Nairobi Outpatient Centre Limited v Kenya Medical Practitioners & Dentist Council; Nairobi Outpatient Gulf Limited & 2 others (Interested Parties) (Application E199 of 2021) [2024] KEHC 15830 (KLR) (Judicial Review) (16 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E199 OF 2021

J NGAAH, J

DECEMBER 16, 2024

BETWEEN

NAIROBI OUTPATIENT CENTRE LIMITED ..... APPLICANT

AND

KENYA MEDICAL PRACTITIONERS & DENTIST COUNCIL . RESPONDENT

AND

NAIROBI OUTPATIENT GULF LIMITED ..... INTERESTED PARTY

GRACE WANGARI MUTHUMA ..... INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS, PHARMACISTS & DENTISTS UNION ..... INTERESTED PARTY

RULING

1. By a motion dated 20 November 2023, the applicant has sought to amend the statutory statement filed alongside the summons dated 21 December 2021 for leave to file a substantive motion for judicial review reliefs. The prayer for amendment has been couched as follows:

> "That the Honourable Court be pleased to grant the Applicant leave to file an amended statutory statement in terms of the draft amended statutory statement annexed herewith."

2. The applicant has also asked for an order that this Honourable Court be pleased to make such other order with respect to filing additional or further responses by the parties in the suit. As far as the costs of the application are concerned, the applicant wants them to be in the cause.

3. The application is supported by an affidavit sworn in that behalf by Dr. Mary Mupa Madumadu who deposes that she is the applicant's managing director and she is also a certified medical practitioner.

4. According to Dr. Madumadu, the amendment of the statutory statement is necessary because at the time the applicant filed this suit, the applicant was not aware of that the respondent made what she has described as "second exclusive communication to the 1st interested party and the 2nd interested party". In this communication, the respondent had notified the interested parties of the respondent's resolution to revoke the licence of the applicant for the reason that the applicant was no longer in existence and, in any event, the directors of the applicant had admitted that they had ceased operating from the licensed premises with effect from 9 November 2021.

5. The interested parties were also informed of the respondent's resolution to process the first interested party's application for a license dated 4 October 2021 and thereafter communicate its decision to the applicant within a reasonable period. Dr. Madumadu has sworn that the communication exclusively made to the interested parties was a subject for another application filed in this Honourable Court as Miscellaneous Application No. E090 of 2022 but which was dismissed on 16 December 2022.

6. The respondent opposed the application and an affidavit to that effect has been sworn by Mr. Michael Onyango who has introduced himself as the Assistant Director, Legal and Corporation Secretary at the Kenya Medical Practitioners and Dentists Council, the respondent in the instant suit.

7. According to the Mr. Onyango, the intended amendment seeks to introduce additional new reliefs of being certiorari, mandamus and prohibition, arising from a decision that was made on 22 November 2021 and which, for that very fact, are beyond the reach of the applicant for it has been caught by the statutory limitation period. The rest of Mr. Onyango's depositions appear to me to be arguments of fact and law against the applicant's main motion.

8. I have considered the submissions filed by the parties in support of their respective positions on the application.

9. As have been admitted by the applicant, this Honourable Court had occasion to consider and determine the applicant's application in Miscellaneous Application No. E090 of 2022 in which the applicant sought, amongst other orders, a quashing order to quash the respondent's decision dated 22 November 2021. This is the same decision which has been described in the instant application as the "second exclusive communication to the 1st interested party and the 2nd interested party".

10. For the avoidance of doubt, one of the prayers for leave to file a substantive motion against the impugned decision in application no. E090 of 2020 was captured as follows:

> " 2. That leave be granted to the applicant to apply for an order of certiorari to bring into this Honourable Court and quash the decision (and all subsequent actions) of the respondent of 22nd November 2021 as communicated in a letter of that date addressed to the applicant and another letter of even date addressed to the 2nd interested party to the exclusion of the applicant and the 3rd and 4th interested parties to process the 1st interested party's application dated 4th October 2021 and further to quash the license issued subsequently to the 2nd interested party."(Emphasis added).

11. The other "letter of even date addressed to the 2nd interested party to the exclusion of the applicant and the 3rd and 4th interested parties" is now the basis of the applicant's present application for amendment

of its statutory statement and introduction of fresh prayers which would otherwise have been covered in the substantive motion had leave been granted in application no. E090 of 2020.

12. This is apparent from the prayers sought to be introduced in the motion before court if the application for amendment is allowed. These prayers are as follows:

> "7. An order of certiorari to bring to this Honourable Court and quash the decision of the respondent of 22nd November 2021 to process the licence of the 1st interested party as communicated in a letter of that dated (sic) addressed to the 1st interested party and 2nd interested party to the exclusion of the applicant and subsequently issue a registration certificate and licence in the name of the 1st interested party.
>
> 9. An order of mandamus against the respondent compelling them (sic) to officially retract in writing it (sic) second resolution of 22nd November 2021to process the application of 1st interested party as the two resolutions of the respondent read in totality are manifestly unreasonable and prejudicial to the applicant and are meant to sanitize the acts of forgery committed by the 1st interested party and the 2nd interested party."

