



**Chiaji v Pharmacy and Poisons Board (Judicial Review Application E205 of 2024)  
[2025] KEHC 3406 (KLR) (Judicial Review) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3406 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E205 OF 2024  
RE ABURILI, J  
MARCH 19, 2025**

**BETWEEN**

**WYCLIFF OCHIENG CHIAJI ..... APPLICANT**

**AND**

**THE PHARMACY AND POISONS BOARD ..... RESPONDENT**

**JUDGMENT**

1. The applicant Wycliff Ochieng Chiaji was granted leave to file his substantive notice of motion on 16<sup>th</sup> September 2024 and it was that notice of motion that is before this court for determination. The notice of motion is dated 13<sup>th</sup> September 2024 and was filed on 19<sup>th</sup> September 2024.
2. The application seeks the following orders:
  - a. An order of Certiorari to remove into this Honourable Court and quash the proceedings and the decision of the Respondent issued on the 6<sup>th</sup> September 2024 to suspend Applicant's license bearing Enrolment Number 6745 for two years.
  - b. An order of Prohibition directed to the Respondent against themselves, their agents, workers, employees, servants and other officials or agencies barring them from suspending, cancelling and/or revoking License bearing Enrolment Number 6745 issued to the Ex parte Applicant.
  - c. The Honourable Court be pleased to give further orders and directions as it may deem fit and just to grant.
  - d. The costs of this application be provided for.
3. The application is supported by a statutory statement dated 13<sup>th</sup> September 2024 and an affidavit sworn on the even date by the applicant.



4. The applicant's case is that he received a Disciplinary Inquiry dated 18<sup>th</sup> July 2024 preferring three charges against him read as follows:
  - i. Permitting the carrying out business of pharmacist in unregistered premises contrary to section 23(1) of the [Pharmacy and Poisons Act](#) Cap 244 Laws of Kenya.
  - ii. Permitting unregistered person to carry on, on your behalf, the business of pharmacist contrary to section 19(1) of the [Pharmacy and Poisons Act](#) Cap 244 Laws of Kenya.
  - iii. Permitting an unauthorized person to handle and to be in possession of part I poisons in your premises contrary to the provisions of section 26(1)(b) of the [Pharmacy and Poisons Act](#) Cap 244 Laws of Kenya.
5. According to the applicant, the particulars of the said three charges read that on or about 30<sup>th</sup> January 2024, the Board's authorized officer while conducting routine inspection established that the applicant, being a pharmaceutical technologist bearing Enrolment Number 6745 and a proprietor of Wickymed Pharmacy (PPB/W/7295) situated in Kaloleni, caused, allowed or otherwise permitted Mr. Elias Ouma his agent and/or employee to operate the said Wickymed Pharmacy (PPB/W/7295) without a registered license.
6. In response to these charges, the applicant vide a letter dated 25<sup>th</sup> July 2024 distanced himself from the said Mr. Elias Ouma and the said Wickymed Pharmacy (PPB/W/7295) situated in Kaloleni. He indicated to the respondent that he neither knew any person by the name Mr. Elias Ouma, nor had his business by the name Wickymed Pharmacy (PPB/W/7295) ever been operated in Kaloleni as alleged.
7. On the 6<sup>th</sup> August 2024, the applicant claims to have presented himself before the Pharmacy and Poisons Board for a disciplinary hearing. However, it was his case that he was never accorded a fair hearing which would include the opportunity to defend himself and the opportunity to interrogate the evidence relied on by the Respondent to incriminate him.
8. It was also the applicant's case that his letter dated 25<sup>th</sup> July 2024 was never taken into consideration by the respondent which according to him, is a clear indication that the respondent had a pre-determined decision to incriminate him even before commencement of the hearing.
9. The applicant also urged that the respondent in its proceedings failed to take into account that the Registrar of Companies had ceased the operations of Wickymed Pharmacy (PPB/W/7295) as from 3<sup>rd</sup> May 2019 10:13a.m.
10. The applicant further lamented that it was unreasonable and irrational for the respondent to base its decision on the demeanor of the applicant and not on facts and the stipulated law. Further, that the respondent acted in breach of the rule of fair hearing as it failed and/or declined to accord the applicant the opportunity to examine information and material evidence that was relied on in making the decision to suspend his license for a period of 2 years.

#### The Respondent's response

11. The respondent filed a replying affidavit sworn on 11<sup>th</sup> October 2024 by Mr. Kibet Kisorio who introduced himself as the Head of Legal Services at the Pharmacy and Poisons Board.
12. The respondent's defence is that it was established under Section 3 of the [Pharmacy and Poisons Act](#) Cap 244, Laws of Kenya, and is empowered by Section 3B(3)(j) to regulate the professional conduct of pharmacists and pharmaceutical technologists, including taking disciplinary actions to uphold standards and ethics.



