Republic v Cabinet Secretary, Ministry of Health & another; Wanyutu & 6 others (Interested Parties); Mummah (Exparte Applicant) (Judicial Review Miscellaneous Application E106 of 2022) [2023] KEHC 3990 (KLR) (Judicial Review) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3990 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E106 OF 2022

JM CHIGITI, J

MAY 4, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY, MINISTRY OF HEALTH ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

OSCAR WANYUTU ..... INTERESTED PARTY

CHRISTINE WASANGA ..... INTERESTED PARTY

ELCAH MBITHI ..... INTERESTED PARTY

KIMANI GITHONGO ..... INTERESTED PARTY

EVANS OLOO ..... INTERESTED PARTY

BERNADETTE ROIMEN ..... INTERESTED PARTY

MATILDA MGHOI MWAKAZO ..... INTERESTED PARTY

AND

SOLOMON MUMMAH ..... EXPARTE APPLICANT

JUDGMENT

Brief Background

1. The application before this court is the Applicant's substantive motion dated 31st August, 2022. The application is supported by a Statutory Statement dated 30th August,2022 and a verifying Affidavit sworn by the Applicant on even date.

2. The application seeks two main prayers as follows;

    i. That an order of Certiorari to remove into the High Court be issued for the purposes of it being quashed, the Gazette Notice No.9332 issued by the 1st Respondent and dated 5th August,2022 which appoints the members of the Board of Directors of Counsellors and Psychologists Board.

    ii. That an order of Mandamus be issued against the Respondents directing them to commence fresh recruitment and appointment of the member of the Board of Directors of Counsellors and Psychologists Board in accordance with the law and the *Constitution* .

    iii. The costs of the application be provided for.

3. The Ex parte Applicant's case is that being a Professor of Psychology and the President of Psychological Society of Kenya he was heavily involved as an individual and as President in the operationalization of the *Counsellors and Psychologists Act*.

4. According to the Applicant as the authoritative Society of Psychologists, the Society has so been recognized by the Cabinet Secretary and comprehensively involved in all matters as pertains the operationalization of the *Counsellors and Psychologists Act* including participating in the inaugural formation and inaugural Board by virtue of Sections 4(2) and (7) of the *Counsellors and Psychologists Act* as regards appointment of Psychologists to the Board of Directors.

5. The Applicant confirms that he received an e-mail from the 1st Respondent on 22nd July, 2022 requesting him to organize a meeting and elect Five (5) persons being Psychologists for selection by the Cabinet Secretary for appointments vide Sections 4(d) and (e) thereof in order to nominate and Gazette the inaugural Board of Directors of the Counsellors and Psychologists Board.

6. A General Meeting was convened on 25th July,2022 where 225 members were in attendance and upon closing of the meeting five persons had been elected for appointment as members of the Board. These were Prof. Aloys Alex Odeck-Ayungo, Collins Omondi Oruko,Dr. Florence Salome Kokul, Prof. Mummah Solomon J and Ms. Lonah Irene Ayako.

7. The names were submitted to the 1st Respondent for completion of the nomination. No response was received from the 1st Respondent upon the said submission.

8. In a Gazette Notice No.9322 dated 5th August,2022 the 1st Respondent proceeded to Gazette the following persons as members of the Board of Directors; Oscar Wanyutu Christine Wasanga (Dr) Elcah Mbithi, Kimani Githongo, Evans Oloo, Bernadette Nashaelo Roimen and Matilda Mghoi Mwakazo.

9. The Applicant contends that the said appointments were done in contravention of Sections 4 and 7 of the *Counsellors and Psychologists Act* as the 1st Respondent failed to take into consideration the names

elected and forwarded by the Society and no reasons whatsoever were given as is required under the law governing administrative decisions.

10. The Applicant urges that although Section 4(1)(a) of the *Counsellors and Psychologists Act* grants the 1st Respondent discretion to appoint a Chairperson of the Counsellors the same is not unfettered, but done in a manner contemplated by the *Constitution* and the enabling *Act*. Transparency and competitiveness are required while giving consideration to gender, regional balance, mix of skills and competencies.

11. The 1st Respondent is also faulted for purporting to appoint the 7th Interested Party as Registrar of the Board yet it is only the Board that can do so in an open, transparent and competitive recruitment process consequently usurping the power of the Board.

