illegal and procedurally wrong. They also relied on the case of ***John Kabui Mwai & Others v Kenya National Examination Council (2011) e KLR*** where it was held that equal treatment does not amount to identical treatment in all circumstances without understanding the impact of discriminatory action upon the particular people concerned.
19. They therefore submitted that in refusing to license the Petitioners as pharmaceutical technologists, the Respondents were acting well within their scope and mandate in order to ensure that all persons licensed to practice pharmaceutical technologists are trained and qualified since they are entrusted with the health and well being of human beings.
20. It was their further submission that KNEC does not have the mandate to develop a syllabus in Pharmaceutical courses as that is the sole mandate of the Ministry of Education, Science and Technology, the Ministry of Health and the 2nd Respondent. That KNEC is only mandated to set exams based on the syllabus that has been developed and approved by the above mentioned bodies.

21. Further that the Ministry of Science and Technology and the Ministry of Health had conducted a joint inspection of quality training in pharmacy in all the public and private institutions and thereafter compiled a list of institutions that had met the basic requirements and standards. They claimed that the Petitioner's institution, 'Kenya College of Medicine and Related Studies' was found not to have complied with the requirements. That when the Respondents noticed an advertisement in a local daily, 'The Daily Nation' by that college purporting to offer a certificate and diploma in pharmacy, they wrote to 'Kenya College of Medicine and Related Studies' warning the institution from offering that course and also warned it to refrain from obtaining money from unsuspecting members of the public especially students who wished to enroll in that institution.
22. They submitted that the 'Kenya College of Medicine and Related Studies' was not approved to offer a course in Diploma in pharmacy, and accordingly, the Petitioners cannot allege to be qualified pharmaceutical technologists so as to enable the 2nd Respondent license them. That they did not act discriminatorily against the Petitioners and indeed the Petitioners are the ones demanding a waiver of lawful requirements in their favour. They relied on the case of Susan Mungai v The Council of Legal Education Petition No. 152 of 2011 and Eunice Cecilia Mwikali Maema v The Council of Legal Education and 2 Others Petition No. 64 of 2013. to support that proposition.
23. They further submitted that the denial of licenses by the Respondents has not in anyway violated the Petitioners' rights under **Article 43** of the **Constitution** because the Petitioners' rights to social security could not rank higher than the public interest where there is a need to protect the public by ensuring that only trained and qualified professionals are allowed to practice in the field of human health.
24. In conclusion, they urged the Court to dismiss the Petition and claimed that the Petitioners remedy lies in damages and compensation from 'Kenya College of Medicine and Related Studies' and not the Respondents.

Determination

25. Before I proceed to consider the substance of the Petition, I think it is important to set out the uncontested issues. First, it is not in dispute that the 1st to 19th, 22nd, 23rd and 25th Petitioners are all graduates of an entity known as the Kenya College of Medicine and Related Studies while the remaining Petitioners (20th, 21st and 24th) studied at Consolata College, and subsequently sat the examinations leading to an award of diploma in pharmacy by KNEC. Second, the Petitioners approached the Respondents on several occasions to be provided with application forms to enable them make an application for licenses to practice as pharmaceutical technologists and were denied the application forms on account of the that the Diploma they held was not recognized by the 1st Respondent. Third, the colleges attended by the Petitioners were not accorded the authority to offer Diploma in Pharmacy by the 1st Respondent.
26. The question therefore is whether the Respondents acted in excess of their statutory mandate in purporting to accredit colleges to offer training in pharmacy.
27. To answer that question I will advert to annexure "KKI" in the affidavit of the 2nd Respondent titled; *"The National Training Programme, Syllabus, Rules and Regulations for Diploma in Pharmaceutical Technology"*. This syllabus has also been approved by the Kenya Institute of Education (KIE); and it is therein stated that the implementation of the Diploma in Pharmacy course must be held in legally recognized institutions that have been approved by the Pharmacy and Poisons Board, and that the examinations for the award of the diploma will be conducted by a body corporate and approved by the Pharmacy and Poisons Board. The same requirements are reproduced in the *'Report of the Task Force on Harmonization of the Training of Pharmaceutical Personnel at Diploma and Certificate Levels'* prepared by the Ministry of Health, the Pharmacy and Poisons Board in collaboration with the Ministry of Education, Science and Technology.

28. Further, Looking at the preamble to the Pharmacy and Poisons Act, which states that; **“An Act of Parliament to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons”**. As can be seen, the mandate of the 1st Respondent is very wide as it is mandated to control the entire profession of pharmacy and to my mind, the control of the profession of pharmacy includes the training, assessment, recognition, registration and practice. It therefore means that it has the powers to accredit colleges offering diplomas in pharmacy including the colleges that the Petitioners attended.

