



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. E383 OF 2020**

**IN THE MATTER OF: BREACH OF FUNDAMENTAL RIGHTS  
AND FREEDOMS ESPECIALLY ARTICLE 1(1)(b), 1(4)(b), 2, 3, 10,  
19, 20, 21, 22, 23, 27, 28, 41, 43, 47, 50, 73, 75, & OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: KENYA'S TREATY OBLIGATIONS UNDER  
THE TREATY ESTABLISHING THE EAST AFRICAN COMMUNITY**

**AND**

**IN THE MATTER OF: ARTICLES 22(10), 258 AND 259,  
40, 47, 48 & 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLE 2, 3, 4, 7, 13 & 19 OF THE  
AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS**

**AND OTHER PROVISIONS THEREOF**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES 2013, SECTION 4**

**BETWEEN**

**DR. RUTAGANDA VIATEUR.....PETITIONER**

**VERSUS**

**THE KENYA MEDICAL PRACTITIONERS**

**AND DENTISTS COUNCIL.....RESPONDENT**

**JUDGEMENT**

## **PETITION**

1. The Petitioner through a Petition dated 30<sup>th</sup> October 2020 seek the following orders:-

***i. A Declaration that the actions by the Respondent rendering the Petitioner ineligible for registration to practice as a Dentist is discriminatory, procedurally unfair, unlawful, unreasonable and infringes on Petitioner's legitimate expectation and Petitioner's right to equality and equal benefit of the law, education in flagrant breach of the Articles 27, 43 and 47 of the Constitution of Kenya and Section 7 of the Fair Administrative Action Act, 2015.***

**ii. Order of Certiorari to remove into this Honourable Court and quash the decision by the Respondent declaring the Petitioner ineligible for registration to practice as a Dentist.**

**iii. Order of Mandamus be made compelling the Respondent to issue the Petitioner with permanent reciprocal registration certificate and the requisite practicing licence and to admit and register to register the applicant herein as a Dentist practitioner.**

**iv. That an order be made for the Respondent to pay the Applicant for the loss of earning and employment from the month of March 2020 when the Respondent failed to renew his practicing licence revoked to date at the rate of Kenya Shillings Three Hundred Thousand (Kshs.350,000) per month being the monthly salary that the Petitioner would otherwise be earning.**

**v. Order that the Respondent compensates the Petitioner for loss of career and golden opportunities and for the inconvenience caused due to its actions.**

**vi. That the Honourable Court be pleased to order an award of damages for compensation to the Petitioner for the violation of his rights.**

**vii. That the costs of the Petition be provided for.**

2. The Petitioner's Petition is supported by supporting affidavit by Dr. Rutangwa Viateur sworn on 3<sup>rd</sup> October 2020 and supplementary affidavit by the Petitioner sworn on 26<sup>th</sup> February 2021.

## **RESPONDENT'S RESPONSE**

3. The Petition is opposed and in doing so the Respondent filed a Replying Affidavit by Michael R. Onyango, Corporation Secretary of the Respondent, sworn on 1<sup>st</sup> February 2021.

## **BACKGROUND**

4. The Petitioner is a Rwandese National, who undertook studies in dentistry in institution in Rwanda and where he practiced at the initial stage before coming to Kenya. The Petitioner now seeks orders directing the Respondent to issue him a permanent reciprocal registration countrywide and the requisite practicing licence and also admit and register him to practice as a Dentist within the Republic of Kenya.

## **PETITIONER'S CASE**

5. The Petitioner aver that he was employed as a Dentist at Port Florence Hospital in Kisumu vide a strength of a temporary licence that had been issued to him and renewed by the Respondent herein. It is contended that the Petitioner is a Rwandese and a member of East African Community and a qualified Dentist who has been practicing and working in Kenya from 2018 under a temporary licence issue to him by the Respondent and the same renewed in 2019 and therefore advised by the Respondent to apply for permanent licence to continue practicing as a Dentist in Kenya. The Petitioner did apply for permanent licence and paid the requisite fees for the same as advised by the Respondent.

6. It is the Petitioner's case that the Respondent failed to issue him with the licence and further moved to remove his name from the list of registered dentist without furnishing the Petitioner herein with any reason for the said action. The Petitioner made several visits to the Respondent's office to be issued with the second licence but all efforts had been futile. The Petitioner assert the Respondent's decision to deny him practicing licence is illegal and unlawful as the same was arrived at without according the Petitioner an opportunity to be heard, neither was he given reasons for the said decision and same was arrived at without giving reason for the decision and without following the laid down procedure.

7. It is further Petitioner's case that the decision by the Respondent was in violation of the protocol for the establishment of East African Community – which anticipates free movement of labour and services across the East African Region. The Petitioner further aver that he is qualified Dentist, who was previously registered as a qualified dentist in Rwanda and had been practicing in Kenya for the last 2 years and the Respondent's decision not to issue him with permanent practicing licence in itself illegal and unlawful. The decision not to issue Petitioner with licence it is urged has caused the Petitioner a lot of distress and loss of earning, as he was relieved from his employment with a gross salary of Kshs.350,000/= per month with Port Florence Hospital Kisumu.

## **RESPONDENT'S CASE**

8. The Respondent, the Medical Practitioner's and Dentist Council (herein upon "**medical Council**") urges that it is mandated by statute under

the Medical Practitioners and Dentist Act to assess and Licence Foreign Nationality as medical or dentist practitioners.

9. It is contended the Petitioner is a Rwandese National and is a Citizen of Rwanda and he has expressly admitted that he undertook his studies on dentistry in the Republic of Rwanda.

10. The Respondent state that **Section 6(4) of the Medical Practitioners & Dentist Act (the Act)** sets out the conditions and requirements for registration of citizens of the East Africa Community to Practice medicine or dentistry in Kenya, and the said provision is the applicable guidance and consideration to the Respondent on the application by the Petitioner. In addition the Respondent asserts that the statutory requirements for registration of foreign medical and dental practitioners in Kenya requires proof of registration from their country of origin, in this case, the Rwanda Medical and Dental Council.

