



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 316 of 2010

**IN THE MATTER OF APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDING FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND
TECHNOLOGISTS BOARD ACT NO 10 OF 1999**

AND

**IN THE MATTER OF KENYA GAZZETTE NOTICE SPECIAL ISSUE DATED 24TH
SEPTEMBER 2010(CXII-94) NO.11519 11520**

**REPUBLIC.....
.....APPLICANT**

VERSUS

**THE MINISTER, MINISTRY OF MEDICAL SERVICES.....
.....RESPONDENT**

**THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGICAL
BOARD.....INTERESTED PARTY**

EXPARTE:

**MOSES COLLINS ONONO LORRE, LABAN ONONO AND RAPHAEL GACONDE GIKERA
ON BEHALF OF THE ASSOCIATION OF KENYA MEDICAL LABORATORY SCIENTIFIC
OFFICER**

JUDGMENT

The application before court is a Notice of Motion dated 2nd November 2010 and filed on 4th November 2010 brought under Order 53 rule 1,3, and 4 of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya.

The applicants seek the following orders:-

- 1. An order of certiorari to remove into this court and quash the decision of the respondent on the appointment of the board members by gazette of the members of the Medical Laboratory Technicians and Technologist Board Contained in the special issue of the Kenya Gazette Notice No.11519 and 11520 contrary to the provisions of section 6 and 26 of the Act No. 10 of 1999.**
- 2. An order of prohibition to remove to this court and prohibit the respondent from exceeding the powers conferred on him by the Act No. 10 of 1999.**
- 3. An order of mandamus compelling the Respondent to reconstitute the board pursuant to section 6 (1) and (2) of the Act No. 10 of 1999 and particularly to publish the names of the applicant elected members to the board under the relevant section of the Act.**
- 4. That the interested party which is illegally constituted should be prohibited from transacting any business and it should be dissolved immediately.**
- 5. That the respondent and the interested party should be condemned to pay cost of this application.**

In support of the application, the applicants rely on the statement of facts annexed to the leave application, verifying affidavit of Moses Collins Onono Lorre sworn on 22nd October 2010 and the further affidavit sworn by Moses Collins Onono Lorre on 13th March 2012.

The Applicants are representatives of the Kenya Medical Laboratory Scientific Officers (AKMLSO), whose profession is regulated by the Act. The Respondent is the Minister for Medical Services.

From my reading of the pleadings, it appears that the substance of the Applicant's case is that the Respondent acted in excess of the powers conferred upon him by The Medical Laboratory Technicians and Technologists Board Act No. 10 of 1999 (the Act) in the manner in which he appointed the Interested Party.

It is the Applicant's case that the Respondent contravened the provisions of the Act by appointing the Board Members under section 26 (1) instead of section 6 (1). The Applicants also contend that the respondent contravened the provisions of section 6(1)(c) and (e) of the Act by failing to gazette the name of the registrar to the Board and omitting the name of the medical Laboratory Technologist in charge of vector borne diseases, and that the Respondent contravened the provisions of section 6(1) (a) of the Act by the gazette of the Director of Medical Services in his personal capacity whereas the act provides that the director is a member by virtue of his office. The Applicants are of the view that this amounts to providing for an alternate director, yet the Act has no provision for an alternate Director.

Finally the Applicants take issue of the fact that the Interested Party continued to exercise its functions despite the fact that it was improperly constituted, and wants the actions of the Interested Party quashed.

This application is opposed by the Respondent and the Interested Party. The Respondent relied on the replying affidavit sworn by the Minister of Medical Services Professor Peter Anyang Nyong'o, while the Interested Party relied on the affidavit of Michael AbalaWanga sworn on 7th December 2010.

It is the Respondents case that the appointment published in the Kenya Gazette pursuant to section 26 (1) instead of section 6 (1) was a typographical error which was communicated by the Respondent to the Applicant on 28th September 2010. The Respondent takes issue with the fact that the Applicant failed to disclose to this Court.

The Respondent states that the reason he did not gazette the Registrar and the medical Technologist in charge of the Division of vector bone diseases was because of the fact that these office holders are by operation of the law deemed members of the Interested Party he also claimed that he did not gazette the Applicants had previously been in office for a term of over two years, and during their tenure, they were

implicated in financial impropriety.