12. The Applicant letter to the 1st Respondent challenging the said appointments did not elicit any response.

13. The 1st Respondent filed a Replying Affidavit sworn by Dr. Patrick Amoth the Ag Director General in the Ministry of Health on 9th January,2023.In the Respondent argues that indeed the Ministry received the complied names of Nominees from the Counsellors and Psychologists Association Chairs.

14. Further that the Director of Health, compiled the nominees' names through a Matrix format provided by the Legal Office and forwarded the same to the 1st Respondent for his action. The 1st Respondent argues that the appointments were done in accordance with Section 6 of the *Act.*

15. Further that it is not possible to appoint members to the Board from all professional bodies because the slots are limited and representation in the Board boils down to only two members out the many professional bodies and that every respective professional boy had one chance out of 16 to be represented in the Board.

16. The Interested Parties' also filed a Replying Affidavit sworn by Kimani Githongo the 4th Interested Party on 12th September, 2022.The Applicant is said to have failed to indicate whether he instituted this suit on behalf of the Society or himself. In addition, that he has failed to attach any authority from the Society that gives him capacity to institute this claim and therefore that the Notice of Motion should be struck off.

17. They also contend that an order of Certiorari is not merited as the same is granted in cases where a body has acted beyond its jurisdiction and when the authority acts in violation of the natural justice clauses, the decision is given by violating the right to be heard, and while acting in judicial capacity, the body acted unethically. It is contended that an Order of Mandamus is issued by the court in instances when any specific legal authority has failed to perform any duty so the court commands him to perform the duty.

18. The Applicant is accused of failing to place any material that indicates that the 1st Respondent failed to adhere to the tenets of Article 10 and 232 of the *Constitution* . It is the Interested Parties' case that there is no indication that the person so appointed did no meet the said criteria as set out by the Act.

19. Further it is their case that there does not exist any policy or legal regulatory framework for such appointments which the 1st Respondent would have been bound by in making the appointment.

20. The Applicant's assertions that the Registrar ought to be appointed by the Board cannot stand as has been stated by the Applicant the Board is an inaugural Board which has not conducted any deliberations or collected any budget or logistics.

21. The 7th Interested Party is said to be a Civil Servant within the Ministry of Health and is solely appointed on secondment from the Ministry as the liaison officer between the Ministry and the Board Members to offer to offer the needed guidance and help structure the board after which the board will implement the provisions of the Act in respect of the appointment of the Registrar.

22. The Society is said to have been registered only in 2015 and that before then there were others who were articulating the issues pertaining to the profession of Counselling and Psychology. The Association it is contended cannot be the voice of the professions taking into account that there are 16 professional bodies in the said professions as follows;

    i. Kenya Psychological Association (KPA)

    ii. Kenya Association of Marriage and Family Therapists (KAMFT)

    iii. Counsellors and Psychologists Society of Kenya (CPS-K)

    iv. Positive Psychology Association of Kenya (PPAK)

    v. Kenyan Guidance Counselling and Psychological Association (KGCPA)

    vi. International Society Substance Use Professionals (ISSUP — Kenya)

    vii. Association of Play Therapy of Kenya (APTK)

    viii. Addiction Prevention and Recovery Association of Kenya (APRAK)

    ix. Kenya Counselling & Psychological Association (KCPA)

    x. Kenya Universities Professional Counsellors Association (KUPCA)

    xi. Kenya Association Marriage Family Therapists (KAMFT)

    xii. Kenya Psychometric Society (KPS)

    xiii. Medical Psychologists Association of Kenya

    xiv. Forum of Afrikan Psychology-Kenya

    xv. Psychological Society of Kenya (PSK)

    xvi. Clinical Psychologists Association of Kenya (CPAK)

23. It is contended that when the Act was enacted the Society had not been registered and further it does not have any authority to or capacity to license practicing psychologists as that will be the preserve of the Government Board once it is operational. The Interested Parties also challenge the Applicant's assertion that the Society is involved in the operationalization of the *Act* as no evidence has been produced in that regard.

24. They also argue that all stakeholders including and professional bodies were involved in the nomination process. The nominees Evans Oloo from International Society Substance Use Professionals (ISSUP-Kenya) was appointed for the position of a counsellor while Kimani Githongo from the Counselors and Psychologists Society of Kenya (CPS-K) appointed as a psychologist.

25. The Applicant is said to have failed to point out that the submission of the said names contravened the provisions of the Act as they did not consider gender and regional balance as all names he submitted are from one region and that he even purports to usurp the powers of other institutions like Universities and Tertiary colleges in presenting names for those institutions without their requisite mandate.