11. It is Respondent's contention that the objective of the above-stated statutory requirement is to ensure that persons who seek to be registered to practice medicine or dentistry in Kenya have the requisite qualifications from their country of origin and they have not been debarred.

12. The Respondent argue that the Petitioner failed to provide evidence of registration from the Rwanda Medical Council. The Medical Council's Training Assessment Registration and Human Resource Committee's recommended that the Petitioner sits for the Medical Council's pre-registration examinations. Further it is contended by the Respondent's that due to the Petitioner's failure to furnish the Respondent a Certificate of Registration from the Rwanda Medical and Dental Council, meant that he cannot be issued with a temporary license for foreign dentists or reciprocal registration to allow him to practice medicine or dentistry in Kenya, as it will be contrary to the Statutory requirements as set out in the Act and the Rules thereunder. In view whereof the Respondent urges that it complied with statutory requirement as set out in the Act.

13. In addition thereto, it is Respondent's case that at all material times the Respondent acted for the best interest of the Country and also for the best interest of patients by complying with the Law and ensuring that only practitioners registered in their country of origin are registered and licensed to practice within the Country. Further, compliance with the law, as stated above, bars quacks and practitioners who are debarred in their own Country of in their Country of origin from coming to practice in Kenya which may be a risk to patients in Kenya.

14. The Respondent further contend that there is no evidence of violation of the provisions of the Medical Practitioners and Dentist Act, the Fair Administrative Act, the Constitution or the Petitioner's legitimate expectation by the Respondent. To the contrary it is asserted that the Respondent has acted in accordance with the Law.

15. The Petitioner filed submissions in support of the Petition dated 26<sup>th</sup> February 2021, whereas the Respondent filed submissions in response dated 7<sup>th</sup> April 2021.

#### **ANALYSIS AND DETERMINATION**

16. I have carefully considered the Petitioner's Petition; and the Respondent's response as well as the parties rival submission and authorities in support, and from the above the following issues arise for determination:-

***a) Whether the Respondent's action of denying the Petitioner reciprocal registration and removing his name from list of registered dentist is tainted with procedural impropriety, illegality, unreasonableness and blatant violation of Petitioner's right to fair Administrative action and whether the Respondent has applied the law retrospectively.***

***b) Whether the Respondent is in violation of the Petitioner's legitimate expectation.***

***c) Whether the impugned decision jeopardize the spirit and objectives of the East African Community Treaty.***

***d) Whether the Respondent is in violation of the Petitioner's right to fair administrative action under Article 47 and the Fair Administrative Action Act, Article 27 on non-discrimination and human rights and right to be heard.***

***e) Whether prayers sought can be granted.***

#### ***A. WHETHER THE RESPONDENT'S ACTION OF DENYING THE PETITIONER RECIPROCAL REGISTRATION AND REMOVING HIS NAME FROM LIST OF REGISTERED DENTIST IS TAINTED WITH PROCEDURAL IMPROPRIETY, ILLEGALITY, UNREASONABLENESS AND BLATANT VIOLATION OF PETITIONER'S RIGHT TO FAIR ADMINISTRATIVE ACTION AND WHETHER THE RESPONDENT HAS APPLIED THE LAW IN RETROSPECTIVELY.***

17. The Petitioner contend that he submitted all relevant documents for registration as permanent Dentist Practitioner on 17<sup>th</sup> April 2019, and made payments in respect of the prescribed fees, made numerous calls and follow ups on his application but the Respondent failed to issue the Petitioner with any feedback leading to expiry of the temporary licence issued to the Petitioner at the end of 2019 and as a result the Petitioner lost his employment as he could no longer practice as a dentist.

18. The Petitioner contended that the Respondent purported to adduce a letter dated 25<sup>th</sup> June 2020 as its response and communication to the Petitioner, which the Petitioner urged was in bad faith, since it was done over 1 year after the applicant had submitted his application. The Petitioner further contended the Respondent were required to have communicated its decision timeously and in the spirit of the Fair Administrative Action Act and under **Article 47 of the Constitution**.

19. The Petitioner in support of the above placed reliance under **Section 4(3) of the Fair Administrative Action Act** which requires procedural fairness. The Section provides:-

**“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; new regulations, expert evidence, ...**

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

20. It is urged that **Section 7(2) of the Fair Administrative Action Act** provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matter, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

21. The Petitioner averred that the Respondent despite having received the Petitioner’s application, and the Petitioner having made numerous visits to the Respondent’s offices; the respondent failed to communicate its position on the Petitioner’s application contrary to its regulations as was indicated on the official part of application documents that **“the process will take on maximum of two weeks,”** but instead this failed to happen but took over 1 year for the Petitioner herein to get any feedback on his application; which the Respondent rejected. It is urged the Respondent did not give any reason as to why the application was rejected and as to why the Petitioner’s name was removed from the list of registered practitioners. This led to the Petitioner’s, services to be terminated by his employer and the temporary licence expiring and the Petition urges he has suffered loss and damage.

22. The Respondent in response urged that, it is a statutory body established pursuant to the provisions of **Section 3 of the Medical Practitioners and Dentist Act**, in which its functions are enumerated under **Section 4 of the Act**, which includes the licensing and registration of medical and dental practitioners, licensing Medical Institutions, and conducting disciplinary proceedings on complaints lodged against Practitioners or Medical Institutions within the Republic of Kenya as set out in **Section 20 of the Act**, among other functions.

23. The Respondent in discharge of its statutory duties, is required to do so through the guidance and assistance of its Secretariat, and it also performs diverse functions through Committees of the medical Council. The said committees consists of members of the Medical Council, and in some instances the respective Committees co-opt other persons or specialists, depending on the needs or required expertise or specialties.

24. It is Respondent’s case that pursuant to **Section 13 and 14 of the Act**, as read with **Rule 5 of the Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014**, the Medical Council is empowered to assess and consider applications of licenses from foreign Nationalities who have graduated from recognized medical schools, as medical or dental practitioners, from other Counties including the states in the East African Community. The Medical Council is empowered by statute to ensure approved applications meet the minimum or set requirements to allow the Applicants practice medicine or dentistry within the Republic of Kenya. The Respondent in discharge of its mandate as empowered by the relevant statute, in considering applications it has the duty and obligation to ensure there is compliance with the law.