13. According to the respondent, Section 12A of the *Pharmacy and Poisons Act* allows the creation of the Enquiries and Disciplinary Committee (EDC), which investigates professional misconduct. It was also the respondent's case that It was the sole regulatory body responsible for the pharmacy profession under Section 60(2)(f) of the *Health Act*. The respondent also relied on Section 12A(2) of the *Pharmacy and Poisons Act* which is said to outline potential sanctions for misconduct, such as admonishment, fines, suspension, or removal from the register.
14. The respondent's contention was that its authority is further supported by the Pharmacy and Poisons (Conduct of Inquiries) Rules, which detail the procedures for initiating complaints and conducting inquiries, with Rule 3 permitting the respondent to institute inquiries on its own initiative.
15. The respondent argued that a pharmacy business in Kenya must have an approved premises, and all individuals holding financial interest in the business must be registered pharmacists or pharmaceutical technologists.
16. Further, that during a routine inspection on 31<sup>st</sup> January, 2024, it was discovered that the applicant allowed Mr. Elias Ouma, who was unqualified, to supervise a pharmacy in Kaloleni, Nairobi, despite knowing that he was unauthorized to handle such poisons. Further, that the premises where the pharmacy was being operated was also not registered.
17. It was also contended that the applicant's pharmacy, Wickymed Pharmacy (PPB/W/7295), was registered in Embakasi but operated under an unregistered location in Kaloleni. That Mr. Elias Ouma was arrested for his involvement at the unregistered premises and was charged with possessing poisons unlawfully, which case is still pending in court.
18. According to the respondent, the applicant was also found to be assisting unqualified individuals to open unregistered pharmacy premises, contributing to the rise of unprofessional practices and that he had failed to renew the registration for his premises since 2018.
19. The respondent contended that it had sufficient evidence and that it sought to exercise its regulatory authority as spelt out in sections 3,12 and 12A of the *Pharmacy and Poisons Act*; Section 60 (2) (f) *Health Act* and the Pharmacy and Poisons (Conduct of Inquiries) Rules. To this end, the respondent sought to have the applicant answer to the charges reproduced outlined above in this judgment.
20. According to the respondent, on 18<sup>th</sup> July 2024, the applicant was formally summoned and notified of the charges against him, in compliance with Rule 6 of the Pharmacy and Poisons (Conduct of Inquiries) Rules. That he was instructed to appear for disciplinary proceedings on 6<sup>th</sup> August 2024, and to provide any defense which he would wish to offer failure to which, the respondent would consider and deal with the charge in his absence.
21. The respondent contends that during the hearing, the applicant stated that he worked at Aga Khan Teaching and Referral Hospital and that he had applied for a variation of his license after which he had closed his pharmacy in Donholm to pursue the said job.
22. It was the respondent's case that when questioned regarding superintending of premises under his professional license, the applicant denied any knowledge not until the online footprints evidenced by "Annexure GKK2", were projected when he beat a hasty retreat and claimed that his former pharmacy in Donholm was now a bar and also that Wickymed Pharmacy had opened in 2018 and closed in 2019, besides denying that he knew Mr. Elias Ouma, the individual arrested at the said premises.



23. The respondent claims that it reviewed the applicant's written statement denying the charges, dated 25<sup>th</sup> July 2024, in its ruling of 6<sup>th</sup> September 2024 and it found that the applicant's defense was baseless, citing evidence that contradicted his statements.
24. The respondent affirms that the applicant was provided with the opportunity to cross-examine and test the evidence against him, in compliance with his constitutional rights to a fair hearing and fair administrative action. Further, that the applicant confirms receiving the summons, charges, and attending the hearing proceedings at paragraphs 3-7 of his supporting affidavit.
25. The respondent relied on the Pharmacy and Poisons Guidelines for Registration and Licensing of Premises, 2023, which outline clear procedures for notifying the cessation of a pharmacy business. According to the respondent, these guidelines are publicly available on its website and are known to all professionals in the pharmacy field, including the applicant.
26. It was the respondent's case that although the applicant claimed to have ceased operations, no evidence was presented to show that he followed the necessary procedures to inform the respondent as required under clause 34.0 of the guidelines.
27. According to the respondent, the closure must be reported in writing to the respondent within 14 days, along with proof of a cessation certificate from the Registrar of Companies or the Attorney General's office. After which, the respondent will then send an inspector to verify that the pharmacy is indeed closed, and the inspection report is uploaded to the online system.
28. The respondent emphasized that notifying the cessation of business is a crucial regulatory measure. Without which, unregistered or ceased pharmacies could reopen without oversight, fostering unqualified practitioners (quacks) that pose a risk to public health and therefore the applicant's failure to comply with this procedure is seen as a serious breach of professional standards.
29. It was the respondent's case that despite the applicant's oral and written defense, it found his explanations unconvincing. The applicant is also said to have lacked enthusiasm in defending himself and his evasiveness when confronted with evidence from the online portal led the Board to question his credibility.
30. The respondent also states that its assessment of the applicant's testimony was based on the inconsistencies in the evidence and the applicant's demeanor, which raised doubts about his credibility. Further, that the Enquiries and Disciplinary Committee, a quasi-judicial body, was entitled to observe his demeanor and base its judgment on that, which was not done in bad faith.
31. It was also the respondent's contention that its decision to suspend the applicant for two years was legal, reasonable, and procedurally fair and pursuant to the powers granted under section 12A(2) of the *Pharmacy and Poisons Act*. Further, that the applicant has not shown any evidence of illegality, irrationality, or procedural impropriety against it.

