



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 74 OF 2020

BETWEEN

KENYA DENTAL ASSOCIATION.....APPLICANT

VERSUS

KENYA MEDICAL PRACTITIONERS

AND DENTISTS COUNCIL.....RESPONDENT

AND

ORAL HEALTH ASSOCIATION

OF KENYA.....1<sup>ST</sup> INTERESTED PARTY

ALEX LANG'AT.....2<sup>ND</sup> INTERESTED PARTY

JUDGMENT

1. This judgment is on a Notice of Motion application dated 30<sup>th</sup> March 2020, filed by Kenya Dental Association (hereinafter referred to as “the *ex parte* Applicant”). The said *ex parte* Applicant is aggrieved by the decision of the Kenya Medical Practitioners and Dentists Council (which it has sued as the Respondent herein), to register and license Auxiliary Cadre/Paradental Staff referred to as Community Oral Health Officers and Oral Health Officers with General Practice licenses.

2. The *ex parte* Applicant is therefore seeking the following orders in its application:-

1. An order of Judicial Review in the nature of Certiorari to remove into this Court and quash the decision of the Respondent to register and license the auxiliary cadre/paradental staff referred to as Community Oral Health Officers and Oral Health Officers with a General Dental Practice Licence which endangers the public quality of health as signified by the registration and Licensing Forms available on their website.

2. An order of Judicial Review in the nature of Mandamus to restrain the Respondent from issuing General Dental Practice Licenses to auxiliary cadre/paradental staff referred to as Community Oral Health Officers and Oral Health Officers a licence that require highly skilled, trained and qualified professionals with a defined scope of practice as signified by the registration and Licensing forms that they have publicly provided.

3. An order of Judicial Review in the nature of Prohibition to preclude the Respondent from licensing auxiliary cadre/paradental staff referred to as Community Oral Health Officers and Oral Health Officers with a General Dental Practice License which process is about to be implemented which will result to cases of misdiagnosis and mistreatment of patients.

4. Further or in the alternative an Injunction restraining the Respondent from any further registration of auxiliary cadre/paradental staff referred to as Community Oral Health Officers and Oral Health Officers as General Dental Practitioners

**5. The costs of this application be provided for.**

**6. Such further or other relief as the Court may deem just and expedient to grant**

3. The Application is supported by the grounds set out in a Statutory Statement dated 19<sup>th</sup> March 2020 and a Verifying Affidavit sworn on the same date and a Supplementary Affidavit sworn on 14<sup>th</sup> July, 2020 by Dr. Timothy Theuri, the *ex parte* Applicant's National Secretary General. The Respondent filed a Replying Affidavit dated 29<sup>th</sup> May, 2020 sworn by Michael R. Onyango, the Respondent's Corporation Secretary. The Oral Health Association of Kenya and its Chairman, Alex Langát, subsequently applied and were joined as the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party respectively in these proceedings. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed a Replying Affidavit sworn on 24<sup>th</sup> August, 2020 by the 2<sup>nd</sup> Interested Party in opposition to the *ex parte* Applicant's Notice of Motion. An exposition of the parties' respective cases now follows.

**The *ex parte* Applicant's Case**

4. The *ex parte* Applicant averred that the Respondent made a decision to register and license auxiliary cadre/paradental staff referred to as Community Oral Health Officers and Oral Health Officers with a General Dental Practice Licence, which decision violates sections 4,6,13,15,16,17,20 and 22 of the Medical Practitioners and Dentist Act. The *ex parte* Applicant in this regard annexed registration and licensing forms of all cadres and oral health practitioners found on the Respondent's website namely kmpdc.go.ke, which it claims is a clear indication that the said Respondent had made the decision to register and license auxiliary cadre.

5. It is contended that the *ex parte* Applicant wrote a letter to the Respondent on 20<sup>th</sup> December, 2019 when they commenced the registration process, and requested that the process be stopped until the Respondent was fully constituted to allow input and feedback from all the stakeholders. However, that the said letter did not elicit any response from the Respondent and/or was disregarded. Further, that the *ex parte* Applicant wrote yet again on 4<sup>th</sup> March 2020 requesting for the Respondent's decision as well as the reasons for the decision as provided for under section 6 of the Fair Administrative Actions Act, but that the said letter did also not elicit any response. Copies of the said letters were annexed.

6. The decision of the Respondent to issue and print the general dental practitioner licences is challenged on three fronts by the *ex parte* Applicant. First, that it will endanger the quality of public health, as such a licence requires highly skilled and trained professionals like dentists and as a result, there are already cases of misdiagnosis and mistreatment of the dental patients. The *ex parte* Applicant finds fault in the said registration and licensing in that it allows non-qualified persons to be general dental practitioners that require highly skilled training, qualification and certification as defined in the national training and quality assurance standards for dental schools and teaching hospitals in Kenya. It was contended that the pathway to the attainment of professional qualification training, registration and licensure in the field of dentistry is well-known, accredited and taught by the major universities in Kenya as per the Bachelor of Dental Surgery Curriculum, and the national training and quality assurance standards for dental schools and teaching hospitals in Kenya.

7. It was further contended that the course on Community Oral Health is a known subset of the Community Public Health unit of oral and dental health promotion, and is not based on any equivalent merits on curriculum and standards of training of the Bachelor of Dental Surgery or Doctor of Dental Surgery degree defined under the national training and quality assurance standards for dental schools and teaching hospitals in Kenya. Further, that the course Bachelor of Science in Oral Health is not based on any equivalent merits on curriculum and standards of training of the Bachelor of Dental Surgery or Doctor of Dental Surgery degree whose curriculum and scope of practice is well known. The *ex parte* Applicant averred that the persons with the auxiliary/paradental qualifications are using such terms as oral health officer, oral health practitioner, community oral health officer, community oral health practitioner, dental technicians, and clinical dental technician interchangeably, with intent to masquerade as dental practitioners and dentists, and cause misrepresentation to the unsuspecting public.