25. Further the Respondent urged that there are committees of the Medical Council established pursuant to the provisions of **Section 4A of the Act** which include:-

**a) Training, Assessment, Registration and Human Resources Committee;**

**b) Disciplinary and Ethics Committee;**

**c) Inspections, Licensing, Finance and General Purposes Committee; and Audit and Risk Committee.**

26. The Respondent stated that the **Training, Assessment and Registration Committee**, herein after referred to as **“TARC”**, is a Committee of the medical Council which is established pursuant to the provisions of **Section 4A of the Act**, as read together with **Rule 3 of the Medical Practitioners and Dentists Training, Assessment and Registration) Rules, 2014, (“the TARC Rules”)** and it is mandated to perform several functions, which includes, approving applications for registration of medical and dental practitioners, and undertaking peer reviews, among other functions.

27. The Respondent as regards applications by a foreign medical or dental practitioner, seeking temporary licenses to practice medicine or dentistry within the Republic of Kenya, pursuant to the provisions of **Section 13 of the Act**, the Medical Council reviews the application through the Inspections and Licensing Committee to ensure the approved applications meet the minimum statutory threshold.

28. It’s Respondent’s position that the qualifications of a foreigner national seeking to practice as a foreign medical or dental practitioner in Kenya must be verified by the Educational Commission for Foreign Medical Graduate, herein after referred to as **“ECFMG”**, which is a Global body which verifies the authenticity of credentials for medical or dental practitioners through its Electronic Portfolio of International Credentials, hereinafter referred to as **“EPIC Certification”**, wherein the primary source for verification of credentials is undertaken.

29. In the instant Petition and a known and established norm that the Medical Council and other equivalent medical Councils from other Jurisdictions or Countries use the ECFMG and EPIC certification to verify credentials for foreign medical or dental practitioners or specialists to confirm whether they are licensed and registered in their country of origin. In undertaking the said verification one of the key requirements is Certification by the Medical Council of the country of origin.

30. The Respondent in addition contended that it is an admitted fact that the Medical Council has issued temporary licenses to several foreign medical or dental practitioners which allows them to practice medicine and dentistry within the Republic of Kenya and majority of them are rendering medical and dental services in mission Hospitals situated across the Country albeit it has not been faulted at all in the manner it issues the temporary licenses to foreign nationals as it has at all times ensured compliance with the Law.

31. The Petitioner urged that his application was rejected based on the law that according to the Petitioner came into effect after the Petitioner had submitted his application. It is contended that the amendment came into force on 17<sup>th</sup> May 2019 way after the Petitioner had made his application for registration as clearly admitted at paragraph 28 and 29 of the Respondent's Replying Affidavit sworn by Michael R. Onyango. It is urged the Respondents decision was based on law and now demands that the Petitioner does sit for examination before he is issued with the licence and further does deemed the Petitioner does furnish it with proof of registration with Rwanda Medical Practitioners and Dentists Council, a requirement that was introduced by the amendments to the Act and which came into effect as from 17<sup>th</sup> May 2019 way back after the Petitioner had already submitted his application papers. It is therefore argued by Petitioner the said amendments could not be applied retrospectively and as such the said amendments should not be used to deny Petitioner registration.

32. I now turn to consider whether the Respondent is applying the provisions of the Act retrospectively. There is no dispute that the Medical Practitioners and Dentists Act was Amended vide the **Health Laws Amendment Act, No.5 of 2019**, which came into force on 17<sup>th</sup> May, 2019. Even before the said amendments to the Act, the requirements for registration and licensing of foreign nationals were set out under the Act and also the **Medical Practitioners and Dentists (Training, Assessment and Registration) Rules, 2014**. It is noted that even before the said amendments to the Act, the recruitments for registration and licensing of foreign nationals were set out under the Act and also the **Medical Practitioners and Dentists (Training, Assessment and Registration) Rules, 2014**.

33. Further the provisions of **Part V of the Medical Practitioner and Dentist (Training, Assessment and Registration) Rules, 2014** provides for Assessment and Registration of Medical and dental practitioners. **Rule 10** thereto provides as follows:-

***“10.(1) An application for registration by an applicant shall be submitted to the Registrar in the prescribed form together with the prescribed fee and shall be accompanied by-***

***a) a full and sufficient evidence of the course or courses studied and the examination undergone in order to ascertain the authenticity of the degree, diploma or other qualifications submitted and the institutions in which they were undertaken together with legible photocopies of the applicant's degrees, diplomas or other qualifications and testimonials, all of which shall be attested by an official of the Board.***

***b) a short statement of the career history of the applicant since qualifying and documentary evidence of any work experience in medicine or dentistry by the employer or institution specifying the exact nature and the extent of the work performed and the period of employment or appointment.***

***(2) A person shall not be registered unless he or she-***

***a) produces his or her national identity card or passport;***

***b) is of good character,***

***c) possesses the requisite knowledge and skills required by the Board;***

***d) is a citizen of Kenya or a national of a State within the East African Community;***

***e) is proficient in English or Kiswahili;***

***f) is of sound physical and mental health***

***3) An application by a person registered in a foreign country shall, in addition to the documents specified in sub-rule (1), be accompanied by a certificate of good standing and registration or similar certificate containing evidence of registration from the appropriate foreign authority. (Emphasis added)***

***4) All the applications for registration shall be submitted to the Committee for approval before the certificates of registration issued by the Board.***

34. Further it is noteworthy that prior to the above-stated amendments to provisions of **Sections 11 of the Act** it was provided that:-

***“11. Persons eligible to be registered as medical or dental practitioners***

***1) Subject to the provision of this Section, a person shall be eligible for registration under this Act as a medical or dental practitioner if he is the holder of a degree, diploma or other qualification which is recognized by the Board as making him eligible for registration, and-***

***a) After obtaining that degree, diploma or other qualification, he has engaged in training employment in a resident medical capacity in one or more institutions approved by the Board for such period, being not less than one year, as the***