13. The similarity in the prayers sought to be introduced in this suit and those that would have been in the substantive motion had leave been granted in application no. E090 of 2020, coupled with the fact that both the instant application for amendment and application no. E090 of 2020 are targeting the respondent's "second exclusive communication" go to demonstrate that the applicant is seeking to achieve, in this suit what it sought but failed to achieve in application no. E090 of 2020.

14. One of the reasons why application no. E090 of 2020 failed was because the order for certiorari was not available to the applicant, the application for leave having been filed out of time. At the risk of sounding repetitive, I noted that the decision sought to be quashed was made on 22 November 2021 but it was not until 6 July 2022 that the applicant filed the instant application.

15. Under section 9 (2) and (3) of the *Law Reform Act* as read with Order 53 Rule 2 of the Civil Procedure Rules, the application ought to have been made within six moths of 22 November 2021. Section 9 (2) and (3) of the *Law Reform Act*, cap. 26 provides as follows:

> (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
>
> (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

16. Order 53 Rule 2 of the Civil Procedure Rules is more or less in the same terms as section 9(3) of the *Law Reform Act*; it states as follows:

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

17. The two provisions are clear that where the prerogative order of certiorari is sought, the application for leave must be made within six months of the date of making the impugned decision or other proceedings.

18. In support of the instant application, Dr. Madumadu has sworn:

> " 3. That at the time the suit was instituted the applicant was not aware of (sic) that the respondent made a second exclusive communication to the 1st interested party and the 2nd interested party notifying them of its resolutions to..."

19. The applicant has fallen short of stating when it became aware of the second exclusive communication. In the absence of any evidence to the contrary, and for the purpose of determination of this application, it can properly be assumed that the applicant was in possession of this information, at the very latest, by 28 June 2022 which is the date of the application no. E090 of 2020. The instant application was filed 23 October 2023, more than one year since that date. Even if it was to be assumed that this is date the applicant got hold of this communication, no explanation has been proffered why it took the applicant more than a year to initiate the instant application.

20. One other reason for dismissal of the applicant's application no. E090 of 2020, which is also pertinent to the determination of the instant application is that the applicant has not stated the grounds upon which its application is based. As it was in the statutory statement in application no. E090 of 2020, so it is in the statement sought to be amended where the applicant has presented the grounds as follows:

> " D. grounds upon which the reliefs are sought
>
> The
> 20. The applicant shall rely on the facts set forth in the verifying affidavit of Dr. Mary Mupa Madumadu dated 21st December 2021 and the further affidavit in support of the application to amend the statutory statement."

Except for a bit of rewording, nothing has drastically changed.

21. In application no. E090 of 2020, I held that the applicant was highly mistaken on this particular issue because depositions in an affidavit verifying the facts relied upon cannot be grounds for judicial review.

22. I held further that Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application for leave 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).

23. 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.

24. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, 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.
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> 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.
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> 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.
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> 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."

25. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review

if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

26. The *Fair Administrative Action Act*, 4 of 2015 has to a greater degree codified these grounds of judicial review. It states in section 7 as follows:

> 7. Institution of proceedings.
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> (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-
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> (a) a court in accordance with section 8; or
>
> (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
>
> (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
>
> (a) the person who made the decision-
>
> (i) was not authorized to do so by the empowering provision;
>
> (ii) acted in excess of jurisdiction or power conferred under any written law;
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> (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
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> (iv) was biased or may reasonably be suspected of bias; or
>
> (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
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> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
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> (c) the action or decision was procedurally unfair;
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> (d) the action or decision was materially influenced by an error of law;
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> (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
>
> (f) the administrator failed to take into account relevant considerations;
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> (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
>
> (h) the administrative action or decision was made in bad faith;
>
> (i) the administrative action or decision is not rationally connected to-
>
> (i) the purpose for which it was taken;
>
> (ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

SUBPARA (a)

the administrator is under duty to act in relation to the matter in issue;

SUBPARA (b)

the action is required to be undertaken within a period specified under such law; (c) the administrator has refused, failed or neglected to take action within the prescribed period.

27. These grounds do not appear to be new grounds or a departure from the traditional grounds of judicial review. If anything, they are largely the traditional grounds of judicial review as we have known them except that they have been broken down into subheadings.

28. Since they form the foundation upon which the application for judicial review is based, grounds for judicial review must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

29. 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."

30. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010. The point, however, is clear that courts will not entertain applications where grounds have not

been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

31. I concluded this issue by saying that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. It follows that without the grounds, the amendment of the statutory statement would be inconsequential as the statutory statement is irredeemable. The amendment would also be of no consequence because no corresponding prayer has been sought for amendment of the substantive motion to include the fresh orders.

32. Ultimately, I come to the conclusion that there is no merit in the applicant's application. It is, instead, misconceived and an abuse of the due process of this Honourable Court. It is dismissed with costs. It is so ordered.

SIGNED, DATED AND POSTED ON CTS 16 DECEMBER 2024

NGAAH JAIRUS

JUDGE