8. Second, that the registration and licensing of Community Oral Health Officers and Oral Health Officers with a general dental practice licence goes against the tenets of professional fees as gazetted in 2016, which are to be charged only by qualified medical practitioners and dentists, and the *ex parte* Applicant annexed the said 2016 rules. According to the *ex parte* Applicant, there is a difference in the strict usage of the terms "community oral health officer" and "oral health practitioner" and that the definition of this new cadre as posited is erroneous and a misnomer, and purports to define the auxiliary cadre as a clinical professional dentistry cadre. It was reiterated that only a highly-skilled, trained, qualified and certified dentist provides all these three services: curative, preventive and promotive oral health care and that this ambiguous misrepresentative definition is intended to mean the practice of dentistry by a dentist.

9. Third, that the requirement for such registration and licensing needed to be deliberated upon through public participation of all the stakeholders. It was contended that the Medical Practitioners and Dentists Act, was amended in May 2019 and introduced contentious and conflicting sections and that a new cadre was introduced of community oral health under section 2 of the Act, which is defined as the provision of curative, preventive and promotive oral health care. Further, that under section 2, a community oral health officer means a person who has undergone the prescribed course of training in an approved institution and holds a diploma, higher diploma or degree in community oral health. In addition, that section 3A (1) (c) (iii) provides for a representative position in the council board by an oral health practitioner representative, while section 5(c) provides for the keeping of a register of this new cadre of health care workers.

10. It was further deposed that the Ministry of Health and professional society has not released a scope of practice guidelines for the practice of dentistry and for the cadre to distinguish its role in the provision of oral health services to the general public, and has not had any form of public participation, stakeholders or professional society review. Further, that while the dentist's professional scheme of service is well defined by the Ministry of Health, no professional scheme of service exists for the auxiliary cadre community oral health officer or oral health practitioners, since dentistry has always been practiced by highly skilled, qualified and certified dentists. It was also stated that the Respondent has not made any adoptions of scope of practice and/or scheme of service as regards the practice of dentistry, and has not made any rules involving the stakeholders and general public as regards the auxiliary cadre course standardization, training, registration, licensing, discipline and regulation as mandated by section 23(f) of the Act.

11. Therefore, the *ex parte* Applicant's case is that the said cadre ought to be registered to provide oral health promotion and preventive services to the general public, and not to practice general dentistry which is a highly skilled profession. Therefore, that the actions of the Respondent in proceeding to misapply the provisions of the law to promote these illegalities is a great disservice to the public on quality of health care provision as envisioned under Article 43(1)(a) of the Constitution, and that it acted in excess of its powers as conferred under the Act. In addition, that by failing to invite relevant stakeholders in reaching the said decision, the Respondent went contrary to the provisions of section 6 of the Fair Administrative Actions Act in that it failed to invite and/or consider views from the public, in spite of the fact that the decision would substantially affect the health of members of the public.

12. In conclusion, the *ex parte* Applicant stated that the actions of the Respondent to register and licence this cadre to operate in an unregulated environment in terms of course standardization, accreditation, training, registration and licensing is injurious to the dentistry profession, and is likely to cause disrepute to the profession on rising cases of patient misdiagnosis, mistreatment and dental malpractice.

### **The Respondent's case**

13. The Respondent averred that it is a statutory body established pursuant to the provisions of section 3 of the Medical Practitioners and Dentists Act, and that its members are appointed pursuant to the provisions of section 3A of the Act, and includes, *inter alia*, one representative of the *ex parte* Applicant and one representative of oral health practitioners. The Respondent annexed a copy of the Gazette Notice Mo 373 dated 10<sup>th</sup> January 2020 on the appointment of its members. It was averred that the functions of the Respondent are set out in the Act, and include the licensing and registration of medical and dental practitioners, licensing medical institutions, carrying out inspections of training and medical institutions and conducting disciplinary proceedings on complaints lodged against practitioners or medical institutions in Kenya, establishing and maintaining uniform standards on the learning of medicine and dentistry in Kenya. The Respondent elaborated on the structures in place to carry out its functions, including its Secretariat and Committees.

14. The Respondent explained that pursuant to amendments made to the Medical Practitioners and Dentists Act and through the Health Laws Amendment Act, 2019, which came into force on 17<sup>th</sup> May 2019, it was granted the statutory mandate to, *inter alia*, register, license and maintain a register of Community Oral Health Officers, who were previously registered under the Ministry of Health, through the Office of the Chief Oral Officer. Further, that prior to the said amendment, there were no regulations to guide or regulate the practice of Community Oral Health Officers, or for undertaking disciplinary proceedings against them, save for a Scheme of Service which came into effect on 1<sup>st</sup> September, 2003. The Respondent asserted that both dentists and Community Oral Health Officers are oral health service providers, and that prior to the above-stated amendments of the Act, dentists were regulated by the Medical Council whereas there was no regulatory agency for Community Oral Health Officers.

15. It was the Respondent's contention that it previously received numerous complaints against Community Oral Health Officers arising from their practice, but had no jurisdiction to regulate their practice, hence the need to regulate the said cadre for the public good and to safeguard the safety of patients. The Respondent stated that the first intake of students for the course on Community Oral Health Officers in Kenya was at the Kenya Medical Training College in 1985 who graduated in 1988, and that the said college has been admitting and graduating Community Oral Health Officers each subsequent year. Further, that Community Oral Health Officers are trained as oral health service providers in two institutions within the country, being, the Kenya Medical Training College and Mount Kenya University. In addition, that the Ministry of Health developed a Scheme of Service for Community Oral Health Officers on 1<sup>st</sup> September, 2003.

16. It was also averred that Community Oral Health Officers are required to undergo mandatory internship after their graduation and during the internship program, they are supervised by dentists or Senior Community Oral Health Officers, who subsequently certify their fitness to practice. It was pointed out that the dentist's or dental practitioner's population ratio in Kenya is approximately 1:42,000 which is far below the World Health Organization's recommended ratio of 1:7000 as set out in the Kenya National Oral Health Survey Report prepared by the Ministry of Health, a copy of which was annexed.