*Board may approve; and*

*b) He satisfied the Board that, whilst engaged in training employment under paragraph (a), he has acquired sufficient knowledge of, and experience in, the practice of medicine or dentistry, as the case may be; and*

*c) He satisfies the Board that he is a person of good moral character and a fit and proper person to be registered under this Act.*

*2) Where the Board does not recognize a degree, diploma or other qualification in medicine or dentistry held by a person as making him eligible for registration, it shall take steps to assess his suitability for registration and for the purpose of so doing may require him to attend an interview and to undergo any oral or written examination. (Emphasis added)*

*3) The Board may, after assessing the suitability for registration of a person under subsection(2), direct that before registration he shall undergo such further period of training or pass such further examination as it may specify.*

*4) The Board shall not authorize the registration of a person until it is satisfied that the requirement of subsection (1) have been fulfilled or, in the case of a person referred to in subsection (2), that the requirement of paragraphs (a), (b) and (c) of subsection (1) have been fulfilled and that any further period of training or examination directed by it under subsection (3) has been completed or passed.*

*5) The Board may, where it considers it expedient so to do, delegate the assessment of suitability for registration under subsection (2) to a committee of the Board which shall, after making the assessment, make recommendations to the Board accordingly.*

35. It is further noted that in instances where the medical council does not recognize a documentation provided by an Applicant as making him or her eligible for registration, it has powers to take steps necessary to assess the suitability of such person for registration. This includes attending an interview and/or require him to undergo any written or oral examination. Further it is noted the steps set out in statute are intended to protect the general public and more so patients as medical or dental practitioners treat and manage patients hence licensing of unqualified persons or quacks could have very dire results.

36. The *Medical Practitioners and Dentist (Training, Assessment and Registration) Rules, 2014* provides that registration cannot be authorized unless all the requirements have been fulfilled. In an instance where there are gaps or where some requirements may appear as though they have not been fulfilled, the Medical Council, through the Training and Assessment Committee, has the mandate and discretion to recommend training or assessment. Further *Rule 12 of the Medical Practitioners and Dentists (Training, Assessment and Registration) Rules, 2014* provides that no person to whom *Section 11(2) of the Act* applies shall be registered unless he or she has passed or has been exempted from an assessment examination.

37. From the facts of this Case and the relevant provision of the Act, I find that the requirements for registration before and even after the amendments of the Act, had similar provisions on registration of foreign nationals and therefore the issue or averments by the Petitioner that the Respondent has retrospectively applied the Act has not been established nor can it stand and the same is without merit.

38. It is further noted that the provision of *Section 6 of the Medical Practitioners and Dentist Act (following the amendments vide the Health Laws (Amendment) Act 2019)* provides for the threshold for registration of medical and dental practitioners. It gives separate thresholds for registration of citizens and for foreign nationalities. In addition *Section 6(4) of the Act* provides for registration of medical and dental practitioners who are citizens of the East African Community, which includes the Petitioner herein as he is a citizen of Rwanda. The said Statutory provision requires that such person be:

a) A citizen of the East African Community;

b) Is a holder of a degree or other qualifications recognized by the Medical 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. *(Emphasis mine)*

39. From the provision of *Section 6(4) of the Act* it is clear that the Petitioner would be eligible for reciprocal registration as a dental practitioner so long as he satisfies the Medical Council that he has met the requirements set out by Statute, as reproduced above, which includes proof of registration by the Regulatory body in his country of origin and he has a good moral standing. I find that the statutory provision above is meant to ensure that medical and dental practitioners from the region covered thereto, who have been debarred or suspended from their jurisdiction for diverse reasons or due to medical negligence do not use reciprocal recognition of East African Community nationalities to seek licenses to practice in Kenya as that may create a risk to patients or jeopardize lives of citizens of Kenya.

40. I therefore have no doubt that the statutory provision stated herein above, was for the good of the medical dentists practitioners as well as the patients. Further the need that the statutory requirement for proof of registration from the country of origin for foreign applicants was a requirement before the amendments to the Act and it is still is a requirement under the Act. I find that there can be no estoppel against a statute nor can the Respondent be faulted for seeking compliance with the law as it is and as required.

41. On issuance of temporary license *Section 13(3) of the Act* makes provision for issuance of temporary licenses *“to eligible foreign medical and dental students to perform specific work or works in specific institutions in Kenya,”* and it further provides at *Section 13(5)*

that a temporary license issued under **sub-section (3)** shall be for a period not exceeding 12 months within a practicing year and it may be renewed. It therefore follows in applying the said section that a temporary license issued to a foreign nationality cannot be issued for perpetually but on only on temporary basis for the period provided in the Act. The temporary license issued by the Medical Council to a foreign dental or medical practitioner, upon meeting the minimum statutory requirements and payment of the requisite fees, is valid for a period determined by the Medical Council, subject to a maximum period of 12 months. The law gives the Medical Council the discretion as regards the period of the license to foreign practitioners albeit subject to a maximum of 12 months for reasons that such applications are limited to specific facilities whereas some practitioners make applications to participate in medical camps or otherwise which are for a very limited period of time and hence their license are issued for the period which is expressly stipulated in the application.

42. According to the provision of the Act, it is expressly provided that foreign medical and dental practitioners, who are not registered in the Republic of Kenya, but have valid qualifications from a different Country or the Country of their origin should at the time of applying for a temporary license be required to have the qualification recognized by the Medical Council, as making them eligible for registration, and the Act expressly provides what they should provide.

43. It should be noted **Section 14 of the Act** provides for the process and requirements for renewal of practicing licenses for medical and dental practitioners. Further, the provision of **Section 14(4) of the Act** stipulates that **a person who is aggrieved by a decision of the Medical Council in the exercise of its powers on renewal of a practicing license may appeal to the High Court** hence the law creates the remedy being an appeal to the High Court.

44. Looking at the Petition herein it is clear that the primary claim by the Petitioner is that the Respondent herein failed to renew his temporary licence on a foreign dentist practitioner. The law provides for the recourse in case there is failure of renewal which is clear that a person aggrieved with the failure thereto is required to file an appeal to the High Court and not a Constitutional Petition as is the case in this matter.