### **The Applicant's Further Affidavit**

32. The applicant in response to the respondent's replying affidavit filed a further affidavit sworn on 28<sup>th</sup> October 2024 in which he deposed that the responsibility of the Enquiries & Disciplinary Committee as per Section 12A of the *Pharmacy and Poisons Act* is to enquire into matters arising under section 12 of the *Pharmacy and Poisons Act* and make recommendations to the Board and that it was the Board if satisfied with the recommendations that was to issue suspension of the applicant's license.
33. According to the applicant, the sanctions/ penalties issued in the ruling dated 5<sup>th</sup> September 2024 are unlawful and illegal as the Enquiries and Disciplinary Committee lacked legal capacity to issue them.



34. The applicant urged that contrary to what took place during his disciplinary hearing, members of the Pharmacy and Poisons Board ought not to be the same persons forming Enquiries and Disciplinary Committee as this would defeat the purpose of Section 12A(2) of the *Pharmacy and Poisons Act* whereby members of Enquiries and Disciplinary Committee are expected by the law to issue their recommendations to the Pharmacy and Poisons Board.
35. The applicant also argued that he does not know anyone by the name Mr. Elias Ouma, and that he had never allowed or otherwise permitted him to superintend a pharmaceutical premises in Kaloleni. It was also his case that although the Chief Executive Officer, Dr. Fred Siyoi was present during the hearing, no minutes as per Section 4 (5) of the *Pharmacy and Poisons Act* Cap 244 have been produced as prima facie evidence to corroborate the respondent's allegations that the Applicant was accorded an opportunity to be heard.
36. The applicant's case is that his right under Article 47(1)(2) of *the Constitution* have been violated as he was not given an opportunity to cross-examine witnesses and examine information and material evidence that was relied on in making the decision to suspend his license for a period of 2 years.
37. He also urged that annexure 'GKK1' unequivocally proves his position that Wickymed Pharmacy was registered under pharmaceutical technologist Wycliffe O. Chiaji with enrolment number 6745 and that its operation at Embakasi Town, Spine Road Street Premises N. PPB/W/7295, Ground Suite Floor Suite 3 Corner House Building 209/12/522 and not Kaloleni as alleged by the respondent.
38. According to the applicant, the Enquiries & Disciplinary Committee is a quasi-judicial body and that the standard of determining the allegation before the Disciplinary Committee is that of a balance of probability, which burden is upon the one alleging.

### **Submissions**

39. The application was canvassed by way of written submissions. The applicant's submissions are dated 31<sup>st</sup> October 2024, asserting that the legislature had envisaged an independent Enquiries and Disciplinary Committee that was to be completely separate from the Board and that it was a clear demonstration of conflict of interest, whereby recommendations by the Enquiries and Disciplinary Committee (which is entirely constituted by members of the Board), are to be received by the Board itself.
40. The applicant also submitted that looking at how the Enquiries and Disciplinary Committee was constituted and a look at what section 4(4) of the Pharmacy and Poisons Board Act provides on quorum of the Board, it would only be fair to conclude that this was the Pharmacy and Poisons Board masquerading as Enquiry and Disciplinary committee. It was also his submissions that, the Board became a judge in its own proceedings and this is a violation of the cardinal principle of law that no man should be a judge in his own cause.
41. Reliance was placed on the Supreme Court of the United States case of Williams v. Pennsylvania, 136 S. Ct. 1899, 1910 (2016) where the court observed that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case".
42. Further reliance was also placed on the case of Re Murchison, 349 U.S. 133, 136 (1955) where the court also observed that "no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome. Interest here includes a situation where one desires or is keen on obtaining a given result".



43. According to the applicant, an inquiry to be conducted by the Enquiries Disciplinary Committee is with regard to persons mentioned under Section 12 (1) (a), (b) and (c) of the *Pharmacy and Poisons Act*, and that these persons so mentioned must have at that time been convicted of criminal offence and have been found guilty of professional misconduct.
44. He further relied on the case of *Githu Muigai & another v Law Society of Kenya & another* [2015] eKLR where the court observed that when the law clearly defines the jurisdiction of a body or authority, that body or authority must operate within those boundaries and should not extend its jurisdiction through administrative tactics or creativity.
45. The applicant reiterated that the decision by the Enquiry and Disciplinary Committee is null and void for the reasons stated above and also for the reason that the offenses that the applicant has been charged with are criminal in nature with a corresponding fine between Kenya Shillings thirty thousand up to one million and an alternative sentence of 3years imprisonment. It was submitted that the standard of these kind of charges contrary to the findings of the Enquiry and Disciplinary Committee can only be beyond any reasonable doubt.
46. On the right to be heard, the applicant relied on the case of *Communication Commission of Kenya and 5 others vs Royal Media Services and 5 others* [2014] eKLR where the court reiterated the importance of observing a party's right to be heard. The case of *Emmanuel Nyiro Chai vs. National Police Commission & 3 Others* [2017] eKLR is also relied on where the court observed that any decision made in violation of natural justice is nullity.
47. The applicant also relied on the case of *Ernst & Young LLP v Capital Markets Authority & Another* [2017] eKLR where the court observed that natural justice, a core concept in justice systems, ensures fairness in decision-making, protecting individuals' rights and liberties. It involves two key principles: *Audi alteram partem*, which grants the right to a fair hearing, and *Nemo iudex in causa sua debet esse*, which mandates impartiality in decisions. These principles serve as essential safeguards against biased or unjust actions.