17. The Respondent further contended that it commenced the process of registration of Community Oral Health Officers immediately after the above-stated statutory amendments, which took effect on 17<sup>th</sup> May 2019, and that the said task forms part of the Council's statutory mandate. Further, that it has invested in technology, and currently all practitioners registered and licensed by the Respondent, including Community Oral Health Officers, are able to apply for their license through its on-line portal without the need of physical visits to the Respondent's offices. In addition, that whereas the Respondent was originally empowered to receive complaints against medical or dental practitioners or medical institutions, pursuant to the above-stated amendments, it is now mandated to also receive complaints against Community Oral Health Officers and their practice, and thereafter undertake an inquiry on the said cadre as provided in the Act.

18. The Respondent contended that it occasionally reviews the existing Code of Conduct and also works in consultation with the Cabinet Secretary, as relates the Rules enacted pursuant to Section 23 of the Medical Practitioners and Dentists Act and that the exercise would be undertaken afresh to incorporate the above-stated amendments to the Act. It was further deposed that the Respondent, working in collaboration with other similar Boards and Councils in the East African Community, has established uniform norms and standards for training in all medical and dental Schools within the region.

19. In conclusion, the Respondent contended that the suit filed herein lacks merit for the reasons that the *ex parte* Applicants have admitted that Community Oral Health Officers have been in existence for a number of years without proper course standardization, accreditation and a clinically grounded training. Therefore, that it is in the interest of the general public in Kenya that the Respondent be allowed to continue undertaking its statutory mandate to regulate the practice by all oral health service providers. Further, that there were stakeholders' meetings undertaken prior to enactment of the above-stated amendments to the Medical Practitioners and Dentists Act, and there was no legal challenge to the provisions of the Act, and no evidence of violation of any provisions of the Constitution as alleged or at all. Lastly, that the suit herein is founded on a misinterpretation of provisions of the Act and the applicable Rules.

### **The Interested Parties' Case**

20. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties averred that the proceedings filed herein by the *ex parte* Applicant are an attempt by the *ex parte* Applicant to infringe on the 1<sup>st</sup> Interested Party's right to operate as a legally registered body, and to mislead this Court for selfish intentions. The Interested Parties stated that the 1<sup>st</sup> Interested Party was registered on 19<sup>th</sup> August 1994 and has been in operation for over 26 years without any incident of misdiagnosis or mistreatment by its members. Further, that the scope and scheme of service of the practice of Oral Health Officers is provided by the Ministry of Health, in which the qualifications and duties of a community Oral Health Officer are clearly stated and defined. The Interested Parties attached a copy of the said approved scheme of service. It was also averred that Oral Health Association of Kenya, the 1<sup>st</sup> Interested Party herein, consists of trained, qualified and skilled Oral Health Officers who practice within the scope as produced in the scheme of service aforementioned, and that the registration of the 2<sup>nd</sup> Interested party as a community Oral Health Officer by the Respondent and subsequent licensing to act as such is completely within the law.

21. According to the Interested Parties, community Oral Health Practitioners provide essential services within the community level and they do not pose any competition to any other practitioners in the same field. In addition, that community Oral Health Officers are highly trained in areas of dentistry by reputable and accredited institutions within Kenya and outside, and that the course work is within approved curriculums at either diploma or degree level, followed by a mandatory one-year internship before being allowed to practice. The Interested Parties attached copies of curricula, and pointed out that the Community Oral Health Officers are trained by qualified Dental Officers who are members of the *ex parte* Applicant, and that their mandatory one-year internship for the is usually supervised and approved by the Dental Officers in various internship centres across the country.

22. It was also stated that before the amendment of the Medical Practitioners and Dentists Act in 2019 to allow the registration and licensing of community Oral Health Officers, all stake holders including the *ex parte* Applicant had a chance to raise their grievances bill, and that Article 119 of the Constitution allows any person to petition parliament to consider the amendment of any legislation. The Interested Parties contended that the term community Oral Health Officer as defined in section 2 of the Act is synonymous with the term Oral Health Practitioner as indicated in Section 3A (1) (c) (111), and the same are applied interchangeably without any ambiguity. In addition, that there is no mix up of the professional cadre roles as the two cadres of Dental Officers and Community Oral Health Officers complement each other, as applies in the case of medical officers who practice hand in hand with Clinical officers with clear and defined roles. The Interested Parties claimed that there are about 800 Dental Officers and more than 1200 Community Oral Health Officers working in various parts of the country and there has been no known case of mix up of the roles in the practice of dentistry.

23. In conclusion, the Interested Parties averred that Article 41(1)(a) states in part that every person has a right to highest attainable standard of health and in this case, the Community Oral Health Officers have been intensively trained and have acquired the necessary skills in the field of Oral Health and in particular, dentistry. It was also averred that the *ex parte* Applicant has not demonstrated with clarity on how the Communities Oral Health Officers practice in an unregulated environment and the extent at which their practice has caused disrepute to the profession.

### **The Determination**

24. The Applicant's advocates on record, Kiptinness & Odhiambo Associates, filed submissions dated 30<sup>th</sup> September, 2020, while Muriu Mungai & Co Advocates, the advocates on record for the Respondent, filed submissions dated 19<sup>th</sup> November 2020. The Interested Parties submissions dated 30<sup>th</sup> November, 2020 were filed by their advocates, Mitiambo & Co. Advocates.