45. Reliance in support of the aforesaid proposition is placed in the case of **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR**, where the Court stated:-

**“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”**

46. Further it is Respondent’s contention that a foreign national seeking a temporary license to practice medicine and dentistry in Kenya must hold a degree or other qualification and also be eligible to practice in his County of origin. It is part of the statutory provisions that a foreign medical or dentist practitioner applying for a temporary license so as to practice in Kenya, need to be eligible to practice in his County of origin. This is intended to prevent those who are debarred in their County of origin from using their original registration to seek a temporary license to practice in Kenya and hence they need to have a valid license from their County of origin.

47. Further on Reciprocal Registration, **Section 6(4)(c) of the Act**, states which makes provision for registration of persons who are citizens of the East African Community, states such persons are also required to present proof of registration in their country of origin. It provides that such a person may apply for **reciprocal registration** as a medical or dental practitioner under the Act, if they meet the requirements set. In addition thereto all foreign nationals, not just those from the East African Community, applying for licensing to practice medicine or dentistry in Kenya are required to present proof of registration from their country of origin and also satisfy the Medical Council, that they have acquired sufficient knowledge of and experience in the practice of medicine or dentistry. I find that the statutory requirement is justified for the best interest of patients and the general public. The requirements in public interest is of paramount importance that it is satisfied.

48. It is Respondent’s contention that on 21<sup>st</sup> December 2017 the Medical Council received the Petitioner’s application seeking to be issued with a Temporary license as a Foreign Doctor for the year 2018. At the time of applying for the temporary license the Petitioner provided the following documents:-

- i) Advanced Diploma in Dentistry dated 5<sup>th</sup> June 2004 from Kigali Health Institute and Transcripts form the same institution;
- ii) Post Graduate Diploma course in Stomatology dated 1<sup>st</sup> December 2006 from Republic of Cuba and University Hospital of Butare, Rwanda
- iii) Master of Public Health from Bugema University, on 13<sup>th</sup> November, 2016;
- iv) Documents indicating his work experience and an Appointment letter to Rheema Hospital;
- v) Certification from the National Council for Higher Education Rwanda;
- vi) Letter from the Commission for University Education, Kenya on Recognition and Equation of Qualification on Accreditation of Ministry of Health Cuba and Kigali Health Institute dated 18<sup>th</sup> December 2017;
- vii) The Petitioner’s curriculum vitae;
- viii) A certificate of registration to the Rwanda Dental Association dated 6<sup>th</sup> December, 2017;

49. The Respondent at the time issued Petitioner with temporary license for foreign doctors pursuant to the application for the year 2018.

50. The Petitioner therefore applied for permit registration (while still on the temporary foreign license), seeking to practice as a dental practitioner on 15<sup>th</sup> April, 2019 as an East African Community member but his application was not approved as the Petitioner failed to provide evidence of registration from the East Africa Community Partner State Board/Council, being registration from the Rwanda Medical Practitioners and Dentist Council.

51. The Petitioner, it is urged avers that he has a certificate of registration from the Rwanda Dental Association dated 6<sup>th</sup> December, 2017, which is not the Regulatory Authority but an Association of Dentists. Further, the Petitioner has stated or explained why he cannot provide the certificate of registration evidencing licensing by the Rwanda Medical doctors and dentists and what is not clear is the Petitioner's moral standing in his home country or whether he has been debarred by the council in Rwanda or suspended.

52. It is further stated by the Respondent that on 15<sup>th</sup> April 2019, on the day of the application, the Petitioner also made an Application for Qualifying Examination for Foreign Trained Doctors/East Africa Community Reciprocal Recognition (Form No.20 of 1977). The said application is at page 14 of the Respondent's Replying Affidavit. The Petitioner paid for the Application fee and the Examination/Evaluation qualification papers as is indicated in the Application. It is also important to note that in the said document, one of the requirements, being no.(viii), is **Evidence of registration from EAC Partners States Board's and Councils (for those applying for reciprocal registration.)**

53. In view of the above it is submitted that the Petitioner cannot be permitted to selectively comply with statutory provisions as relates registration of foreigners seeking to practice medicine or dentistry in Kenya and he cannot seek to be treated differently more so when one is in breach of the law.

54. The Respondent contended that the Petitioner was only informed of the requirements which were made pursuant to the amendment vide the **Health Laws Amendment Act, No.5 of 2019**, which came into force on 17<sup>th</sup> May, 2019. However, the Petitioner now feigns ignorance of having not known the requirements whereas he knew the same as at 2019 and it is also clear that his knowledge of the requirements is evident from the letter he wrote to the Medical Council vide the letter dated 23<sup>rd</sup> June, 2020 (at page 16 of the Respondent's Replying Affidavit) wherein he indicated that he is not registered with the Rwanda Medical and Dental Council.

55. From the Petitioner's pleadings and Respondent's submissions herein above, and moreso on part of the Petitioner, it is clear that the Petitioner was aware of what was required in support of the application and the Petitioner has not demonstrated, that he has met the minimum threshold for registration to practice dentistry in Kenya. I find that he has a remedy of complying as required by the Respondent. He should therefore lodge an application for registration in his home country to enable him to be eligible in Kenya. I find that there cannot be any estoppel against statutory provisions as the statutory provisions cannot be waived even by purported consent of parties. I further find even the new issue in the Petitioner's supplementary affidavit sworn on 26<sup>th</sup> February 2021, where the Petitioner has deponed at paragraph 13 that he fled Rwanda because he was under persecution from politicians cannot be a basis to waive the legal requirements.

56. It is not in dispute that registration is undertaken once after graduation from a medical or dental school and taking of the Hippocratic oath. Thereafter the practitioner is issued a license annually and this can be affirmed by the provision of **Section 5 of the Act** as it's also the common trend for most professionals. In the premises the Petitioner has not explained sufficiently why he has failed to get evidence of registration in compliance with the provision of **Section 6(4)(c) of the Act**. I find the provision of the aforesaid Section is framed in a mandatory manner and the Medical Council has no discretion to waive the said requirement.

