



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 180 of 2004**

**IN THE MATTER OF: AN APPLICATION BY M.A.G. RASOOL FOR ORDERS OF CERTIORARI & MANDAMUS**

**AND**

**IN THE MATTER OF: THE ACCOUNTANTS ACT CHAPTER 531 OF THE REGISTRATION OF ACCOUNTS BOARD DATED 20<sup>TH</sup> NOVEMBER 2003**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**REGISTRATION OF ACCOUNTANTS BOARD.....RESPONDENT**

**EXPARTE ..... MOHAMED A.G. RASOOL**

**RULING**

The applicant in this Judicial Review application dated 9<sup>th</sup> June 2004 is M.A.G. Rasool who has sought for orders of *certiorari* to remove to the High Court and quash the decision of the Registration of Accountants Board dated 20<sup>th</sup> November 2003.

This applicant has also sought for orders of mandamus directed to the Registration of Accountants Board directing the said Registrar to issue the applicant with the authority to practice under **Section 21(1A) of the Accountants’ Act, Cap 531 of the Laws of Kenya**.

The grounds giving rise to the reliefs sought by the applicant are stated in the body of the application and more specifically expounded in the statement in support of the application. Pursuant to the leave granted to the applicant, he filed a supplementary affidavit on 9<sup>th</sup> July 2004 in support of the application. The facts of the matter that have snowballed into the present dispute may be stated as thus:

The appellant states that he was employed as an accountant in the year 1974 by some firm of Accountants on a full time and part time employee until December 1976 when he terminated the employment and commenced his own practice of accountancy on 1<sup>st</sup> March 1977 and henceforth rendered accountancy services to the public within the meaning of **Section 19(1) of the Accountants Act, Cap 531 of the Laws of Kenya**.

The Accountants Act, Cap 531 was enacted in 1978 with the sole object of regulating accountancy services which were hitherto unregulated. One of the regulatory measures that was introduced by the Act was the requirement that all the accountants were to be registered. A Registration of Accountants Board

was created under the Act for that purpose.

Initially only professional accountants were eligible for registration under the Act and pursuant to **Section 18 of the Act**, the applicant applied for registration as an accountant but the Accountants' Board rejected his application. The applicant was promised to wait for a proposed scheme whereunder the Registration Board would be empowered in special circumstances to grant annual license under certain conditions and controls to persons who like the applicant, could prove to the satisfaction of the Board that they had been offering full-time accountancy services to the public by 1<sup>st</sup> July, 1977 (*the date when the Act came into operation*); even though such persons were not professional accountants. That was the Board's decision dated 25<sup>th</sup> June 1979.

According to the applicant, the proposed scheme aforesaid was indeed actualized by the 1985 amendment to the Accountants' Act (*Section 2 thereof*) which entitled the Board *inter alia* that they could;

**1 (A) "Notwithstanding subsection (1), the Registration Board may upon application issue a written authority to practice renewable annually, to a person who satisfies the Board that –**

(a) ...

(b) *He was on the 1<sup>st</sup> July 1977 engaged in performing any of the services specified in Section 19(1).*

The functions specified in **Section 19** include verification of financial transactions, books, accounts or records, and the auditing or verification of financial accounts or related statements. For these functions a person will need to obtain a practicing certificate in order to perform them in a private capacity.

The applicant duly submitted his application for annual practice certificate under **Section 21 (1A) of the Act** and the Board rejected the application, and so were the applicant's several subsequent appeals culminating with the Board's decision dated 20<sup>th</sup> November 2003 which is the subject of the relief's sought herein by the applicant.

The applicant thus complains that the Board's decision to refuse him registration and issuance of an annual practicing certificate is misconceived and illegal. Further the applicant contends that it was not necessary for him to have registered his practice under the Registration of Business Names Act in order to qualify for registration. Finally the applicant contended that the Board misdirected itself on a point of law, exceeded their jurisdiction, acted unfairly and in breach of the rules of natural justice.

This application was opposed by the respondent. On the part of the respondent, the Board relied on a replying affidavit that detailed the circumstances under which the applicant's application for registration was rejected way back in February 1991, more than twelve years ago. They annexed copies of letters dated 21<sup>st</sup> February 1991 and 24<sup>th</sup> February 1992. The appeals made by the applicant to the Board were similarly rejected and this was communicated to the applicant through his Advocate, M/s Chesang & Co. Advocates dated 17<sup>th</sup> July 2003 and 20<sup>th</sup> November 2003.

According to the respondents' the applicant's application was rejected for failure to satisfy the Board that prior to 1<sup>st</sup> July 1977, he was engaged as a sole practitioner. The respondent denied that the applicant's application was rejected purely on the applicant's lack of a registration of Business Certificate which was only part of the evidence that the Board required.

It was the Board's position that the applicant had been practicing without authority even after he was informed to stop representing himself to the public as a practicing accountant way back in 1991.

The respondent argued that the applicant failed to provide the Board with evidence or any sufficient evidence that he was by himself or in partnership with any other person prior to July 1977 practicing as an accountant within the meaning of **Section 19(1) of the Accountants' Act**, and further to satisfy the

conditions set out in the Board's communication to him dated 25<sup>th</sup> June 1979.

The respondent denied that they treated the applicant any differently from any other person but that they were guided by the Board's mandate to ensure that only qualified persons are issued with practicing certificates as public accounts which is in keeping with good public policy.

In considering the remedies sought, I have taken into consideration that the remedies sought by the applicant are discretionary and must be granted only on the basis of evidence and sound legal principles. (See the case of **Weda & 14 others Vs the Council of Legal Education HC Misc. Appl. No. 5 of 1993**). Relevant considerations to bear in mind is that discretionary powers must always be exercised in good faith, for the purpose for which they were granted and within the limits of the Act or other instrument confirming the power. Discretion must also be exercised fairly, not capriciously, and in accordance with proper legal principles and these standards imply that all relevant considerations must be taken into account and that extraneous considerations be disregarded by the person or body exercising the power. (See **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 1 page 70**)

In this case, it is clear that the applicant was invited by the Board according to Section 21 of the Accountants' Act to present before the Board evidence that prior to 1<sup>st</sup> of July 1977 he was in full time practice either by himself and or in partnership practicing as an accountant as envisaged by Section 19(1) of the Accountant Act.

It seems that the material presented to the Board were not satisfactory to enable the Board grant the certificate. The applicant argues that the Board misdirected itself and made an error in law by insisting that the applicant should provide evidence of registration as an accountant. However the respondent argues that the decision of the Board was not based solely on the applicant's lack of registration of Business Certificate which would have been part of the evidence.

As it was held in a similar case involving Judicial Review application in H.C.C. Misc case No. 316 of 2001 Antony John Kibititis Vs Land Registrar, Kilifi District.

*"It is trite law that in Judicial Review applications the court is not concerned with the merits of the decisions but with the decision making process."*

The fundamental issue to address in this matter is, whether the decision of 20<sup>th</sup> November 2003 is ultra vires, or was reached in breach of the rule of natural justice or is such that no person or body of persons properly directing itself or themselves on the relevant facts and law and acting reasonably could have reached such decision or that there is an error of law on the face of the record.

In the present case, the applicant was duly given an opportunity to present the evidence in support of his application. From what he submitted it is clear that prior to 1<sup>st</sup> July 1977 he had been in private practice for a period of four months prior to that he had been in employment. The Board in its discretion found this insufficient evidence and rejected the applicant's application for an annual practicing certificate. The applicant made several appeals which the respondent considered although there is no right of appeal provided for under the law. The applicant also sought the intervention by the office of the Attorney General who advised the Registrar of the Board to review the Board's decision vide a letter dated 17<sup>th</sup> June 1997.

I would term the said letter by the office of the Attorney General as a mere legal opinion. It is my humble view that the Board's mandate which includes the regulation of the profession of accounts should not be interfered with unless there has been a breach of one or several considerations that are stipulated above.

In this case the Board acted within its mandate in considering the applicant's application and rejecting the same. This case does not call for a judicial intervention. I am satisfied that the applicant was given an opportunity to present his case, the case was considered and the decision arrived by the Board was expedient and in discharge of their public duty of regulating and ensuring the protection of public.

Another issue that was raised and perhaps should be dealt with is the merit of the verifying affidavit that was filed herein in support of the Notice of Motion. This verifying affidavit did not state the facts relied upon by the applicant. The facts and the documents in support of the application are stated in the statements. It has long been settled that under the **Order 53 rule 1 (2)** that the facts relied on are required by the rules to be in the verifying affidavit not in the statement. Reference is made of the Court of Appeal decision in the case of **Commissioner General, Kenya Revenue Authority - vs - Elvano Onema Owaki Civil Appeal No. 45 of 2000** where the Court of Appeal held as follows;

*"We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order 53. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:*

*"The application for leave "By a statement" – the facts relied on should be stated in the affidavit .....*

*"The statement should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts verified by an applicant."*

Although the applicant subsequently sought and obtained leave to file a supplementary affidavit. I think this was a fundamental flaw that goes into the merit of the application, as there were no new matters that were introduced by the supplementary affidavit. The verifying affidavit is defective.

Another issue that is of tremendous concern is the fact that the applicant's application was rejected several years ago. The applicant was never issued with a practicing certificate since the enactment of the Act and the regulations thereto that is since February 1991, when his application was formally rejected after the amendment. There is no evidence that the applicant has been authorized to practice since 1978 and yet this application was filed in the year 2004. The time for filing an application is clearly stipulated although one can argue that the applicant had lodged an appeal. What is not clear is what the applicant was doing between 1978 to the year 2004. Was he practicing without a practicing certificate in breach of the law? Due to this unexplained for delay by the applicant, this should also disentitle him of the remedies that are sought.

In the upshot of all the matters analysed above, the application has no merit and is hereby dismissed with costs.

Orders accordingly.

**Dated and delivered on 5<sup>th</sup> May 2006.**

**MARTHA KOOME**

JUDGE