### ***Preliminary Observations***

25. Before commencing on an examination and determination of the issues advanced by the parties, it is necessary to restate the parameters of judicial review jurisdiction. It was in this respect stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala*, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

26. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In

addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

27. **Lastly**, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights

28. The *ex parte* Applicant in this regard framed its issues for determination as follows:

a) *Did the Respondent have mandate to license the auxiliary cadre/paradental staff with a general Dental Practice Licence as per the provisions of section 5(3) (b), (c) and 23(f) of the Medical Practitioners and Dentist Act.*

b) *Has the Respondent developed a scope of practice and training for the training of cadre/paradental staff in consultation with other stakeholders as guided under section 4 and 23(f) of cap 253?*

c) *Does the decision to license the auxiliary cadre/paradental staff with a general Dental Practice License endanger the public quality of health and did that decision involve the Mandatory Public Participation Requirement?*

29. On the issue of scope of practice and training of cadre/paradental staff, the *ex parte* Applicant submitted that the training materials provided by the Interested Parties are not in the realm of the qualifications and training in dentistry as envisaged under the approved and accredited Bachelor of Dental Surgery curriculum, but are for a curriculum in Dental Technology, diploma and degree course, which is a different course that is not regulated under the Act. Further, that the said curriculum is not equivalent to the Bachelor of Dental Surgery curriculum, community oral health curriculum, and oral health curriculum.

30. In addition, that the Interested party attached internship logbooks for a number of auxiliary cadre officers, and that there is a difference in the logbook requirements between the dentists and auxiliary cadre of community oral health officers. Further, that the dentist's logbook is regularly reviewed and accredited by the Respondent under stakeholder engagement and well-known professional standards of practice, yet the accreditation, review and qualification requirements of the Interested Parties' logbook is not known.

31. It needs to be pointed out at the outset that the issues raised and arguments made by the parties that require an examination of whether the content and quality of the training of community oral health officers or oral health practitioners merit their licensing or registration as dental practitioners is beyond the remit of this Court as a judicial review Court for various reasons. Firstly, it will require this Court to make a value and qualitative judgment as regards the curriculum, training materials and training methodologies of the courses offered for the different cadre of oral health workers, which is a merit review that is beyond the standards set for judicial review and in section 7(2) of the Fair Administrative Action Act.

32. The standards of merit review set out in section 7 (2) of the Act are as follows:

- **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;**

**(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**

**(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;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(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;**

**(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

33. Secondly, engaging in a comparison of the curriculum and training content of dentists *vis-s vis* that of Community Oral Health Officers and oral health practitioners will require this Court to make a primary decision as to whether they are fit for purpose, so as to determine if the Respondent acted lawfully. In doing so, this Court will be usurping the roles of other public bodies that regulate academic programmes, which is a forbidden in judicial review. The *ex parte* Applicant in this respect cited various decisions including **Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) (2020) eKLR** and **Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) (2020) eKLR** where the court held that, it is the Commission for Higher Education that is tasked with ensuring that there exists uniform standards in the learning, accreditation, licencing and qualifications in the provision of university education in Kenya.

34. In addition, under section 4 of the Act, the Respondent's functions include to establish and maintain uniform norms and standards on the learning of medicine and dentistry in Kenya, and to approve and register medical and dental schools for training of medical and dental practitioners. The first point of call therefore as regards any concerns about the quality and adequacy of the curriculum being taught to, and quality of practice of the cadres of dentistry and oral health practitioners, are the concerned public bodies stated in the above cited decisions, and the Respondent, and not this Court.

35. Likewise, a determination as to whether the licensing of this cadre will endanger or has endangered public health is a disputed fact, which will require the adducing and examination of evidence in this regard, before a determination can be made as to whether there has been violation of the Constitutional provisions in Article 43 on the right to health. This is a fact-finding and fact resolution exercise that is normally suitable in the first instance for the normal civil process in a court, or a body with statutory authority to undertake such an exercise such as Respondent. Judicial review, being a *sui generis* process, is generally not suitable for resolution of questions of contested facts.

36. Indeed, the response by the Respondent on the averment that the licensing and registration of Community Oral Health Officers is a violation of the provisions of Articles 41 and 43 of the Constitution, was that there is no evidence provided to prove the said allegations. The Respondent submitted in this respect that it is trite law that violations of the Constitution must be pleaded with specificity, and cited the decision in **EG & 7 Others Vs Attorney General & Others Petition 150 & 234 of 2016 (Consolidated)**, wherein it was held that "a court confronted with a claim of violation of a constitutional right is required to inquire into the allegations only when there are specific facts supporting a right in the constitution or the law." A judicial review Court cannot undertake such an inquiry as explained in the foregoing.

37. Consequently, the three main issues raised for determination that fall within the jurisdiction of this Court are firstly, whether the Respondent acted legally in licensing Community Oral Health Officers with a general Dental Practice Licence; secondly, whether the action to license the Community Oral Health Officers with a general Dental Practice Licence was undertaken procedurally and fairly, and thirdly, whether the *ex parte* Applicant merits the relief sought.

#### ***On the legality of the licensing of Community Oral Health Officers***

38. According to the *ex parte* Applicant, the lack of a clear definition of the term "dentist" provides great difficulty to make distinction between the cadres, dentists and Community Oral Health Officers and it is the reason for the misfeasance and malfeasance by the regulator council. Further, that the Act does not provide the definition of an oral health practitioner or provide for the interchangeable application of the terms dentist, community oral health officer and oral health practitioner. Therefore, that these terms must not be construed to be synonymous with each other or be used to provide equivalency in professional qualifications. It was contended that the registration and

licensing of the cadre Community Oral Health Officers with the general Dentists practitioners' license is against the provisions of the Act, as the scope of practice and training of a dentist is so much different from that of the auxiliary cadres.

39. The *ex parte* Applicant submitted that section 5(3) of the Medical Practitioners and Dentists Act (hereinafter referred to as "the Act") states that the registrar shall annually maintain a register of community oral health officers, and that the maintenance of separate registers implies that the cadres of dental practitioners/dentists and auxiliary Community Oral Health Officers entails a clear separation of qualification, duty and scopes of practice. Further, that the Respondent has also not made any delegated legislation to guide the above process as required by section 23(f) of the Act. It was contended that section 6 of the Act which regulates the process of registration of medical practitioners and dentists in Kenya does not provide for the registration of auxiliary cadres as dentists. Further, the Act has no legal provisions or subsidiary directions on how auxiliary cadre can be registered, licenced, trained and regulated, save for the provision of section 23 on creation of delegated regulations which has not been actioned on by the council. In addition, that definition of dentist in the Act does not include auxiliary cadres and Community Oral Health Officers.