The Respondent also insists that he was not by law required to gazette the Registrar and the Medical Technologist in charge of the division of vector borne disease under section 6(1)(c) and 6(1)(e) of the Act as these office holders are by operation of the law deemed members of the board of the Interested Party.

The Respondent also asserts that he complied with section 6(1)(i) of the Act by nominating Sofia Adan, James R.S. Wakungwi, Samwel O. Ogwen, Wilson M. Gichimba and Ali Hassan Noor, the maximum five (5) persons allowed by the act and not six (6) as misrepresented by the applicant since he as the Minister in charge had discretion on whether to appoint technicians or technologist. He is therefore of the view that the Interested Party is properly constituted.

The Interested Party in its affidavit contends that the application before the court is devoid of merit. The Interested Party states that during the previous tenure of the Applicants in the board of the Interested Party, there were several allegations of malpractices by the members of the Board. As a result, the Permanent Secretary in the Ministry of Medical Services appointed a team to look into these allegations. The team engaged the Efficiency Monitoring Unit (EMU) from the Office of the Prime Minister to carry out investigations and make appropriate recommendations to the Ministry of Medical Services. The outcome of the investigations was that the Applicants were adversely mentioned in the EMU report. It was recommended that members of the Board who had previously served for two consecutive terms should not be re-appointed to the Board because of they had served in the Board without implementing any tangible reforms.

The Interested Party avers that the Applicants have approached the court with unclean hands, since they were implicated in the EMU report as being involved in financial impropriety.

The Respondent after receipt of the court order restraining any action with respect to the Board proceeded to make amendments to the anomaly in the Kenya Gazette vide Kenya Gazette Notice Vol. CHII-NO. 118 of 12th November 2010 and Gazette Notice No. 13555 and 13556 of 12th November 2012. The Applicants are of the view that this action was without the leave of the court and therefore amounted to contempt of court. I note that there were orders restraining the Interested Party from performing any of its duties. I also note that the Interested Party did not heed these orders, and that the Applicants moved this court for orders of contempt of court, which were dealt with by Githua J, on 10th November 2011.

Counsel also submitted in court that the Act was enacted purposely to regulate the affairs of the Interested Party and the ex parte applicants are representatives of all the members of the Association of Kenya Medical Laboratory Scientific Officers (AKMLSO) whose profession is regulated by the Act, and that there is therefore the need for proper representation in the Board as provided for by section 6(1) and (2) of the Act. I could not agree more with this submission.

Counsel for the Applicant's submits that the Interested Party is not only improperly constituted, but has also been operating in contempt of court orders. For these reasons, Counsel is of the view that all the actions of the Interested Party be quashed.

From the pleadings before the court, I note that the Respondent later made corrections to the offending Gazette Notice by way of a corrigenda in the Kenya Gazette. The Applicants also take issue with the fact that by the time the amendment was being done, this suit had already been filed and stay orders granted. The Applicants are of the view that the action of the Respondent amounted to contempt of court.

The Respondent is also said to have contravened the provisions of section 6(1)(c) and (e) of the Act by failing to gazette the name of the registrar to the Board and omitting the name of the medical Laboratory Technologist in charge of vector borne diseases respectively. This is unprocedural and illegal as the respondent is applying selective interpretation and application of the law.

Section 6 of the Medical Laboratory Technicians Technologist Act states:

The Board shall consist of

- (a) The Directory of Medical Services;**
 - (b) The head of the National Public Health Laboratories of the Ministry;**
 - (c) The Registrar;**
 - (d) The Director of technical training in the Ministry for the time being responsible for education;**
 - (e) The medical laboratory technologist in charge of the Division of Vector-Borne Diseases;**
 - (f) Three registered laboratory technicians, two of whom shall be in private practice, to be elected by the Association;**
 - (g) Three registered laboratory technologists, two of whom shall be in private practice, elected by the Association.**
 - (h) The executive chairman of the Association;**
 - (i) Not less than three but not more than five laboratory technicians and technologists appointed by the Minister; and**
 - (j) Not more than two other member co-opted by the Board from time to time whose knowledge and experience is deemed necessary for the better performance of its functions.**
- (2) The Minister shall appoint a chairman from among the members of the Board.**
- (3) The Board shall elect a vice-chairman from amongst its members, who shall be a laboratory technician or technologist in private practice.**

The Applicants seek an order of certiorari to quash the decision of the Respondent in the appointment of the Board. The grant of issue of orders of certiorari is set out in Halsbury's Laws of England, 4th Edition Vol.1 at page 202:

"[An order of] Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury".