57. The Respondent in response to the Petitioner's application recorded that the Petitioner undergoes pro-registration exams and the same was communicated to the Petitioner vide a letter dated 26<sup>th</sup> June 2020. The registration of foreign medical and dentist practitioners as per the Act requires proof of registration from their country of origin as provided under **Section 6(4) of the Act** and in the Petitioner's case he confirmed through his letter of 23<sup>rd</sup> June 2020 that he is not registered with the regulatory body in Rwanda, being the Rwanda medical and Dental Council.

58. I find that the Respondent, considered all factors objectively and the best interest of patients and upon noting that the Petitioner had not provided proof of registration from the Rwanda Medical And Dental Council, for reasons explained, it acted accordingly through the Training and Assessment Registration Committee, which is the Committee in charge of approval of registration and licensing, and recommended that the Petitioner undertakes a pre-registration examination exam. I find the Respondent acted properly, legally and reasonably and in accordance with the provisions of the Act and in the best interest of patients and general public in considering the Petitioner's application not to be licenced to treat patients in Kenya.

59. In view of the provisions of the Act and the Respondent's action as noted herein above, I find the Respondent acted in accordance with the provisions of the Act and for the best interest of patient's and general public of Kenya for which it cannot be faulted. I find from the evidence and facts in support of their rival positions, the Petitioner was all the time aware of the legal requirements for permanent reciprocal registration but failed to act as expected of him hence the Respondent is not to blame at all for its actions and the manner in which it handled the Petitioner's application, which was not in compliance with the requirements. The Petitioner was and is bound to comply with the law which the Respondent is required to enforce for the best interest of the patients and general public.

60. I find that the Petitioner has failed to adduce evidence in support of his allegations as pleaded, that the actions of the Respondent were tainted with unprocedural impropriety, illegality or were unreasonable or that the Respondent took into account irrelevant considerations. The burden of proof as regards the allegations herein above lies upon the Petitioner but other than alleging he failed to discharge the burden of proof, hence the allegation are without merits.

#### **B. WHETHER THE RESPONDENT IS IN VIOLATION OF THE PETITIONER'S LEGITIMATE EXPECTATION.**

61. I now turn to consider whether the Respondent is in violation of the Petitioner's legitimate expectation. The Petitioner contended that he had a legitimate expectation, that the Respondent, would accord him fair administrative process and that his application would not be rejected summarily and without being given reasonable explanation as to why his application had been rejected. It is urged that the Petitioner having

been allowed to practice in Kenya with temporary license, he had a legitimate expectation that he would be allowed and be issued with a permanent registration. The Petitioner urged that he submitted all the relevant academic credentials and that it is surprising that his application request, was rejected without being given any reasons as to why his application would be rejected. It is further urged the Petitioner had secured employment in Kenya and had worked for 2 years without any misconduct, hence his right as an employee had crystallized and it was impartial to ask him to sit for an examination, whereas he had been practicing as a Dentist for over 10 years. It is further averred the petitioner had paid for the registration and had a reasonable expectation that he would be issued with permanent reciprocal registration, being a member of East African Community.

62. The Petitioner in support of the above-mentioned proposition sought reliance in the case of *Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited HC Misc. Civil Application No. 359 of 2012* where it was stated that:-

***“...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”***

63. The Respondent in response contended, that there cannot be a legitimate expectation where there is a clear provision in a statute. Thus the Medical Practitioners and Dentist Act, which has expressly provided the statutory requirements for registration of medical and dental practitioners who are members of the East African Community and further where the same Statute provides for the forum to determine any disputes.

64. Considering the provisions of the Act, I find the medical Council could not grant the Petitioner permanent reciprocal registration as any such action, would be in contravention of the clear and unambiguous provisions of **Section 6(4) of the Act**, which expressly required the Petitioner to provide proof of registration from his country of origin, thus the Petitioner failed to do so. I find had the Respondent acted as sought by the Petitioner to meet what is referred to by the Petitioner as legitimate expectation, that would amount to a breach of the law.

65. It has been stated that legitimate expectation cannot prevail against statute. In support of the aforesaid proposition reliance is placed in the case of *Royal Media Services Limited & 2 others vs. Attorney General & others [2014] eKLR* cited in *Kevin K. Mwitii & others v. Kenya School of Law & 2 others [2015] eKLR*, where it was held that:-

***“Legitimate expectation cannot prevail against statute. See Mason Hayes - Curram, 2008. “The Doctrine of Legitimate Expectation; Recent Developments”. I may also add that legitimate expectation, however strong it may be, cannot prevail against express provisions of or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise. (Emphasis mine)***

66. Similarly in the case of *Republic vs. Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR* it was held, inter alia, that:-

***“...statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.” (Emphasis mine)***

67. In addition to the above-mentioned authorities further reliance is placed in the case of *H.W.R. Wade C. F. Forsyth at pages 449 to 450* where the Court stated as follows:-

***“It is not enough that an expectation should exist; it must in addition be legitimate... First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation... Second, clear statutory words, of course, override an expectation howsoever founded... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...”***

***“An expectation whose fulfillment required that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Act of Parliament by making promise of unlawful conduct or adopting an unlawful practice.” (Emphasis added)***

68. From the above facts and provisions of the Act and authority referred herein above, I find that there is no demonstration that the Respondent acted in violation of the Petitioner's legitimate expectation. The Respondent has demonstrated to the contrary, that it acted in strict compliance with the provisions of the Act and the law in force. In the instant petition there is no dispute that the Petitioner was issued with a temporary license for foreigners following his application in the year 2017. Under the Act and the Rules then, one could be issued with the temporary license which was for a limited period of up to 12 months. However, in the present regime and under the law, as it is now, for a foreign national seeking to be issued with the permanent reciprocal registration, as a member of the East African Community, he has to present proof of registration from the Country of origin. I find that the foregoing was the requirement before the above-stated amendments to the Act and the current statutory requirement.