40. The Respondent on its part submitted that there is no evidence to suggest that it has violated any of the aforesaid provisions of the law, as the registration and licensing of Community Oral Health Officers is in accordance with the current law. It was contended that the Respondent has many functions, as set out in section 4 of the Act, which includes the licensing and registration of medical and dental practitioners, licensing medical institutions, carrying out inspections of training and medical institutions and conducting disciplinary proceedings on complaints lodged against practitioners or medical institutions in Kenya, and establishing and maintaining uniform standards on the learning of medicine and dentistry in Kenya, amongst other functions.

41. Further, that by virtue of the amendments to the Act, the Respondent was granted the statutory mandate to, *inter alia*, register, license and maintain a register of Community Oral Health Officers. The Respondent reiterated and detailed the history of the training and regulation of Community Oral Health Officers prior to the said amendments, and urged this Court to adopt the holding in the judgement delivered in **Professor Stanley Khainga & Others vs Kenya Medical Practitioners and Dentists Board & Others, Petition No. 22 of 2018**, wherein the Court declined to interfere or superintend the Respondent's statutory functions and held it can only interfere if it is demonstrated a statutory body acted outside its mandate.

42. Lastly, the Respondent submitted that the provisions of section 23 of the Act stipulate that it occasionally reviews the existing Code of Conduct, and the expectation is that the exercise will be undertaken afresh to incorporate all the amendments introduced to the Act including on the practice of community oral health officers. According to the Respondent, the absence of the rules does not make the registration and licensing of community oral health officers irregular or contrary to the law, more so given that the incorporation of their practice into the Act was undertaken in May, 2019 and there is no evidence of bad faith on its part.

43. The Interested Parties similarly submitted that the Respondent performs its functions within the confines of the Act, and had not violated any of the provisions of the Act. In any event, that the Applicant had participated in the discharge of the functions through their representative contended that the registration and licensing of any cadre including Community Oral Health Officers is approved by a full council meeting in which the *ex parte* Applicant is part and parcel. the process of registering Community Oral Health Officers was in line with the Health Laws (Amendments) Act 2019. He stated that it is therefore not a decision of the Council as the Applicant appears to suggest but a requirement of the law.

44. It is not disputed by the parties that the Respondent has been licencing Community Oral Health Officers. Section 5 of the Act establishes a register of various cadre of health practitioners, and also mandates the Respondent's Chief Executive Officer to maintain the said register as follows:

**(1) For the purpose of this Act, there shall be a Registrar.**

**(2) The Chief Executive Officer shall be the Registrar, and shall perform such duties in connection with the register as are prescribed by this Act.**

**(3) The Registrar shall annually maintain—**

**(a) a register for interns;**

**(b) a register of medical and dental practitioners;**

**(c) a register of community oral health officers;**

**(d) a register of general practitioners;**

**(e) a register of specialist practitioners;**

**(f) a register of foreign medical and dental practitioners;**

**(g) a register of approved medical and dental schools;**

**(h) a register of approved internship training centres;**

**(i) a register of health institutions; and**

**(j) such other registers as may from time to time be required by the Council.**

45. It is evident from the said provisions that the Respondent is required to maintain a register of community oral health officers. **Black's Law Dictionary** Ninth Edition at pages 13395 to 1397 in this regard defines to register as to enter in a public registry, or to enrol officially. A registrar is defined as a person who keeps official records, while registration is the act of recording or enrolling.

46. Section 6 of the Act provides for persons who qualify to be registered as medical and dental practitioners as follows:

**(1) A person who—**

**(a) is a citizen of Kenya;**

**(b) is a holder of a degree or other qualification obtained from a University in Kenya or the East African Community which is recognized by the Council as making him eligible for registration;**

**(c) presents proof of completion of internship; and**

**(d) satisfies the Council that he is a person of good moral standing,**

**may apply to the Council for full registration as a medical or dental practitioner under this Act.**

**(2) A person who—**

**(a) is a citizen of Kenya;**

**(b) is a holder of a degree or other qualification obtained from a University outside Kenya or outside the East African Community which is recognized by the Council as making him eligible for registration;**

**(c) has passed the internship qualifying examinations;**

**(d) presents proof of completion of internship; and**

**(e) satisfies the Council that he is a person of good moral standing,**

**may apply to the Council for full registration as a medical or dental practitioner under this Act.**

**(3) A person who—**

**(a) is a citizen of Kenya;**

**(b) is a holder of a degree or other qualification obtained from a University outside Kenya or outside the East African Community which is recognized by the Council as making him eligible for registration;**

**(c) presents proof of completion of internship in the country in which he trained;**

**(d) has passed pre-registration examination; and**

**(e) satisfies the Council that he is a person of good moral standing,**

**may apply to the Council for full registration as a medical or dental practitioner under this Act.**

**(4) A person who—**

**(a) is a citizen of the East African Community;**

**(b) is a holder of a degree or other qualification recognized by the Council as making him eligible for registration;**

**(c) presents proof of registration in their country of origin; and**

**(d) satisfies the Council that he is a person of good moral standing,**

**may apply to the Council for reciprocal registration as a medical or dental practitioner under this Act.**

(5) A person who—

(a) is not citizen of Kenya or of a partner state of the East African Community;

(b) is a holder of a degree or other qualification recognized by the Council as making him eligible for registration;

(c) presents proof of registration from the country of origin or any other jurisdiction;

(d) satisfies the Council that, he has acquired sufficient knowledge of, and experience in, the practice of medicine or dentistry as the case may be;

(e) satisfies the Council that he is a person of good moral standing; and (f) has passed an examination prescribed by the Council,

may apply to the Council for temporary registration as a foreign medical or dental practitioner under this Act as is prescribed in regulations.