29. The term 'accredit' has been defined by the **Blacks Law Dictionary** as follows; *“To recognise (a school) as having sufficient academic standards to qualify graduates for higher education, or for professional practice”*. Accreditation of colleges, as can be seen from the inspection checklist for institutions offering pharmacy training at diploma and certificate levels, attached to the affidavit of the 1st Respondent, involves the process of reviewing the physical facilities, teaching resource persons and curriculum to ascertain that it meets the defined quality standards set by the 1st Respondent.

30. The argument by the Petitioners that the Board is not required to approve any college offering the diploma in pharmacy cannot therefore be true.

The provisions of **Section 8(2)** of the **Act** also bears out this position. That Section provides as follows;

“Every person who satisfies the Board that he holds a diploma in pharmacy approved by the Board of any College in Kenya or any other country, shall subject to this Act, be entitled to have his name entered in the Roll”.

The above is the law and the argument by the Petitioners that the 1st Respondent, is only mandated to approve a particular diploma, and once that diploma has been approved, it did not matter which college offered it, cannot be true, and I so find. Whatever the diploma, the Board must be satisfied.

31. Indeed, the Petitioners indirectly admit that the 1st Respondent has the mandate to accredit colleges that offer training in pharmacy, but cry foul that the 1st Respondent failed to inform them in a public notice that their preferred colleges were not authorized to offer a diploma in pharmacy, and they were shocked to learn, after their graduation, that the 1st Respondent did not recognize their certificates and the diploma in pharmacy. The Petitioners have been put in a situation where dreams and expectations have been shattered and they may not be to blame for their predicament.

32. Sadly, that being the law and having found that the 1st Respondent is the body mandated under the Act to control the Pharmacy profession, which in my view includes the training in pharmacy, it therefore follows that I do not see how they acted *ultra vires* their powers in purporting to accredit colleges offering training in Pharmacy.

33. The second issue for determination is whether the 1st Respondent failed to accord the Petitioners fair administrative action contrary to **Article 47** of the Constitution. The Respondents have admitted that they refused to give the Petitioners the application forms as they had determined on the face of their applications that their diploma was not one of those recognised by the Board. On their part, the Respondents stated that the Petitioners were accorded fair administrative action as their documents were scrutinized and found not to have met the laid down procedures for them to be given the application forms to apply to be registered as pharmaceutical technologists.

34. To determine whether the Respondents denied the Petitioners' right to fair administrative action, I will revert to the provisions of **Section 7(2)** of the **Act**. This Section provides that;

“Every application by a person to be entered in the Roll of Pharmaceutical Technologists shall be made in the prescribed form and shall be addressed to the Registrar”.

35. In the instant case, the Respondents chose to reject the applications even before they had been

made. Under Article 47 of the Constitution, every person is entitled to fair administrative proceedings before a decision is made affecting their fundamental rights. In the case of **The Management of Committee of Makondo Primary School and Anotr v Uganda National Examination Board, HC Civil Misc Applic No.18 of 2010**, the learned judge stated as follows of rules of natural justice;

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

Similarly in the case of **Geothermal Development Company Ltd v Attorney General (supra)** the Court stated as follows;

“The right to hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of the constitution must be implied in every Act especially the right to due process and it cannot be taken away.”

I agree with the learned judges. And in the instant case the Respondents had no discretion to deny the Petitioners the opportunity to make the application and hold a per-determined position that the Petitioners were not qualified even before considering the applications. The Respondents acted in an unfair manner and detrimentally prejudicial to the interests of the Petitioners.

36.To my mind, fair administrative action also demands that the Respondents were to issue the applications forms to the Petitioners, who would in return make the application in the prescribed form, thereafter they would submit the application to the Board, which Board would consider the application and satisfy itself whether the Petitioners hold the requisite qualifications or not and lastly communicate to the Petitioners the Board's decision. To proceed otherwise is a violation of the Petitioners' right to fair administrative action under **Article 47** of the **Constitution** and I so find. However, this finding is subject to a realistic understanding of the circumstances of the case and subject to what I shall say at the end of the judgment.

37.The Petitioners also claimed that the Respondents have discriminated against them contrary to **Article 27** of the **Constitution** by accepting certificates of other students awarded by KNEC and refusing to accept their certificates. The Respondents have admitted that they have licensed other students who had been awarded the certificate by KNEC being the examining body as it was one of the bodies authorized to conduct examination by the 1st Respondent.