26. The 4th Interested Party contends that he convened virtual meetings and sent WhatsApp messages to all Chairpersons of the Associations, University HoDs and Heads of middle level Colleges to ensure no party was left out. The Ex parte Applicant is faulted for failing to attend any of the stake holder meetings despite having promised the 4th Interested Party that he would.

27. The virtual meeting convened on 22nd July,2022 resolved among other things as follows;

    i. Elecah Mbithi and Mr Githongo to communicate to the Ministry of Health and inform them about our meeting and request them to wait till Monday 25th July 2022 for the submission of the nominated names.

    ii. The various Associations to have their in-house meetings and nominate 3 members each for consideration, that is one counsellor, one Psychologist and one person representing the marginalized and Minorities.

    iii. There are about 14 associations so a total of 42 names should be tabled for consideration at a joint meeting of all the Chairpersons of the Associations. This meeting should be held by Sunday 24th July 2022 at 6 pm. The meeting will be convened jointly by Mr. Githongo, Aphylne Turfy, Dr. Lilian Nyagaya and Evans Oloo.

    iv. The members of the various Universities to convene a meeting and nominate 1 person for consideration for appointment to the board this meeting should be held by Sunday 24th July,2022 at 6pm. Dr. Beatrice Kathungu will convene the meeting for universities this meeting should be held by Sunday 24th July 2022 at 6pm.

    v. Members of the Tertiary Institutions to convene a meeting and nominate 1 person for consideration for appointment to the board this meeting should be held by Sunday 24th July,2022 at 6 p.m. Jane Ngatia to convene the meeting for Tertiary Institutions. This meeting should be held by Sunday 24th July 2022 at 6 pm.

    vi. Kimani Githongo to convene a meeting of the representatives of the Chairpersons of the 3 teams and consider a consensus of the names to be forwarded to the Ministry of Health for vetting and appointment to the Board on Sunday 24th July,2022 at 7.30 pm.

28. Following the said resolutions all Chairpersons of the professional bodies convened meeting of their Associations and in the meeting of Sunday 24th July,2022 all the names of the nominees for the various Associations were forwarded and received during the meeting held on 2th July,2022 at 7.30 p.m. This included the Universities and Tertiary Institutions. Only PSK and CPAK did not attend the said meeting despite being invited.

29. The Interested Party contends that Universities as well as Tertiary Institutions, Marginalized and Minorities and other interested stakeholders deliberated and finally came up with the list of nominees to be submitted to the Ministry for appointment. The Applicant is said to have together with three other professional bodies in their sole capacity nominated names and forwarded them.

30. The 4th Interested Party states that the 1st Respondent did all that was required of him.

31. The Applicant also filed a Further Affidavit in which he reiterated the contents of his Verifying Affidavit and further averred that he instituted the instant suit in his personal capacity being aggrieved by administrative actions of the 1st Respondent.

32. It is also the Applicant's case that PSK represents the Science and Practice of the entire mental health Profession, not only in Kenya but the East and Central African Region, the African Continent, and the world.

33. The Applicant also argued that the 4th Interested Party usurped the powers of the 1st Respondent in proceeding to convene a meeting. Further that the law stipulates that for first appointments, only organizations appearing to the 1st Respondent to be representatives of the profession of Counselling and Psychology are required to submit names to the 1st Respondent.

34. The application was canvassed by way of written submissions.

Analysis and Determination:

35. This Court has had due regard to each party's case and all the pleadings, evidence and written submissions prepared by each of the Parties some of which may not be reproduced herein.

36. Two issues crystallize for determination and these are;

    (a) whether the orders sought are merited and

    (b) who shall bear the costs of the application.

37. The Court (Ngaah J) in the case of *Republic v Cabinet Secretary, Ministry of Health and Kenya Nutritionists & Kenya Dieticians Institute Ex Parte Oscar Kambona* the court held as follows;

> " One of the vital components of an application for judicial review is the grounds upon which it is made. They are important because Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:
>
> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).
>
> And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave."

36. The grounds for judicial review were enunciated in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410 in which Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in

mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

36. The classic grounds for judicial review are typically viewed as those of illegality, irrationality, and procedural impropriety. If any of these are demonstrated to exist, the court will step in and give the remedy for judicial review. However, as Lord Diplock pointed out, the list is by no means complete. The experienced judge hurried to add that further legal research in this area might provide additional justifications in certain cases. The proportionality principle has likely been developed as an additional justification for judicial scrutiny in this spirit.