69. As regards Petitioner's application for registration, the Act provides statutory provisions, which provides on requirement for registration of foreign medical practitioners and dentists seeking to practice in Kenya. The provisions bind the Respondent herein. In view whereof I find there cannot be a legitimate expectation contrary to statutory provisions. It is noteworthy that the Act expressly provides for remedy for the

action complained of by the Petitioner but the Petitioner herein has failed to pursue the said remedy. It is clear that **Section 14 of the Act** provides for renewal of licenses. It is further provided that where the licence is not renewed; **Section 14(1) of the Act**, provides that a person aggrieved with the decision of the medical council has a right to appeal to the High Court against the decision. In view of the Petitioner's failure to have appealed the Respondent's decision, it follows that the Petitioner's suit herein as pleaded and filed is premature and misplaced.

**C. WHETHER THE IMPUGNED DECISION JEOPARDIZE THE SPIRIT AND OBJECTIVES OF THE EAST AFRICAN COMMUNITY TREATY.**

70. The Petitioner on the issue whether the impugned decision jeopardized in any way the spirit and objectives of the EAC Treaty placed reliance on **Article 10 of East African Community Treaty** which **Article 10** provides:-

***“Free Movement of Workers***

**1. The Partner states hereby guarantee the free movement of workers, who are citizens of the other Partner States, within their territories.**

**2. For the purposes of paragraph 1, the Partner States shall ensure non-discrimination of the workers of the other Partner States, based on their nationalities, in relation to employment, remuneration and other conditions of work and employment.**

**3. For the purpose of this Article, the free movement of workers shall entitle a worker to:**

**a) Apply for employment and accept offers of employment actually made;**

**b) Move freely within the territories of the Partner States for the purpose of employment;**

**c) Conclude contracts and take up employment in accordance with the contracts, national laws and administrative actions, without any discrimination;**

**d) Stay in the territory of a Partner State for the purpose of employment in accordance with the national laws and administrative procedures governing the employment of workers of that Partner State;**

**e) Enjoy the freedom of association and collective bargaining for better working conditions in accordance with the national laws of the host Partner State; and**

**f) Enjoy the rights and benefits of social security as accorded to the workers of the host Partner State.**

71. The above-mentioned protocol came into force on 20<sup>th</sup> November 2019. The object of **Article 7** is **“Free Movement of persons”** which provides:-

***“7(1) The Partner States hereby guarantee the free movement of persons who are citizens of other Partner States within their territories.***

***7(2) In accordance with paragraph 1, each Partner State shall ensure non-discrimination of the citizens of the other Partner State based on their nationalities by ensuring:***

***a) The entry of citizens of other Partner States into the territory of the Partner State without a visa***

***b) The free movement of persons who are citizens of the other Partner State within the territory of the Partner State***

***c) That the citizens of the other Partner States are allowed to stay in the territory of the Partner State, and***

***d) That the citizens of the other Partner State States are allowed to exit the territory of the Partner State without restrictions.***

***7(5) The free movement of persons shall be subject to limitations imposed by the host Partner State on grounds of public policy, public security or public health.***

***7 (6) a Partner State imposing limitation under paragraph 5, shall notify the other Partner States accordingly***

***7(9) The implementation of this Article shall be in accordance with the East African Community Common Market (Free Movement of Persons) Regulations, specified in Annex 1 to this Protocol.”***

72. On the other hand **Article 8** thereto provides:-

***“The Partner States shall: (a) plan and direct their policies and resources with a view to creating conditions favourable for the***

*development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty; (b) ... (c) **Abstain for many measure likely to jeopardize the achievement of those objectives or the implementation of this Treaty.*** (Emphasis added)

73. It is Petitioner's contention that the Treaty impose on each individual partner state an obligation to ensure that objectives of the Community are kept on the back of its mind during the planning and allocation of resources process. It is urged therefore the Petitioner herein is qualified Dentists who has been working for the last over 10 years. He is not a trainee Doctor to be subjected to examinations by the Respondent herein, as he qualified as Dentist in 2003. It is averred that at the time he worked in Rwanda, the governing body for Dentists was the Rwanda Dentist Association whose membership certificate, the Petitioner did produce with Responded herein. He was issued with the temporary license based on this.

74. The Petitioner urged therefore that it is unfair to ask him to produce membership with the current body governing Dentist in Rwanda when he has not been living in Rwanda since 2012. It is averred that he went to Uganda for further studies and thereafter relocated to Kenya where he has been working as a Dentist. The Petitioner therefore urges that examination are issued to beginners and those persons whose qualifications are in doubt but not professionals who have been practicing as such.

75. The Respondents in response asserted that the East African Community Protocol on Establishment of the **East African Community Common Market Protocol Article 10** provides that the East African Community will guarantee the free movement of workers who are citizens of Partner States within their territories. Free movement of workers under the said Article entitles the worker to, inter alia, **to move freely within the territories of Partner States and conclude contracts and also take up employment in accordance with the contracts, national laws and administrative actions without discrimination.**

76. I am alive to the fact, that whereas the East Africa Community Protocol recognizes free movement of workers, the same provides that such movement must be in accordance with the national laws and hence it does not waive statutory provisions of any Nation. In view whereof I find and hold that the applicable law in this matte is the Medical Practitioner's and Dentist Act. The Petitioner herein is bound by the Act and is under obligation to comply with the provision of the Medical Practitioners and Dentist Act, with regard to the application in issue herein by furnishing a Certificate of Registration from the Rwanda Medical and Dental Council, being the Regulatory body in Rwanda. Further, he also in the alternative have to comply with the Medical Council direction and requirements to sit for the Medical Council's pre-registration examinations, as communicated in the letter dated 25<sup>th</sup> June, 2020.

**D. WHETHER THE RESPONDENT IS IN VIOLATION OF THE PETITIONER'S RIGHT TO FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 AND THE FAIR ADMINISTRATIVE ACTION ACT, ARTICLE 27 ON NON-DISCRIMINATION AND HUMAN RIGHTS AND RIGHT TO BE HEARD.**

77. The Petitioner contended that the rejection of the application without granting the Petitioner a right to be heard and address any concerns raised prior to removing his name from the list of registered Dentist practitioners is a flagrant breach of the Petitioner's right to a fair hearing as enshrined under **Article 50 of the Constitution**. It is contended that the Petitioner submitted his application for registration as a permanent dentist on 15<sup>th</sup> April 2019. It is averred that the Peitioner did not receive any communication until he moved this Honourable Court, as that is when he was told that he needed to sit and pass an examination, based on a law that came into effect at a time he had already submitted his application. It is further asserted that the Respondent did not offer the applicant herein any explanation as to why his application had been rejected in the first place, as he is a stranger to the purported letter dated 25<sup>th</sup>, June, 2020, and in any event the said letter was only issued to the Petitioner over 1 year since the time that he had submitted his application.