A reading of the Act shows that the Minister **shall** gazette the names given to him by the association. In this case, the Association elected officials and handed over the names to the Minister, but the Minister declined to gazette them because of financial impropriety. The Respondent communicated the decision to the Secretary General of the Association by way of a letter dated 28th September 2010 (marked as MAW 3 in the affidavit of MichealAbalaWanga, for the Interested Party). In this letter, the Respondent asked the Association to consult and forward alternative names to the Minister for purposes of gazette.

This is clear evidence that the Minister communicated the reason for his decision to the Applicants. They were however not given a chance to defend themselves from the accusations found in the EfficiencyMonitoringUnit report. They were also not given a chance to scrutinize the evidence of the financial misconduct against them. This was a violation of the rule of natural justice that no man shall be condemned unheard.

I must now address myself to the question as to whether the Minister acted unreasonably in electing not to gazette the names given to him by the Association. The reasons given by the Minister in his replying affidavit are that the two persons elected by the Association had been drawing double allowances. The Applicants on the other hand are of the view that there was nothing wrong in the manner with which the allowances were paid to the two persons, since criminal charges were not preferred against the two.

In my opinion, the Applicants did not adequately address the issue of the manner of drawing allowances. Financial misconduct is a serious offence, and anyone accused of this must properly and sufficiently deal with these accusations. After all, the nominees were to serve in a fiduciary capacity, which would require that they be persons of integrity. For this reason, I find that the Minister acted reasonably in electing not to gazette the two people proposed by the Association. The Applicants' motion on this ground therefore fails.

Another issue raised against the Minister is that he applied the law selectively. The Respondent replied that he was not by law required to gazette the Registrar and the Medical Technologist in charge of the division of vector borne diseases. In addressing this issue, I turn to the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya. Section 44 reads as follows:

44. Where the President, a Minister, a public officer or a public body is empowered by a written law to appoint a person to perform any functions or hold any office, he or it may either appoint a person by name or appoint the holder of a named office to perform the functions or hold the office in question.

The Medical Laboratory Technicians and Technologists Act at section 6 is silent on the gazette of the Board. The provisions only deal with appointment. However, the Interpretation and General Provisions Act provides guidance. This Act provides that a Minister, having the power to appoint either a person or an office holder must make the appointment. In this case, the office holders described in Section 6 of the Act are to be members of the Interested Party. The Minister ought to have gazetted either the names or the office holder for all the positions as provided for in Section 6.

For this reason, I find that the Minister did not follow the law and acted in contravention of the law in making the appointments. I therefore hold that the Interested Party is not properly constituted.

The Applicant seeks an order of prohibition to prohibit the Respondent from exceeding the powers conferred on him by the Act with respect to the appointments made to him in constituting the board of the Interested Party. On the issue of orders of prohibition, the Court of Appeal in the case **Kenya National Examination Council versus Republic, civil Appeal No. 266 of 1996**. **“Prohibition looks to the future....An order of prohibition is powerless against a decision which has already been made....”**

In these circumstances, there would be no point in granting the order because the offending decision has already been made.

Having addressed my mind to the issues, it is my decision that the Minister acted outside his mandate and in violation of the law. For these reasons, I allow the Applicants' motion in terms of prayer 1 and 3 to this extent: I grant an order of certiorari quashing the decision of the Respondent on the appointment of the board members as it is contained in Gazette Notices No.11519 and 11520 and grant an order of mandamus compelling the Respondent to reconstitute the board pursuant to section 6 (1) and (2) of the Act. It means that the Minister is at liberty to appoint members as indicated under Section 6 of the Medical Laboratory Technicians and Technologists Board. Each party to bear its own costs, and no individual can claim to have a right to be appointed by the Minister. The appointments to be made and gazetted within the next seven (7) days.

Orders accordingly.

Dated and Delivered at Nairobi this 30th day of July 2012

M. WARSAME
JUDGE