



Republic v Registrar Pharmacy & Poisons Board & another; Kenya National Union of Pharmaceutical Technologies & another (Interested Parties); Muchiri (Exparte Applicant) (Judicial Review E042 of 2024) [2024] KEHC 15241 (KLR) (Judicial Review) (3 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E042 OF 2024
JM CHIGITI, J
DECEMBER 3, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

REGISTRAR PHARMACY & POISONS BOARD 1ST RESPONDENT

PHARMACY AND POISONS BOARD 2ND RESPONDENT

AND

KENYA NATIONAL UNION OF PHARMACEUTICAL TECHNOLOGIES INTERESTED PARTY

KENYA PHARMACEUTICAL ASSOCIATION INTERESTED PARTY

AND

JOHN NDING’URI MUCHIRI EXPARTE APPLICANT

RULING

1. This is a ruling to the 2nd Interested Party’s application for award of costs dated September 16, 2024.
2. The Applicant herein commenced these proceedings by way of Chamber Summons Application dated 27th February, 2024 seeking, inter alia, leave to institute Judicial Review proceedings. Leave having been granted, the Applicants filed the substantive Judicial Review application vide the Notice of Motion Application dated 15th March, 2024.
3. In their motion, the Applicants seek, inter alia: -



- i. An order of certiorari do issue to remove to this Honorable Court, for quashing, the decision of the Respondents contained in their online portal declining to issue an annual license to the Applicant.
 - ii. An order of prohibition do issue forbidding the Respondents by themselves, their agents, employees or any other person(s) whomsoever or howsoever acting on, with and or under their instructions from declining to issue an annual license to the Applicant.
 - iii. An order of mandamus do issue compelling the Respondents to issue an annual license to the Applicant upon payment of the requisite fee and compliance with Section 9C of the Pharmacy & Poisons Act.
4. The suit is marked as closed with costs on 30th July, 2024.

2nd Interested Party's case;

5. The 2nd Interested Party (hereinafter referred to as 2nd IP) argues that the issue on what the Court should take into consideration when determining the costs of the suit was addressed by the learned judge in *Morgan Air Cargo Limited v Evrest Enterprises Limited* and they include:
- a. the conduct of the parties
 - b. the subject of litigation
 - c. the circumstances which led to the institution of the proceedings
 - d. the events which eventually led to their termination
 - e. the stage at which the proceedings were terminated
 - f. the manner in which they were terminate
 - g. the relationship between the parties and
 - h. the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.
6. The 2nd IP posits that the applicant applied for renewal of his practicing license on 28th January 2024 and made payment on 12th February 2024. The application for renewal was processed and approved on 21st February 2024 and the Applicant was issued with Licence No.PT2024DO6576 together with a Premises Registration Certificate for Bestcare Hospital Limited Licence No. BU202407615.
7. It is its case that the Applicant then moved this Honourable Court for leave to file Judicial Review proceedings on 27th February 2024 and the same was granted on 28th February 2024. He subsequently filed the substantive application on 1st March 2024.
8. It is also its case that on 30th July 2024 the Applicant was compelled to inform the court that he had received his practicing licence for the year 2024 after the other parties persistently insisted on the same in their responses and during court sessions.
9. It argues that the Applicant kept pursuing the matter from 27th February 2024 to 30th July 2024 and failed to inform the Court that it had received both his practicing and premises licences on 21st February 2024. As such, it ought to be compensated by the Applicant for the costs incurred in defending the matter through drawings and several court attendances



10. Reliance is placed on Cecilia Karuru Ngayu v Barclays Bank of Kenya & another 12016/eKLR while considering the chain of events from filing of the suit up to determination of the case the court held that: -

“Considering the entire chain of events from filing this suit up to the time the parties left the issue to the court to determine, the numerous court attendances cited above I find no reason to deny the second defendant costs and in exercise of my discretion in a manner that meets the interests of justice for both parties in the circumstances of this case....”

11. The 2nd IP deponed that the Ex parte Applicant has out rightly demonstrated that he was malicious in pursuing the case as he has circulated texts, posts and messages insinuating that he was out to fix the Respondents and the 2nd Interested Party.
12. The 2nd IP further deponed that the Ex parte Applicant has now embarked on a campaign to incite other pharmaceutical professionals to commence other cases against it as such it is just and fair that the Ex parte Applicant is condemned to pay costs to the 2nd Interested Party.
13. The 2nd IP prays that it be awarded costs and the same be borne by the Applicant.