### **The Respondent's submissions**

48. The respondent and interested parties filed written submissions dated 12<sup>th</sup> November 2024. The respondent's submission is that contrary to the arguments advanced by the applicant, the Board and the Enquiries and Disciplinary Committee are not separate entities. It was submitted that the Enquiries and Disciplinary Committee is a subset of the Board through which it discharges its regulatory mandate over professionals in the profession of pharmacy and based on this, its membership is drawn from the board.
49. The respondent submitted that the provisions of the Pharmacy and Poisons (Conduct of Inquiries) Rules stipulate that the inquiries are actually conducted by the Board sitting as the Committee. That Rule 2 of the Rules defines the chairman referred to under the Rules as the chairman of the Board. According to the respondent, nowhere in the law, is the Board permitted to delegate its regulatory functions to any other independent professional or regulatory bodies.
50. It was submitted that section 12A of the Act merely empowers the respondent to establish the Enquiries and Disciplinary Committee but it does not specifically provide that membership of the EDC must be drawn or co-opted from outside the Board.
51. Further, that the Committee is not a local tribunal whose membership is constituted independently but is merely an administrative and advisory tribunal, whose mandate is to advise and recommend



- on what disciplinary measure is supposed to be undertaken by the respondent, to pharmacists and pharmaceutical technologists, found guilty of professional misconduct.
52. The respondent also submitted that owing to its regulatory mandate, it requires an administrative tribunal, like the Enquiries and Disciplinary Committee, to be inquirer/investigator, jury and enforcer and that if these roles were to be reposed on different entities, the pharmacy profession would never be fully and efficiently regulated.
  53. To further support this position, reliance is placed in the Supreme Court case of *Popat & 7 others v Capital Markets Authority* (Petition 29 of 2019) [2020] KESC 3 (KLR) where the court observed that administrative tribunals are created for a variety of reasons and they respond to a variety of needs and as such there will be repeated dealings in both administrative and adjudicative capacities and thus the legislatures more often than not allow for an overlap of functions.
  54. The respondent also relied on the Supreme Court case of *Independent Electoral and Boundaries Commission v. Hon. Sabina Wanjiru Chege* SC Petition No. 23 (E026) of 2022 where the court observed that the IEBC could conduct investigations, summon witnesses, hear complaints and make determinations as it was authorized by statute and as such the same did not foul the principle of natural justice, *nemo iudex in causa sua* (no man should be a judge in his own cause). It was submitted that Rule 3 of the Act empowers the respondent to on its own motion, institute an inquiry into the conduct of professionals in the pharmacy profession.
  55. It was submitted that as the issues before the Committee were not predicated upon the provisions of Section 12 of the *Pharmacy and Poisons Act* and that there was no need for a criminal conviction so as to enable the EDC exercise its jurisdiction. The respondent also submitted that in any event, the requirement for conviction, as a precursor to a disciplinary action, would have been impossible in the instant case since It was not the applicant who was arrested at the premises.
  56. The respondent's submission is that its swift action to exercise its regulatory mandate were geared towards curing a mischief wherein professionals, in the pharmacy profession, would deliberately permit unqualified persons (non-professionals) to run their premises, knowing, very well, that they (professionals) will not be subjected to criminal proceedings, thereby escaping disciplinary hearings.
  57. The respondent further urged that the phrase "any of the terms or conditions of practice", in Section 12A, clearly indicates that its regulatory mandate is covered by the entire gamut of laws, regulations, rules and/or guidelines governing the profession of pharmacy and therefore it would be wrong to limit the jurisdiction of the Committee to the provisions of Section 12 of the *Pharmacy and Poisons Act*.
  58. It was also urged that the respondent's mandate as provided under Section 60 (2) (f) of the *Health Act* and Section 3B(3)(j) of the *Pharmacy and Poisons Act* to regulate the professional conduct of pharmacists and pharmaceutical technologists; and take such disciplinary measures as may be appropriate to maintain proper professional standards and ethics is exercised through the Committee.
  59. The respondent also submitted that the Pharmacy and Poisons (Conduct of Inquiries) Rules, which rules outline the procedure for initiating complaints, issue of summons, hearing and determination of any complaint(s) against professionals in the pharmacy profession do not restrict the jurisdiction of Enquiries and Disciplinary Committee.
  60. The respondent further urged that professional misconduct occurs when a professional breaches the laws governing a profession and some of these laws are criminal in nature and therefore, a professional may be subjected to disciplinary proceedings and criminal proceedings concurrently. It was therefore based on the above, that disciplinary proceedings can be commenced against a professional based on offences which are criminal in nature, however, the disciplinary committee cannot mete out sanctions



which are a preserve of the criminal court but may mete out those that are provided for under section 12A(2) of the *Pharmacy and Poisons Act* .