(6) An application made under subsections (1), (2), (3), (4) or (5) shall be in the prescribed form and shall be accompanied by the prescribed fee.

(7) The Council shall consider every application made under this section and shall register the applicant if satisfied that the applicant is—

(a) duly qualified in terms of this section; and

(b) a fit and proper person to be so registered.

47. Under section 7 of the Act, the Respondent shall issue to every person registered under the Act with a certificate of registration in the prescribed form. A plain reading of section 7 is that it applies to the persons who are registered under section 6, as section 5 does not deal with the registration of any person, but with the maintenance of records of the various cadres of health professionals. It is also notable in this respect that the Act defines a register as “the register of medical practitioners, dental practitioners and health institutions for public and private practice which the Council is required by section 5 to keep”.

48. Two observations are key in the interpretation of the provisions of the Act on registration. It is notable that in section 5 there is a distinction and separation made between the register of medical and dental practitioners and register of community oral health officers. Secondly section 6 only provides for the registration of medical and dental practitioners, but not of community oral health officers. A medical practitioner is defined in section 2 to mean a person registered under this Act as a medical practitioner, while a “dental practitioner” and “dentist” mean a person registered under this Act as a dentist. A community oral health officer is on the other hand is defined as “a person who has undergone the prescribed course of training in an approved institution, and holds a diploma, higher diploma or degree in community oral health”.

49. A plain reading of the Act is that while the Respondent has the powers to maintain an official record of community oral health officers, the Act has not provided for the procedure of registration of this cadre of health professionals, nor given powers to the Respondent to issue them with a certificate of registration. This Court is also reluctant to imply such an incidental power for two reasons. First because such an incidental power can only be implied where it is necessary for the relevant function, and must fall within the scope of that function, as held in Attorney General vs Great Eastern Railway (1880) 5 App. Cas 473. The objective of the Act is stated as : “to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto”, while the function of in section 5 is to maintain a register of various health professionals, and section 6 expressly provides for the process of such registration in the case of medical practitioners and dental practitioners.

50. Both a literal, informed and purposive interpretation of the Act therefore requires that the registration process for community oral health officers must of necessity be in like manner as that of medical practitioners and dentists for this function to be properly exercised, as it is incidental thereto. The power and process as regards the registration of community oral health must therefore also be expressly provided for in similar manner and cannot be implied. There was thus an obvious oversight in this regard when amending the Act to include the process of registration for the new cadre of community oral health officers that was introduced. It is notable in this regard that there was an admission of this oversight by the Respondent.

51. A number of linguistic canons of interpretation are also relevant in this respect. The *noscitur a sociis* principle provides that a statutory term is recognised by its associated words, and a word or phrase is not to be construed as if it stands alone, but in light of its surrounding text. Therefore the provisions of section 5 of the Act as regards maintaining a register of community oral health officers as well as of other health professionals, must be read and understood in the context of the provisions of section 6 of the Act on the process of registration.

52. In addition, the principle *expressum facit cessare tacitum* provides that to express a thing expressly, ends the possibility that something inconsistent with it is implied. Therefore, under this principle, you cannot imply or infer a power that goes against the express words used in an Act. As stated in Whitemen vs Sadler (1910) AC 524, “express enactment shuts the door to further implication”. The chief application of this principle is the *expressio unius est exclusio alterius (expressio unius)* principle, which provides that to express one thing is to exclude another. Therefore to the extent that section 6 of the Act specifically names medical practitioners and dental practitioners as the persons the Respondent has powers to register, it also expressly excludes community oral health officers from the exercise of the powers of registration.

53. Second, it is evident from a reading of sections 5, 6 and 7 of the Act, that there are certain pre-conditions and factual situations that are required to be met and satisfied before the process of registration is carried out, in terms of ascertainment of the qualifications of the various cadres of health professionals. It would thus not be sensible, prudent nor desirable to imply a power to register community oral health officers in the absence of specific provisions as regards their qualifications. Where a statutory precondition for the exercise of power involves questions of precedent facts, a public power cannot confer on itself powers of specifying the precedent facts, as it may reach an erroneous conclusion as to their nature and extent. It is for this reason that the required precedent facts are normally specifically provided in the empowering statutes.

54. I am in this respect guided by the holding of the Supreme Court of the United Kingdom in **R(A) vs Croydon LBC (2009) 1 WLR 2557**, that where a statutory provisions gives rise to an issue of precedent fact, the determining factor is the intention of Parliament, and in particular whether Parliament intended to place a limit on the exercise of the relevant power by the public body. The Courts will in this respect have regard to the legislative and administrative context in order to divine the intention of Parliament, including the relevant legislative scheme as a whole, and the nature and importance of the power to which the factual precondition relates.

55. In the present case, the determining factor and pre-condition for registration of health professionals, as shown by the purpose of the Medical Practitioners and Dentists Act and section 6 thereof, is their training and qualifications. Therefore, ascertainment of the competence and qualifications of community oral health officers is a crucial and important precedent fact before their registration, which must not only expressly provided for in the Act, but also shown to exist before their registration.

56. It is thus the finding of this Court arising from the foregoing reasons, that the registration and licencing of community oral health officers by the Respondent, in the absence of an express statutory provision for their registration, including on their qualifications, was substantively *ultra vires*.

### ***On Whether the Licensing of Community Oral Health Officers was Procedural and Fair***

57. The *ex parte* Applicant submitted in this regard that it wrote to the Respondent in December 2019 and March 2020 regarding the misapplication of the law and no responses were provided. It was also contended that sections 4 and 6 of the Fair Administrative Act provides that administrative actions must be taken expeditiously and lawfully, and that every person has the right to be given written reasons for any administrative action. It was submitted that even though the *ex parte* Applicant was a key stakeholder, it was never given reasons for the decision to register cadres with a general dentist practise license. Furthermore, that it is the law that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator should comply with the provisions of section 4 (3) of the Fair Administrative Action.