The Exparte Applicant’s case;

14. According to the Applicant, on 1st February, 2024, the Ex Parte Applicant applied for a renewal of his practicing certificate to the Respondents who have the mandate to issue annual licenses to Pharmaceutical Technologists under Section 9C of the Pharmacy & Poisons Act and are responsible for issuance of certificates of registration, practicing licenses and provision of Continuous Professional Development (CPD).
15. He argues that following that application, the Respondents declined it on the ground that the Ex Parte Applicant had not allegedly paid subscription fees to the 2nd Interested Party. The message contained on the Respondents’ online portal reads as follows: -
- “KPA subscription details not found. Kindly contact KPA to validate details.”
16. It then followed that on 5th February, 2024 the 2nd Interested Party sent a text message to the Ex Parte Applicant informing him to pay Kshs. 30, 000/- before the issuance of his said practicing licence.
17. The Ex parte Applicant argues that on 15th February, 2024, the Ex Parte Applicant wrote an email to the 2nd Interested Party requesting for a breakdown of the said Kshs. 30,000/- and the 2nd IP responded forwarding to the said breakdown.
18. It is his case that the 2nd IP is the author of the dispute herein as it is the one that was behind the non-renewal of the Ex Parte Applicant’s said practicing certificate by the Respondent despite the fact that he had complied with Section 9C of the Pharmacy & Poisons Act and had obtained the requisite 20 CPD points and also paid Kshs. 15, 000/- as the annual renewal fees as generated from the Respondents’ online portal.
19. The Ex Parte Applicant further argues that in failing to renew the licenses, the Respondents were in breach of Section 9D of the Pharmacy & Poisons Act which provides that the Board may deny or refuse to issue or renew a license under this Act if it determines after due process, that the Applicant has failed to comply with the requirements of this Act or its rules.



20. It is his case that it was not given an opportunity to be heard before the Respondents made the decision not to renew his annual license. He argues that it was after being served by the pleadings in the Judicial Review application that the Respondents accepted his payment without the necessity of paying the 2nd IP's subscription fees and issued him a practicing certificate.
21. He later on 30th July, 2024 informed this Honourable court that, in view of the said issuance of the said practicing certificate, the matter had been overtaken by events and it was marked as such and the court direct that his costs to be paid by the Respondents.
22. It is his case that the counsel for the 2nd Interested Party applied for its costs to be paid by the Ex Parte Applicant which application was opposed and hence these submissions on that issue.
23. It is also his case that were it not for the 2nd Interested Party's pegging its subscription fees on the Ex Parte Applicant's renewal of his practicing certificate, he would not have come to court.
24. Reliance is placed on the case of Nabro Properties vs Sky Structures (2002) 2 KLR 299, in which the court held that no party is allowed to base its claim on its own wrongs. Hon. Chief Justice Gicheru (as he then was) held follows: -

“It is a maxim of law recognized and established that no man shall take advantage of his own wrong.”
25. The Ex Parte applicant posits that costs are awarded at the discretion of the court and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially.
26. Reliance is also placed in the case of Republic v Communication Authority of Kenya and another ex-parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR where the court held as follows: -

“In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co.Ltd[1967]EA 287 and Mulla (12m Edn) P. 150.”
27. The Ex Parte Applicant submits that taking into account the conduct of the 2nd Interested Party, the subject of litigation and the circumstances which led to the institution, by him of the legal proceedings and the events which eventually led to the termination of this suit, the 2nd IP is not entitled to any costs.

Analysis and determination;

The only issue for determination is on costs.
28. In the case of Republic v Communication Authority of Kenya and another ex-parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR the court held as follows: -

“In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters



which led up to litigation. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 and Mulla (12m Edn) P. 150.”

29. This court has the discretion to determine the issue of costs. From the conduct of the parties prior to the filing of the suit as well as during the proceedings it is clear that both parties carried themselves in a manner that aggravated the challenge at hand.
30. On its part the Applicant applied for renewal of his practicing license on 28th January 2024 and made payment on 12th February 2024. The application for renewal was processed and approved on 21st February 2024 and the Applicant was issued with Licence No. PT2024DO6576 together with a Premises Registration Certificate for Bestcare Hospital Limited Licence No. BU202407615.
31. The Applicant then instituted these proceedings on 27th February 2024. He subsequently filed the substantive application on 1st March 2024.
32. The Applicant pursued the matter from 27th February 2024 to 30th July 2024 without informing the Court that he had received both his practicing and premises licences on 21st February 2024.

“He who comes to equity must come in clean hands.” The court finds that the Applicant should have disclosed to the court that he had been issued with the licence.

33. To this court, it is clear that the Respondent acted within reasonable time in processing the Applicant’s licence and it cannot be blamed. The Applicant does not argue nor demonstrate that he or his business suffered any prejudice.

Orders:

Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2024.

J. CHIGITI (SC)

JUDGE