61. It was also the respondent's further submission that during the hearing proceedings it duly complied with the right to fair hearing and right to fair administrative action, guaranteed under Articles 50 and 47 of *the constitution*.
62. The respondent submitted that as was held by the court in the case of Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR the applicant has to prove that the decision, or act complained of, is tainted with illegality, irrationality and procedural impropriety. It was also urged that judicial review restricts itself to the process of making the decision; and does not concern itself with the merits of the decision being challenged and in support of this position reliance is placed in the case of Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR where the court reiterated as much.
63. The respondent relied on the case of Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR, where the court is said to have observed that where the applicant fails to establish grounds for judicial review namely illegality, unreasonableness, irrationality, abuse of power and frustrating legislative purpose, such application has no merit and must suffer only one fate, dismissal.

### **Analysis and Determination**

64. I have considered the application as argued, for and against. The issues for determination are:
  - a. Whether the Enquiries and Disciplinary Committee had jurisdiction to determine EDC/006.2024?
  - b. Whether the composition of the Enquiries and Disciplinary Committee rendered the proceedings unfair and unconstitutional
  - c. Whether the applicant's right to a fair hearing was violated
  - d. Whether the decision to suspend the applicant's license should be quashed.

### **Whether the Enquiries and Disciplinary Committee had jurisdiction to determine EDC/006.2024?**

65. The applicant challenges the Enquiries and Disciplinary Committee's jurisdiction to hear and determine his inquiry on grounds that he is not among the persons mentioned under Section 12 (1) (a), (b) and (c) of the *Pharmacy and Poisons Act* under whose jurisdiction the Enquiries and Disciplinary Committee's jurisdiction falls. He argued that the persons so mentioned have at any time been convicted of any criminal offence and have been found guilty of professional misconduct.
66. He relied on the case of Githu Mu'igai & another v Law Society of Kenya & another [2015] eKLR where the court observed that when the law clearly defines the jurisdiction of a body or authority, that body or authority must operate within those boundaries and should not extend its jurisdiction through administrative tactics or creativity.
67. The respondent in response argued that as the issues before the Committee were not predicated upon the provisions of Section 12 of the *Pharmacy and Poisons Act*, there was no need for a criminal conviction so as to enable the EDC exercise its jurisdiction. The respondent also submitted that in any event, the requirement for conviction, as a precursor to a disciplinary action, would have been impossible in the instant case since It was not the applicant who was arrested at the premises.



68. It was also the respondent's case that the phrase "any of the terms or conditions of practice", in Section 12A of the Act clearly indicates that its regulatory mandate is covered by the entire gamut of laws, regulations, rules and/or guidelines governing the profession of pharmacy and therefore it would be wrong to limit the jurisdiction of the Committee to the provisions of Section 12 of the *Pharmacy and Poisons Act*.
69. The respondent also submitted that the Pharmacy and Poisons (Conduct of Inquiries) Rules, which rules outline the procedure for initiating complaints, issue of summons, hearing and determination of any complaint(s) against professionals in the pharmacy profession do not restrict the jurisdiction of Enquiries and Disciplinary Committee.
70. Jurisdiction is a fundamental issue that goes to the very core of any legal proceeding. Consequently, should this Court determine that the Enquiry and Disciplinary Committee lacked the requisite jurisdiction to entertain and adjudicate upon the applicant's matter, it follows that all other issues arising therein must necessarily collapse and cannot be the subject of judicial consideration.
71. It is an established principle of law that any entity acting in excess of its jurisdiction must forthwith cease its proceedings, as any decision rendered without lawful authority is null and void ab initio. This principle was reaffirmed in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR*, wherein the court categorically held that jurisdiction is everything, and without it, a court or tribunal has no authority to act. The Court of Appeal held thus:

"By jurisdiction, is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit was imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it had jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

72. The Court of Appeal further held that:

"Jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it was without jurisdiction."

73. The Supreme Court in the case of *In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR)* held as follows:

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1*, which bears the following passage (Nyarangi, JA at p.14):



“I think that it was reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”
74. This Court in the case of Amazon Transporters Limited v Public Procurement Administrative Review Board & 2 others; Jennygo Enterprises Limited (Interested Party) [2025] KEHC 2457 (KLR) observed as follows;
25. This is because jurisdiction of the court is the first thing that a court of law must first be certain that it has, to entertain any claim before it. Jurisdiction is everything without which a court of law acts in vain. Jurisdiction is conferred by *the Constitution* or statute. Parties cannot clothe a court of law with jurisdiction, even by consent. Neither can a court of law arrogate itself of the jurisdiction that it does not have or possess and purport to entertain a claim which the statute considers to be stale or statute barred. [emphasis added]
75. Finally, in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited [2012] eKLR the Supreme Court stated as follows:
- “A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
76. Having established that jurisdiction is everything, I now proceed to analyze what the law provides in regard to the jurisdiction of the Enquiries and Disciplinary Committee, (The committee). The Committee is established under Section 12A of the *Pharmacy and Poisons Act* which provides:
- “12A. Enquiries and Disciplinary Committee
1. The Board shall establish an Enquiries and Disciplinary Committee which shall enquire into any matter arising under section 12 of this Act.
  2. Where on the recommendations of the Enquiries and Disciplinary Committee the Board is satisfied that a pharmacist or pharmaceutical technologist is in breach of any of the terms or conditions of practice prescribed by the Board, the Board may-
    - a. issue the pharmacist or pharmaceutical technologist with a letter of admonishment;
    - b. impose a fine as may be prescribed in regulations;
    - c. suspend the registration or enrolment of the pharmacist or pharmaceutical technologist for a specified period not exceeding five years; or



d. remove the name of the of the pharmacist or pharmaceutical technologist from the Register as may be appropriate.