58. Reliance was placed on the decision by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, that the administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires*. It was also submitted that the scope of purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large, so as to uplift the quality of public decision making. It was accordingly submitted that licensing of community oral health officers with a general dental practice licence is a misapplication of the guiding laws, rules, and policies, and shows a lack of adherence to procedural issues, since there exists no law, regulations, or policy for the said auxiliary cadre.

59. Further, that if the decision is to be allowed, there would be no distinction on the type of services to be provided by the community oral health officers and dentists, and that the standard of care and codes of practice to be used in case of malpractice and regulation of the said cadres would be unfairly, illegally and unprocedurally applied. Reliance was placed on the decision in **Republic vs Kenya Medical Laboratory Technicians and Technologists Board Exparte Adpath Laboratories Limited [2019] e KLR** that judicial review orders would help curtail the injustice that will be caused to the Public were such arbitrary decisions allowed to be made.

60. Submissions were also made by the *ex parte* Applicant on the lack of public participation in making of the impugned decision. The *ex parte* Applicant contended that the Respondent is comprised of nine board members, a majority of whom, eight in number, are not dental practitioners. Further, that there is only one dental representative in the Respondent board, and the Respondent cannot therefore purport to say that due to that one member, there was public participation among the stakeholders before the decision was made. Furthermore, that the *ex parte* Applicant did write on several occasions, in December 2019 and March 2020 to the council, expressing their concerns and requesting for the minutes as well as a copy of the decisions passed to allow auxiliary cadre (community oral health officers) licensure with general dental clinical practice licence, which would have established whether public participation was carried out.

61. The *ex parte* Applicant submitted that Article 10 of the Constitution has a mandatory requirement of public participation as a national value and principle of governance. Clause 2 (a) of the Article explicitly mentions public participation of the people as such. He added that thus, value and governance principle is indeed supposed to be adhered to whenever a state organ, state officer, public officer and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions. The South African Court case of **Doctors for Life International vs Speaker of the National Assembly and Others (CCT 12/05) (2006) (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** and the Kenyan case of **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others (2014) eKLR** were cited for the position that the duty to facilitate public participation is not a hollow, formalistic one and for its sake, as it entails qualitative participation by members of public and of stakeholders and that their input is supposed to be considered seriously.

62. The Respondent on the other hand submitted that the registration and licensing of community oral health officers is a statutory mandate given to the Respondent, and its exercise could not be said to be in violation of the right to fair administrative action, so long as it is undertaken within the confines of the law. The Respondent further submitted that the *ex parte* Applicant, being a stakeholder, was involved in the process of the amendments to the health laws vide the Health Laws (Amendment) Act, 2019, and could therefore not feign ignorance as to the contents of the Act. The authorities cited by the *ex parte* Applicant on the issue of public participation were distinguished on the grounds that they did not apply in the circumstances of this case, as the amendments to the Act had already come into effect and the Respondent had been undertaking its statutory duties. Further, that the present suit does not challenge the constitutionality of the amendments to the Act and hence they respectfully submitted that those decisions are not appropriate.

63. The Interested Parties likewise submitted that the *ex parte* Applicant is aptly represented in the Respondent council by one of its members who is also their National Chairman. Further, that section 3A (5) of the Act provides that six members of the Council shall constitute a quorum at any meeting and there is no any other provision under the Act that requires the Respondent Council to give reasons to any of its members for doing any act that it is mandated to do under the confines of the law. It was further averred that the *ex parte* Applicant has not demonstrated how the registration and licensing of the community oral health officers is a violation of the Act and the Constitution, or that the Respondent has exceeded its mandate or contravened the mandatory provisions of the law. The Interested Parties reiterated their arguments that the practice by community oral health officers has been in existence for a long period of time, and further that the cadre ought to be registered and regulated.

64. I will first address the limb canvassed as regards the application of the provisions of the Fair Administrative Action Act to decisions made by the Respondent, including that of licencing of community oral health officers. Article 47 of the Constitution, and the provisions of the Fair Administrative Act in this regard now import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the Constitution provides as follows in this regard:

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

65. The Fair Administrative Action Act was enacted to implement the provisions of Article 47, and the said Act defines an administrative action to include - (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

66. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

67. The Fair Administrative Action Act therefore clearly applies to the Respondent in its capacity and exercise of its powers as a statutory authority, and in respect of any decisions that it makes that may affect the rights of others, including the members of the *ex parte* Applicant. Procedural fairness in administrative action is embedded in the 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. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision has an effective opportunity to make representations, before it is made and by an impartial decision maker.

68. In the present case, the *ex parte* Applicant’s grievance is that it wrote to the Respondent severally requesting details of its decision to license the community oral health officers, and did not get any response, The *ex parte* Applicant annexed copies of a letter to the Respondent dated 20<sup>th</sup> December 2019, requesting for the input of stakeholders on the requirements for registration of community oral health officers; and one dated 4<sup>th</sup> March 2020 requesting for a copy of the Respondent’s decision on the said registration and issue of licences to the community oral health officers.

69. Section 6 of the Fair Administrative Action Act in this respect specifically states as follows;

(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

(2) The information referred to in subsection (1), may include-

(a) the reasons for which the action was taken; and

(b) any relevant documents relating to the matter.

(3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.

(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

(5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure. “

70. There is thus a clear statutory duty on the part of the Respondent to provide information on its decision to register and licence community oral health officers and the reasons thereof, and particularly given that the said decision was of significance to the *ex parte* Applicant's practice. The Respondent in this respect urged that it was exercising a statutory function, and therefore cannot be said to be in violation of the right to fair administrative action so long as it is an action undertaken within the confines of the law. The duty to act fairly however relates to procedural fairness in decision making, including in the exercise of a statutory mandate. Therefore, the duty exists irrespective of, and in addition to the existence of substantive powers to act, and the answer to a question whether the threshold of fairness has been met will depend on the nature of the matters in issue, and whether there was a reasonable opportunity for parties to present their cases in the relevant circumstances.