37. Turning back to the applicant's application, it is not apparent from the statement accompanying the application which of the grounds of judicial review the applicant is relying upon. He has not stated in precise, specific and unambiguous terms the ground or grounds for judicial review upon which he seeks this Honourable Court's intervention and to grant him the orders of Certiorari and Mandamus.

36. It is the applicant's responsibility to first and foremost state categorically the ground or grounds upon which he seeks a judicial review court to intervene and impeach the administrative action in question, the court cannot and need not speculate on what is going through the minds of any particular applicant.

37. While reiterating the importance of stating grounds for judicial review in concise and precise terms Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

36. Order 53 of the *Rules of the Supreme Court of England* is the "new order" referred to in this text, and its provisions are more or less on par with our own Order 53 of the *Civil Procedure Rules, 2010*. However, it is important to note that applications without clearly outlined grounds will not be considered by courts. It is not so much a matter of analytical nicety as it is a practical imperative to state the arguments clearly.

36. Similarly, the Court of Appeal in the case of *Centre for Peace and Democracy (CEPAD) Board of Directors v Non-Governmental Organizations Co-Ordination Board* [2014] eKLR held as follows;

> " It is plain from the above provisions of rule 4(1) of Order 53, that the statement which accompanied the application for leave may be relied upon in the substantive notice of motion. A complaint against such a statement would therefore automatically be a complaint against the application in which leave was sought and granted."

36. The Court went ahead to reiterate the importance of the contents of a Statutory Statement while stating thus;

> " The learned Judge in the end determined that the defect was not a procedural technicality and that without a proper description of the applicant, the substratum of the application was absent which rendered the substantive motion incompetent. We have no reason to differ with the learned Judge of the High Court. The statutory statement is a mandatory requirement for the grant of leave and for the issue of the substantive order. We appreciate that under rule 4(2) of Order 53 aforesaid, a statement may indeed be amended on the application of the applicant. That leave to amend, in our view, does not extend to substituting the applicant given the provisions of rules 1(2) and 4 of the said Order. As found by the learned Judge of the High Court, the applicant is the central focus of the application under the said Order as it is the applicant who seeks relief after being aggrieved. The grieving party in our view, may not be changed after leave to commence proceedings for orders of judicial review has been granted, because such change would invalidate the accompanying documents which should be the same for both the application for leave and the application for the substantive order. That is why the learned Judge stated that if the defect had been brought to her notice she could not have granted leave to seek the substantive order. We have therefore no difficulty in finding that the defect in the statutory statement was not typographical or procedural as argued by the appellant. It went to the root of the entire substantive notice of motion. Article 159 (2) of the *Constitution* 2010 could not therefore come to the aid of the appellant.

36. In the instant case the Applicant's Statutory Statement fails to set out grounds upon which the Judicial Review orders of Certiorari and Mandamus are sought and as has been reiterated the Statement is a mandatory requirement for the grant of leave and the issuance of the substantive order.

37. This has left the court without the much-needed evidence that would have enabled this court to assess and or determine whether or not the Respondent acted illegally, or unlawfully and or in a manner that was tainted in procedural improprieties. The statutory statement and the Verifying Affidavit would have been the vehicles through which the Exparte Applicant would have discharged the burden of proof.

38. Indeed, the judicial review proceedings before this court speak to the violation of the right to fair hearing as guaranteed under Article 47 of the *Constitution* which leads to the Judicial Review reliefs under Article 23 of the *Constitution* .

39. In order to obtain the intervention of the court, the party who alleges that his rights have been violated must with reasonable precision state the Articles of the *Constitution* allegedly violated. The court does not have the duty to look for the evidence that is in the litigant's custody. It is upon the aggrieved litigant to tender the evidence to the court. Failure to do so is detrimental.

40. The Pleadings in judicial review suits are pleadings just like in any other form of suit. The litigant must set out and plead a clear case in line with the principles of *Anarita Karimi Njeru v Republic* [1979] eKLR the standard for drafting constitutional pleadings was set as follows:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution* , it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

36. The lapse in question cannot be termed as a mere technicality as it goes to the root of the application as not filing a valid Statutory Statement invalidates the application for leave and therefore there is no valid application before the Court for it to issue the substantive orders sought. This being the case Article 159 (2) of the *Constitution* 2010 cannot not therefore come to the aid of the Applicant.

36. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. The Applicant's application is such an application and for this reason it cannot see the light of day.

ORDERS:

36. The Application dated 31st August 2022 is hereby struck out.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY, 2023.

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JOHN CHIGITI (SC)

JUDGE