(3) The Board may order a pharmacist or pharmaceutical technologist to reimburse costs and expenses incurred in connection with a disciplinary hearing and such costs shall be a civil debt recoverable summarily by the Board.  
[emphasis added]

77. The above Section 12A of the Act establishes the Enquiries and Disciplinary Committee (EDC) mandated to investigate matters arising under Section 12 of the Act and recommend action to be taken by the Board. On receiving of the recommendations of the EDC, if the Board is satisfied that a pharmacist or pharmaceutical technologist has violated any terms or conditions of practice, the Board may take disciplinary measures, including issuing a letter of admonishment, imposing a fine as prescribed by regulations, suspending registration or enrollment for up to five years or removing the professional's name from the Register.
78. The Authority may also order a pharmacist or pharmaceutical technologist to reimburse the costs incurred during disciplinary hearings. Such costs are recoverable as a civil debt, enforceable summarily by the Board.
79. Having understood the above provisions, it is equally important to reproduce section 12 of the Act which sets out the scope of matters that the Committee can handle. The section provides:

“ 12. Professional misconduct

(1) Where—

- a. a person applying to have his name registered; or
- b. a registered pharmacist or any person employed by him in the carrying on of his business; or
- c. a person whose name has been deleted from the register or any person employed by him as aforesaid, has at any time been convicted, whether within or outside Kenya, of any criminal offence or been guilty of any misconduct (being in a case falling within paragraph (c) of this subsection a conviction or misconduct which took place either before or after the deletion of the name) which in the opinion of the Board renders the convicted or guilty person unfit to have his name on the register, the Board may, after inquiring into the matter—
  - i. in a case falling within paragraph (a) of this subsection, direct that the applicant's name shall not be registered, or shall not be registered until the Board otherwise directs;
  - ii. in a case falling within paragraph (b) of this subsection, direct the registrar



to delete the name of the registered pharmacist from the register;

- iii. in a case falling within paragraph (c) of this subsection, direct that the name removed from the register shall not be restored thereto, or shall not be restored thereto until the Board otherwise directs, and where the Board directs that a name shall be deleted from the register or shall not be restored until the Board otherwise directs be registered or restored to the register, the Board may also direct that no application to the registrar in respect of its registration, or as the case may be its restoration to the register, shall be entertained thereafter until the expiration of such period as may be specified in the direction or until the fulfilment of such conditions as may be so specified.

2. Where the name of any person has been deleted from the register in pursuance of a direction under paragraph (ii) of subsection (1) of this section, the Board may, either of its own motion or on the application of that person, direct the registrar to restore the name to the register, either without fee or on the payment to the registrar of such fee as may be prescribed in the behalf, not exceeding the fee prescribed for registration in pursuance of section 9.

- (3) It shall be the duty of the registrar—
  - (a) to give notice of any direction under this section to the person to whom the direction relates;
  - (b) to give notice of any refusal of an application made under the last foregoing subsection to the applicant, and any such notice shall be sent by registered letter which, in the case of a registered pharmacist, shall be addressed to his address on the register.

80. Section 12 of the *Pharmacy and Poisons Act* provides a strict framework under which the Committee may exercise jurisdiction. The section states that an inquiry by the Committee is limited to the following persons:

- i. Persons convicted of a criminal offence; or
- ii. Found guilty of professional misconduct.



81. The wording of Section 12 is clear and unambiguous in that disciplinary proceedings should be predicated upon a prior criminal conviction or a finding of guilt of professional misconduct.
82. In the applicant's case, there is no evidence that the applicant had been convicted of any offence or that he had been found guilty of professional misconduct before the Committee assumed jurisdiction over the matter.
83. In its defense, the respondent has argued that the phrase "any of the terms or conditions of practice", in Section 12A, clearly indicates that its regulatory mandate is covered by the entire gamut of laws, regulations, rules and/or guidelines governing the profession of pharmacy and therefore it would be wrong to limit the jurisdiction of the Committee to the provisions of Section 12 of the *Pharmacy and Poisons Act*.
84. Is that interpretation correct? I do not think so. The phrase "is in breach of any of the terms or conditions of practice prescribed by the Board" speaks to a breach of terms by the persons envisaged under section 12 that is, persons who have within or outside of Kenya been convicted of any criminal offence or have been found guilty of any misconduct.
85. In the present case, no evidence of a prior conviction or a finding of guilt for professional misconduct was presented before the applicant was subjected to the Enquiries and Disciplinary Committee.
86. In the case of Attorney General & another v The Commission on Administrative Justice [2024] KECA 1157 (KLR), the Court of Appeal held as follows:

"It was settled law that a statutory body may only act within the scope of the powers or duties conferred on it, and accordingly, where a body acts outside the powers which are prescribed for it, such an action is ultra vires and null and void. Likewise, a statutory body may interpret and determine the scope of its powers or duties incorrectly, and as a result, act beyond its powers. Put another way, a statutory body will act unlawfully if it incorrectly interprets a statutory provision as conferring on it a power or a duty to act, when such provision confers no such power or duty. See in this respect sections 12.05 to 12.07 of Judicial Review: Principles and Procedure (2013), by Jonathon Auburn, Jonathan Moffet and Andrew Sharland, and section 7(2)(a) (i) and (ii) of the *Fair Administrative Action Act*, which makes such actions or decisions reviewable by the Courts."[emphasis added]

87. Given the restrictive nature of the EDC's jurisdiction, the applicant's inquiry did not fall within the mandate of EDC. However, this does not imply that there was no alternative avenue for the matter to be heard and determined by the Board.
88. In its defense, regarding the constitution of the Committee, the respondent has made reference to The Pharmacy and Poisons (Conduct of Inquiries) Rules, asserting that these rules suggest that the members of the respondent Board are also required to serve as the members of the Enquiries and Disciplinary Committee.
89. Upon a thorough perusal of the Rules, it was evident that the inquiry referenced therein pertains to an inquiry conducted by the Board itself, rather than by the Committee.
90. Rule 2 provides as follows:  
In these Rules, unless the context otherwise requires—  
"chairman" means the chairman of the Board;  
"charge" means a charge or charges specified in a notice of inquiry;



“complainant” means a person or body of persons who makes a complaint to the Board;

“inquiry” means an inquiry held by the Board under these Rules.

91. Rule 3 provides for who may institute a complaint against a registered pharmacists as follows:

“An inquiry into the conduct of a registered pharmacist may be instituted by the Board on its own initiative or upon a complaint addressed to the Board by or on behalf of any person alleging professional misconduct on the part of the registered pharmacist”

92. Rule 5 subrule 2(d) provides that:

2. The Board may, after giving the matter due consideration—

(a) ....

(b) .....

(c) ....

(d) if it is of the opinion that the evidence furnished in support of the complaint discloses prima facie evidence of professional misconduct, hold an inquiry in accordance with these Rules.

93. The Rules from Rule 6 all the way to Rule 13 provide for the procedure to be followed in regard to the inquiry and under Rule 14, the penalties that the Board may impose, upon a finding of guilt are set down as follows:

a. a reprimand or a caution or reprimand and a caution; or

b. the penalties specified in section 12 of the Act.

94. From the above exposition, it is obvious that although it was the Board that is charged with the mandate of conducting inquiries into the conduct of pharmacists and pharmaceutical technologists when dealing with matters concerning persons under Section 12 of the Act, the Board is required to utilize a committee known as the Enquiries and Disciplinary Committee to handle such cases. The jurisdiction first lies with the Board which receives the complaints or forms the opinion, on its own motion, that there is need to enquire into the conduct of the professional, before the Board can delegate to the EDC to carry out its mandate.

95. In *Ernst & Young LLP v Capital Markets Authority & another* [2017] eKLR it was held as follows: (persuasively)

“I am aware that in the modern state, the decisions of statutory or administrative bodies can have a more immediate and profound impact on people’s lives than the decisions of courts, and public law has since *Ridge vs. Baldwin*[41]been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it “judicial” in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

(42) Procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done.



- (43) Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The Petitioner argued that the first Respondent cannot be impartial because he is the investigator, prosecutor and the hangman.

The question that begs for answers is whether or not during the preliminary investigations in the present case, the first Respondent was required to apply the rules of natural justice and if so, whether the manner they acted constituted a breach of the rules of natural justice. Counsel for the petitioners cited the High Court decision rendered in *Alnashir Popat & Others vs Capital Markets Authority*[44] in support of his argument. In the said decision, the High court held that " the Respondent cannot undertake impartial proceedings in regard to the bond issue as it was involved in the process of issuing and approving the bond and that additionally the unique circumstances of the case would dictate that the Respondent does not get involved in any investigatory and enforcement proceedings.

Counsel for the first Respondent submitted that the above decision was rendered per incurium and without considering court of appeal decisions on similar circumstances, and specifically referred to the court of appeal decision rendered in *Judicial Service Commission vs Gladys Boss Shollei & Another*[45] which quoted with approval the decision of the Supreme Court of Canada in the case of *George R. Brosseau vs Alberta Securities Commission*.[46] Because of its relevancy to the present case, I find it necessary to briefly recall the facts of this Canadian case.

Brosseau was a solicitor who prepared the prospectus of a company that later went into bankruptcy. The Alberta Securities Commission launched an investigation into Brosseau's actions. Brosseau argued that the Commission suffered from institutional bias due to Chair's multiple functions, which allowed him to initiate investigations, prosecute people, and then act as a judge on the panel determining their case, i.e. he/she involved at both the investigatory and adjudicatory levels. The Commission disagreed – they argued that while not specifically authorized by statute, implicit authority for the investigation could be found in the general scheme of the Securities Act.

L'Heureux-Dubé, writing for the court, held that:-

" as a general principle, a person is entitled to an independent, impartial decision-maker, the *nemo iudex in causa sua* esse principle. In general, it was not permitted for members of an adjudicatory panel to also be involved in the investigatory stages of a proceeding, as this would give rise to a reasonable apprehension of bias. However, statutory authorization for overlapping functions are an exception to this rule, subject to the statute being constitutional. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, It was necessary to allow for an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that It was authorized, it will not generally be subject to any reasonable apprehension of bias test. Applying this to the case at bar, here the authorization is "implicit"; the 'Act contemplates the involvement of the Chair at several stages of the proceedings. The public interest role of the Commission could not be carried out without informal investigations/reviews of this sort. Securities acts are aimed at regulating the market and protecting the general public - this must be recognized in determining how to interpret their acts. It was clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that



certain activities which might otherwise be considered "biased" form an integral part of its operations.

The ratio decided in the above decision is that administrative decision makers are created for a variety of reasons to meet a variety of needs and in some instances, an overlap in functions (which is generally not permitted on account of bias) is a necessary element to fulfilling a decision maker's mandate. Provided that the particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), an overlap in functions may not give rise to a reasonable apprehension of bias."

96. The Court further stated as follows:

"I also find that that the first Respondents functions were authorized by the relevant statute and that the statute authorizes overlapping functions. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is necessary to allow for an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it was authorized, it will not generally be subject to any reasonable apprehension of bias test, unless reasonable possibility of the bias has been sufficiently demonstrated. [emphasis added]

97. From the foregoing, it was incorrect to contend that professionals accused of misconduct would evade accountability if the Enquiries and Disciplinary Committee's jurisdiction were limited to the scope outlined in Section 12. This is because the Board, when convened as the Board, has the authority to conduct inquiries into complaints of professional misconduct. This position is clearly established under The Pharmacy and Poisons (Conduct of Inquiries) Rules.

98. I however note that the Board, from the letter dated 18<sup>th</sup> July 2024, appeared to be confused about the process. Whereas the letter containing the charges directs the applicant to appear before the Board to establish any defence which the applicant may wish to offer, the decision as impugned was made by the EDC which as I have stated above, had no jurisdiction to conduct the Enquiry in the matters that it did, noting that its jurisdiction is limited or restricted to matters under section 12 of the Act and to recommend to the Board for appropriate action.

99. In the end, I find that the Pharmacy and Poisons Act does not contain any provision explicitly granting the Enquiries and Disciplinary Committee of the Board, powers to exercise disciplinary authority over practitioners in the manner it did in the present case, where the professional being disciplined has not been convicted of any offence under the Act.

100. In statutory interpretation, courts are guided by the principle that jurisdiction must be expressly conferred by law and cannot be implied or inferred in the absence of a clear legal foundation.

101. Given that jurisdiction is a matter of substantive law and not procedural discretion, I find and hold that the Enquiries and Disciplinary Committee acted beyond its statutory mandate in purporting to exercise disciplinary authority over the applicant. At this point, it is important to mention that quasi-judicial bodies ought to understand their respective mandates through an induction programme. Where the statute provides for committees of the bodies to do anything on behalf of the Board, the Board must let the Committees do the work and report to the Board. Those Committees must be established as commanded by the Act and its mandate explained. In the same vein, where the Act commands that certain actions or decisions are to be taken by the Board and not the Committee, again, that must be adhered to.



102. As I conclude, I must mention that it is important that the Regulations made under the *Pharmacy and Poisons Act* are strictly followed to uphold the integrity of the profession and protection of the public who are the consumers of the drugs and medicines which are dispensed in pharmacies and chemists in this country. Many people have died because of being given drugs by unqualified persons masquerading as pharmacists dispensing those drugs without any professional knowledge in pharmacy.
103. Cases of professional misconduct among pharmacists are increasingly rampant and it is in the public interest that due process is observed while ensuring accountability.
104. Having said all that, I find that all actions taken by the Enquiries and Disciplinary Committee in this regard against the applicant herein were ultra vires and in excess of its jurisdiction. They are therefore null and void ab initio.
105. Accordingly, judicial review order of certiorari is hereby issued, calling into this court the decision of the Enquiries and Disciplinary Committee of the Pharmacy and Poisons Board made on 6<sup>th</sup> September, 2024 to suspend the applicant's license bearing Enrolment Number 6745 for two years is hereby called into this court for purposes of quashing and the same is hereby quashed.
106. Having quashed the impugned decision, there would be nothing left to prohibit. I therefore decline to issue prohibition order as sought in the Notice of motion.
107. Therefore, while the applicant cannot be subjected to unlawful proceedings, this Court directs that a fresh inquiry be conducted by the Pharmacy and Poisons Board in strict adherence to the law and procedural fairness.
108. As the inquiry is still pending, and parties will have to go back to the drawing board, I order that each party bear their own costs of these proceedings.
109. This file is closed.

**DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2025**

**R.E. ABURILI**

**JUDGE**