71. The admitted failure to provide its decision and reasons therefore leads this Court to make an adverse inference and finding about the fairness of the Respondent's decision.

72. The second limb as regards the procedural propriety of the Respondent's impugned decision to licence community oral health officers was on lack of public participation. Public participation and stakeholder engagement in the application, interpretation and implementation of laws and policies, is now specifically required of all state organs, state officers and public officers under Article 10 of the Constitution. A 5-Judge Bench of this Court in **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)** [2020] eKLR, considered the question whether a public authority undertaking statutory functions authorized by its parent statute is obligated to engage in public participation and/or stakeholders' engagement while carrying out those functions, and if so, to what extent.

73. In this respect the Court identified two scenarios as follows:

**“ 133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the ‘internal operational decisions concept’. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.”**

74. The Court held that subjecting the first scenario to public participation is undesirable and that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions, and that as long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

75. As regards the second scenario, it was held as follows:

**“137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.**

76. The importance of participation of stakeholders in decision making was also explained in **Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others** [2015] eKLR in the following manner: -

**“..... Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.”**

77. The *ex parte* Applicant in this regard has provided evidence of a letter requesting or stakeholder input in the Respondent's decision to licence community oral health officers. The Respondent's and Interested Parties responses were that the *ex parte* Applicant is represented in its council and this suffices in terms of participation in decision making. The Respondent and Interested Parties position is however not tenable and does not suffice in this respect, since the *ex parte* Applicant's representative sits in the Respondent council as a decision maker, and is therefore subject to the same duties as the rest of the council members with respect to fair administrative action and public participation. In effect, the representative wears two hats in this respect, as agent and decision maker, which both impose additional obligation upon him or her, and the rest of the Respondent's Council members that are attendant to decision-making.

78. In this regard, the basis and manner of licencing of community oral health workers by the Respondent was a decision that was not only relevant in terms of implementation of the Act, particularly given that the Respondent was also implementing new amendments to the law in this regard, but also to the extent that it was likely to affect the stakeholders in the provision of oral health services. The failure to consult the stakeholders in the process was therefore not only unconstitutional, but also procedurally infirm.

### ***On Whether the Relief sought is Merited***

79. The *ex parte* Applicant has sought orders of certiorari, mandamus, prohibition and an injunction. An order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. An order of certiorari on the other hand nullifies an unlawful decision or enactment. An injunction is an order prohibiting a person from doing something or requiring a person to do something.

80. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the orders of prohibition and certiorari can issue as follows: -

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

81. An order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of Appeal in the above cited decision held as follows on the applicable principles for an order of mandamus to issue:-

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”**

82. The decision of the Respondent to register and license Community Oral Health Officers and Oral Health Officers with a General Dental Practice Licence has been found by this Court to have been both substantively and procedurally *ultra vires*, and to have been undertaken unfairly and without stakeholder participation. The orders sought of certiorari to quash the said prosecution is thus merited. Consequently, an order of prohibition stopping any further unlawful registration and licensing of Community Oral Health Officers and Oral Health Officers is also merited.

83. On the orders of mandamus sought, it was held in **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes

that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

84. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel a Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

85. In the present case, there are available remedies of certiorari and prohibitions that will address the *ex parte* Applicant's grievances as regards the continued licencing of Community Oral Health Officers and Oral Health Officers. In addition, the issue of the legal duty of the Respondent in relation to the registration and licensing of Community Oral Health Officers and Oral Health Officers is one that is likely to be addressed by the necessary legislative enactments, and this Court cannot grant orders that will curtail performance of the Respondent's future statutory duties. The order of mandamus cannot therefore be granted in the manner sought.

86. The only duty that merits the orders of mandamus in this respect is the duty of the part of the Respondent to undertake public participation and stakeholder engagements on the registration and licencing of Community Oral Health Officers and Oral Health Officers, to inform the implementation of the provisions of the law in this regard.

87. Lastly, injunctions are normally in principle granted where there has been a breach of private law rights, and not with respect to public rights or duties, and are therefore not an appropriate remedy in the present application. The Court of Appeal in ***Cortec Mining Kenya Limited vs Cabinet Secretary, Attorney General & 8 others*** (2015) eKLR held as follows as regards the grant of injunction in judicial review proceedings: -

***“34. Can this court grant an order of injunction in a judicial review matter such as this one? For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place.***

***The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies.”***

88. It is also notable that an injunction will be superfluous in light of the finding that prohibition orders are merited in the circumstances of this case.

### **The Disposition**

89. This Court therefore finds that the *ex parte* Applicant's Notice of Motion application dated 30th March 2020 is merited to the extent of the following orders:

**I. An order of Certiorari be and is hereby granted to remove into this Court and quash the decision of the Respondent to register and license Community Oral Health Officers and Oral Health Officers with a General Dental Practice Licence for being *ultra vires*.**

**II. An order of Mandamus be and is hereby granted compelling the Respondent to undertake stakeholder consultations on the registration and Licensing of Community Oral Health Officers and Oral Health Officers within one hundred and eighty (180) days from today's date.**

**III. An order of Prohibition be and is hereby granted prohibiting the Respondent from further registration and licensing of auxiliary cadre/paradental staff referred to as Community Oral Health Officers and Oral Health Officers, unless and until the necessary legislative framework on such registration process, including on the necessary qualifications of Community Oral Health Officers and Oral Health Officers is enacted.**

**IV. Given the potential of order (I) above disrupting the provisions of oral health services, the effect of the said order is hereby suspended for one hundred and eighty (180) days, to afford the Respondent an opportunity to regularize the situation.**

**V. There shall be no order as to costs as this matter was one of public interest, and arose from amendments made to the Medical Practitioners and Dentists Act.**

90. Orders accordingly.

**DATED, AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2021**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVI -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondent's and Interested Parties' Advocates on record.**

**P. NYAMWEYA**

**JUDGE**