38.I am aware of the reasoning of Nyamu J in **John Kabui Mwai & 3 Others v KNEC (Supra)** where he stated as follows;

“we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is or goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before understanding of the compact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context ... In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context. It is only by determining the larger context that a court can determine whether differential treatment results in equality.”

39. I agree with the learned judge and in the instant case I do not see how the Petitioners have been discriminated against upon by the Respondents. I say so because firstly, KNEC conducts or set examinations on a subject that has been approved by the Respondents. Secondly, I have already found that KNEC has no mandate to develop any syllabus in pharmaceutical courses as that is the preserve of the Ministry of Health, the Ministry of Science and Technology and the 1st Respondent. The role of KNEC is clearly seen under Section 10 of KNEC Act as follows;

“a) conduct academic, technical and other examinations within Kenya as it may consider desirable in the public interest.

b) ...

c) ...

d) Make rules regulating the conduct of examinations and for all purposes incidental thereto.”

The claim by the Petitioners on this aspect of the case cannot succeed and the reasons are obvious.

40. Turning to the allegation that the Respondents have violated the Petitioners rights under **Article 43** of the **Constitution** on the right to social security and the right to dignity under **Article 28**. I am in agreement with the Petitioners that after undergoing the long period of studies and spending huge resources in education, the Petitioners had the legitimate expectation that they would be licensed to trade as pharmaceutical technologists in order to achieve social and economic security and to sustain themselves and their dependants. But that is not the end of the matter.

41. The situation presented in this Petition is delicate. On one hand the Respondents are mandated to ensure that persons who get licensed to practice as pharmaceutical technologists are trained and qualified to the best standards since the general public entrust their health and well being on them. The Board also has the duty to insist on the highest professional standard for those who wish to practice as pharmaceutical technologists. This Court cannot intervene in that duty if it was undertaken on merit, since the Board is the best judge of merit pertaining to the training of pharmaceutical technologist and this Court is not.

42. On the other hand, having found that the decision not to license the Petitioners was made in breach of their right to fair administrative action, this court must intervene and inquire into the circumstances leading to that decision in situations where the Board abused its discretion and failed to observe the Petitioners right to fair administrative action - See ***Republic v The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil case No. 137 of 2004.***

43. The Respondents have also outlined the steps they took to warn the Petitioner's colleges that they should not undertake the training of diploma in pharmacy as it had not been accredited and its diploma was not recognized by the Board. The college however went on to purportedly train the Petitioners thus creating the ugly situation they find themselves in today. What the Petitioners are asking the Respondents is to license them to practice pharmaceutical technologist since they are not to blame for the situation they are in today. Granted, the Petitioners are unsuspecting members of the public who were tricked into enrolling into Consolata College and Kenya College of Medicine and Related Studies without knowing that institutions were unaccredited. But even then, the Respondents cannot waive the requirement that the Petitioners be trained in a recognised institution and within their discretion, licence them to practise. I will revert to that issue shortly because there is nonetheless the need to have the Petitioners have some gainful employment.

44. Before concluding and having found that the Petitioners' right to fair administrative action was violated, they are entitled to a remedy. Ackermann J in the case of ***'National Coalition for Gay***

and Lesbians Equality & 13 Others v Minister of Home Affairs, CCT. 10 OF 1999, in that regard quoted with approval the statement of Lamer J who stated thus;

“When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow court to fashion remedies when constitutional infringements occur” - Neville v Ontario (1989) 60 DLR (4th) 609 at 641-2.

Further that;

“The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovativeremedies, if need be, to achieve this goal”.

I am in agreement and in this case, the Petitioners were never heard prior to their denial of license to practice. There is also the contested question regarding the real meaning of **Section 8(2)** of the **Pharmacy and Poisons Act, Cap 244** and the powers of the Pharmacy and Poisons Boards and Registrar under **Sections 6, 7, 8 and 9** of the said **Act**.

45. The remedy that attracts my mind in the circumstances and noting the prayers in the Petition is to order as follows;

(a) Let the Respondents within 30 days grants each of the Petitioner the right to apply in the prescribed form addressed to the Registrar to be licensed to practice as pharmaceutical technologists

(b) Let the Pharmacy and Poisons Board consider each application, the qualifications of the applicants and consider whether they are qualified to practice as pharmaceutical technologist irrespective of their college of training.

(c) Thereafter, a report to be filled in this Court within 60 days for final orders to be made.

46. The Petition is determined in the above terms and each party shall bear its own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Amolo for Petitioners

Mr. Otundo holding brief for Mr. Naikumi for 2nd Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE