



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Misc Appli 124 of 2005

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS
UNDER SECTIONS 8 AND 9 OF CAP 26 AND ORDER L111 OF THE CIVIL
PROCEDURE RULES LEAVE TO APPLY FOR AN ORDER OF PROHIBITION AND
CETIORARI**

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

**IN THE MATTER OF THE KENYA MEDICAL LABORATORY
TECHNICIANS AND TECHNOLOGISTS BOARD**

**REPUBLIC
APPLICANT**

VERSUS

**THE ATTORNEY-GENERAL FOR AND ON BEHALF OF THE MINISTRY OF
HEALTH...RESPONDENT**

**EX-PARTE APPLICANTBINDI A.
GADHIA**

R U L I N G

By her notice of motion dated 17th June, 2005, Bindi AmitKumar Gadhia the applicant herein seeks orders of Judicial review as follows:-

- (1) An order of prohibition against the Kenya Medical Laboratory technicians and technologists Board from restraining the applicant from working as a Medical laboratory Technologist;
- (2) An order of mandamus against the Kenya Medical laboratory Technicians and technologist Board by itself, directing it to issue a certificate of registration the applicant as a Medical laboratory Technologist; and
- (3) An order of certiorari to remove into this court for purposes of being quashed its report, conclusion

and decision of the Kenya Medical Laboratory technicians and Technologist Board dated 22/2/2005 declaring the applicant unregistrable.

The application is supported by some grounds disclosed on the body of motion, two verifying affidavits of the applicant and a statement of facts. The Attorney-General filed a notice of appointment as acting for the Ministry of Health and thereafter he filed grounds of opposition. M/S Otieno Ragot and Company advocates filed a replying affidavit of Joseph Gachare the Registrar and Chief Executive of the Board sworn on 17th October, 2005 and notice of their appointment as acting for the Kenya Medical Laboratory Technicians and technologists Board Interested Party.

In brief the facts which gave rise to these proceedings are that Bindi A. Gadhia who is a Kenya Citizen had pursued an undergraduate course in Microbiology at the University of Bombay and on 20/12/94 she was awarded a Bachelor of Science degree. Thereafter she took a course in Medical laboratory Technology for which she was awarded a diploma on 5th October, 1996. During 1996 she is shown to have undergone internship and practical experience in the Medical Laboratory Technology and hospital training programme and that she was given documents to support the same. Thereafter the applicant came back to Kenya and from April 1998 to March 2000 she worked as Clinical laboratory Supervisor and Quality Control officer with Walter Reed Project a USA Army malaria Medical Research Unit in Nyanza under the auspices of the Kenya Medical Research Institute (KEMRI). From 1st May, 2000 to 30th June, 2003 the applicant worked with Jalaram Nursing and Maternity Home Limited in Kisumu as a Medical laboratory Technologist. On 26th June, 2001 the applicant applied to the interested party seeking to be registered as a Medical Laboratory Technologist, but the Interested Party asked her for Kshs.2,500 fees for registration which was paid. There does not appear to be any action undertaken by the Interested party from that time until 16th August, 2004 when it again requested the applicant to fill another application form for registration which appears to have been duly done. On 31st March, 2005 the applicant received a letter dated 22nd February, 2005 from the Interested Party in which her application was refused and it was declared that she was not registrable. It was also stated in the letter that it was illegal for the applicant to work as a Medical Laboratory Technologist. It is also indicated on 3/6/2005 she received another letter dated 10/3/2005 in which the Interested Party claimed that the applicant did not meet some criteria for registration and that she should sit for examinations but it appears that until these were commenced she had not received any communication showing the area of her training in which the Interested Party sought to examine her, the venue for the examination or the timetable. The record of this case indicates that the Interested party was established under Act No.10 of 1999 which was gazetted on 28th January, 2000 and for that reason it could not have prescribed the training of the applicant.

When the application came up for hearing Mr. Gadhia for the applicant and Mr. D. Otieno for the interested Party were in court when Mr. Otieno intimated that he had filed a notice of preliminary objection which he intended to argue in limine. However Mr. Gadhia for the applicant strongly objected to it claiming that the said notice was only served upon him that morning and that did not give him sufficient time to respond to it. I directed the advocates to argue together both the application and the preliminary objection.

Mr. Gadhia for the applicant submitted that the Interested Party had unreasonably declined to register the applicant as a Medical Laboratory Technologist and that its decision and/or declaration that the applicant is unregistrable is without basis, arbitrary and capricious and that it is also a breach of natural justice; that unless the decision of the Interested Party is quashed and it be compelled to register the applicant, her profession is in jeopardy; that the applicant is a Kenyan Citizen who is a Bachelor of Science graduate in Microbiology from the University of Bombay and who has undergone training in Medical Laboratory Technology for which she was awarded a diploma; that following her training and internship the applicant has obtained extensive working experience since she came back to Kenya between 1998 and 2003; that in her application of 26th June, 2001 the applicant sought to be registered by the Interested Party as a Medical Laboratory Technologist and that the immediate reaction of Interested party was to call for payment of registration fee and that it did not specify the minimum qualification which had to be attained before being registered; that by its letter of 22nd February, 2005 the Interested Party at long declined to register the applicant claiming without giving reasons that she is not registrable and that it did not give any specific areas of the applicants training in which it directed she should be

examined; that it was evident from the letters dated 10th March, 2005 and 31st March, 2005 and the failure to adequately specify the criteria necessary for registration of one as Medical Laboratory Technologist that the Interested Party did not know what it require and that it was only bent in frustrating the applicant; that the fact that the Interested Party declined to register the applicant without giving reasons amounted to breach of her right to natural justice; that the grounds of opposition filed by the respondent are without merit; that the Interested party had admitted that the applicant had qualified as Medical Laboratory Technologist before the Interested Party was established under Act 10 of 1999 which came into force on 28th January, 2000 and that neither the Act nor the Interested Party had spelt out the qualification and the criteria necessary before one is registered. Mr. Otieno for the Interested Party opposed the application contending that it is defective and bad in law in that the Interested Party which is a body corporate capable of suing and being sued was not made a party in it; that the application is also defective in that no additional verifying affidavit in terms of Order 53 rule 7(1) of CPR was served before the hearing; that the Supplementary affidavit on record was irregularly filed and that it ought to be expunged from the record as it is a nullity; that the order of review relating to the prohibition does not lie as the act complained of had been made; that the order of Mandamus cannot also lie as the applicant has not specified the duty the Interested party failed to carry out; that the court has no jurisdiction to grant an order of certiorari so as to show public bodies such as the Interested Party how to go about their work; that the applicant has an alternative remedy in that she could sit, an examination as other people in similar situation have done; that it had been shown that the public interest is superior than that of an individual; that this application for judicial review is incompetent as there is no basis for it, and that the ground of ultra virus which was not pleaded should not be urged; that the claim that the replying affidavit is incompetent due to the fact that it was filed by the advocates who were not on record is not correct as Civil Procedure Rules not apply to proceedings under Order 53 of C.P.R.

The first objection to this application is that it is defective and bad in law in that the Interested Party which by section 3(2) of the Act No.10 of 1999 is a body corporate capable of suing and being sued was not named in the notice of motion as a party. Reliance in support of this contention was placed in cases of FARMERS BUS SERVICES LIMITED VRS TRANSPORT LICENSING APPEAL TRIBUNAL (1957) E.A. 779 MWAU VRS PRINCIPAL IMMIGRATION OFFICER (1985) KLR 72 and KISUMU HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO.87 OF 2003 – KENYA SUGARCANE GROWERS ASSOCIATION VRS MINISTER FOR AGRICULTURE. The notice of motion names the Attorney-General who acts for the Ministry of Health as the respondent and goes ahead in its prayers to clearly indicate that the prayers were sought against the Interested Party. The Interested party was not misled and the Attorney-General could have appeared for it but it chose to be represented by different firm of advocates. In my view the fact that the Interested Party was not specifically named as the respondent in the notice of motion is not fatal to the application. In any case the Interested Party having filed a replying affidavit and taken part in proceedings has not in any way been prejudiced. I therefore find that this ground is without merit.

The second ground is that the application is also defective in that it did not comply with Order 53 rule 7(1) of CPR, which provides that where an application seeks an order of certiorari a copy of document to be quashed verified by an affidavit must be lodged with its registrar before the hearing of the notice of motion. I also do not find this ground to be valid as the applicant had sought leave to file a supplementary affidavit in which a copy of the letter of 22nd February, 2004 which is sought to be quashed annexed and verified as provided was lodged. I note that there is an objection to the said supplementary affidavit which was filed on 17th June, 2005 pursuant to a grant of leave on 15th June, 2005. As far as I know that leave was granted before the notice of motion was filed. There does not appear to be any provision under Order 53 against filing of such a document. The authority of Kenya Sugarcane Growers Association cited is distinguishable from this case and I find that this ground is also without merit. The applicant raised an objection to replying affidavit contending that it was defective as it was not filed by advocates on record. It was claimed on behalf of the Interested Party that the Civil procedure Rules do not apply to the proceedings under Order 53 but section 34 and 35 of the Advocates Act direct that such documents should not be accepted by those who register documents However this replying affidavit was irregularly accepted by the High Court registry and it is on record. There was no prayer for its expunction of it from the record of this case

Turning to the complain that a judicial review in the nature of an order of prohibition does not lie in this case due to the fact that the decision made on 22nd February, 2005 has been made and it cannot be prohibited is correct observation. It is settled that an order of prohibition applies to the future acts and not past ones. However, in this case the applicant claims that the interested Party seeks to stop her from working as a Medical Laboratory Technologist which in my view is continuing process and prayer for an order of prohibition is relevant prayer.

On the issue of the prayer for an order of mandamus it was contended that the applicant should have pinpointed the duty which the Interested Party failed to do before it can be compelled to do it. The facts of this case as stated above indicate that the applicant had applied to be registered as a medical laboratory technologist in June, 2001 but in the year 2004 she was issued with fresh application forms. The Interested Party does not appear all along to have been in doubt as to what the applicant has sought from it. The two letters it issued in March 2005 the Interested Party confirmed that it was fully aware that the applicant had sought to be registered under Act No.10 of 1999 and that the Interested Party could not have claimed that she did not “meet certain criteria for registration” if the Interested Party was in doubt as what she sought. The objection is therefore without any basis. Act No.10 of 1999 has clearly placed the responsibility of registering the Medical Technicians and Technologists its duty. The objection is therefore without basis.

On the prayer for an order of certiorari I do not think the applicant intends that this court should show the Interested Party how to carry out its duties under the law. As indicated above the interested Party was established under section 3 of Act 10 of 1999. Section 19 of that Act stipulates that it is an offence to work as laboratory technician or technologist unless such a person is registered. The applicant has amply demonstrated that she was qualified as laboratory technologist and had worked in this country for more than 5 years before seeking registration. The Interested Party is charged with the responsibility of registering laboratory technician and technologist. Where it refuses to register an applicant the Interested Party has to apply rules of natural justice as its function is quasi judicial and I agree with AB Shah J (as he then was) said in HIGH COURT MISC. CIVIL APPLICATION NO.1122 OF 1994 – In the matter of application by Rita Biwott for order of mandamus The conduct of the Interested party when it received the applicant’s application of June 2001 for registration and then it thereafter never took any action for about three years until August, 2004 when it sent fresh application forms discloses a body which is confused and/or it does not have any regard for its duties. That long delay and the fact that the applicant was not granted a hearing before being refused registration and without being denied any valid grounds for the refusal can only be termed arbitrary and capricious. The rules of natural justice were totally ignored. Even the claim that she should have sat an examination there was no clear indications as to what subjects she was to be examined on.

In the result I would grant the orders of Judicial review as follows:-

- (1) An order of prohibition to restrain the Interested Party from preventing the applicant from working as a medical laboratory technologist;
- (2) An order of mandamus directed to the Interested Party to issue a certificate of registration of the applicant as a Medical laboratory Technologist;
- (3) An order of certiorari to remove into this court for purposes of being quashed the decision of the Interested Party conveyed in a letter of 22/2/2005 in which it declared the applicant is unregistrable.

The applicant will have the costs of this application against the Interested Party.

DATED AND DELIVERED THIS 17TH DAY OF NOVEMBER, 2005.

B. K. TANUI

J U D G E

In the presence of: Mr. Gadhia for applicant Mr. D. Otieno for Interested Party.

B. K. TANUI

J U D G E

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