78. The Petitioner in support of the above sought reliance in the case of **Local Government Board v. Arlidge, Viscount Haldane** which observed,

***"...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice."*** (Emphasis added)

79. The Petitioner further urged that the Respondent's inaction and failure to communicate its decision in a timely manner was motivated by bad faith and ill motive since it was communicated after the expiry of his temporary license and over 1 years after he had made his application.

80. The Respondent urged, that there is no evidence to support allegations that the Respondent is in violation of the Constitution, the Laws of Kenya or any Treaty as the Medical Council has expressly advised the Petitioner of the statutory requirements which are needed to facilitate a successful application for a temporary license for a foreigner and permanent reciprocal registration as a dentist. It is further Respondent's case that the Petitioner has not pleaded and demonstrated with specificity or with the required precision, the manner in which the medical Council has violated his Constitutional rights to freedom from **discrimination under Article 27, fair administrative action under Article 47, Article 43, right to fair hearing under Article 50(1), right to information under Article 35, or in violation of Article 73 of the Constitution or any rights at all.**

81. As regards Petitioner's contention that he was not given reasons as to why he was not issued with a permanent reciprocal license to practice dentistry. He also seeks the Court's finding that his right to information was violated. It is urged that the evidence before this Court show that the Petitioner was informed of the reasons why he could not be issued with a temporary license or a permanent reciprocal registration as a dentist. This is also demonstrated by his own letter addressed to the medical Council dated 23<sup>rd</sup> June, 2020 (page 16 of the Respondent's Replying Affidavit) wherein he gave his explanation why he did not have the certificate from the regulatory body of his country of origin.

82. The Respondent further stated as urged the Fair Administrative Act which was passed pursuant to **Article 47(3) of the Constitution**

provides at **Section 6** as follows:-

**“Requesting for reasons for administrative action**

...

**(3) The administrator to whom a request is made under subsection (1) shall, within thirty days 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.**

83. It is clear under **Section 6 of the Fair Administrative Act** an administrator to whom a request is made is required to furnish the applicant, in writing with reasons. In the instant Petition, the Petitioner did not adduce evidence of a request for reasons to be furnished to him by the Respondent. The Petitioner as submitted by the Respondent was aware of the reasons why he could not be registered as a dentist in Kenya having not satisfied the requirements under the Act.

84. Further under **Section 7(2) of the Fair Administrative Action Act**, it provides for grounds of review of an administrative action. It is provided clearly that for the Court to review an administrative action on administrative decision, the applicant, now the Petitioner, must demonstrate the grounds set out therein. I find no demonstration has been exhibited by the Petitioner, the manner in which the Respondent acted unlawfully or unreasonably as alleged. I find the Respondent cannot be blamed nor faulted for acting in accordance with the law. I find the allegations against the Respondent without any basis.

85. The Respondent in support of the above proposition placed reliance in the case of **Republic vs. Kenyatta University Ex parte Martha Waihuini Ndungu [2019] eKLR** stated that:-

**“the subject of the Section [Section 6] is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.”**

86. In the instant Petition the Petitioner alleges that the Respondent failed to supply him with information and he thus alleges that there was a violation of **Article 35 of the Constitution**. The Petitioner however has failed to meet the requirements of **Article 35 of the Constitution**. Under the aforesaid Article it is clear that every person has a right to information, however, such a person must request for the said information. This was held in the case of **Andrew Omtatah Okoiti vs. Attorney General & 2 others [2011] eKLR cited in Saniako N. Kibiwot vs. Land Control Board, Marakwet Davison & 2 others [2019] eKLR** where the Court stated:-

**“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise of protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The Court cannot be the first port of call. The Petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant’s application is rather premature.”**

87. Further, in the same decision, the Court stated that:-

**“violation of right of access to information cannot therefore be deemed to have occurred unless first a request for information is shown to have been made and refused or neglected by the respondents. The request must accord with Section 8(1) of the Access to Information Act which provides that: “An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.”**

88. In the instant Petition I find that the Petitioner has failed to demonstrate by way of evidence before this Court, that he requested for reasons for the administrative action, neither did he demonstrate that he requests for information, in the terms of **Section 8(1) of the Access to information Act**. I find in view of this that a violation can be deemed to have arisen or occurred where there existed a request as clearly provided under **Section 8(1) of the Access to Information Act**.

89. The Petitioner herein alleged he has been discriminated and has not been treated equally before the law.

90. **The Black’s Law Dictionary, 10<sup>th</sup> Edition** defines “discrimination” as:-

**“Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured.”**

91. Further the Court of Appeal deals with the issue of discrimination in the case of **Mohammed Abduba Dida vs. Debae Media Limited & another, Civil Appeal No. 238 of 2017 (2018) eKLR** stated as follows:-

**“with regard to differential or unequal treatment it was observed in the case of Kedar Nath vs. State of W.B. (1953) SCR 835 (843) that: “mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view.” Similarly, in the case of Federation of women Lawyers Fida Kenya & 5 others vs. Attorney General & another 2011 eKLR it was stated thus: “in our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.” (Emphasis added)**

92. In a Petition on discrimination to succeed, the Petitioner must demonstrate that the differential treatment is unreasonable, arbitrary or there is no rational basis. In the present case the Petitioner herein has not demonstrated any of the above save to pleading and/or making generalized statements. Looking at the instant Petition, and facts of the Petition, it turns out that the Petitioner herein has not demonstrated any of the above but has made only generalized statements. I find in view of the foregoing there was a basis for refusing to register the Petitioner as a dentist in Kenya as he did not provide the Certificate of registration from his country of origin and hence, he did not comply with the Statutory requirements. He was therefore not discriminated.

93. Further under **Article 24 of the Constitution** it is clearly provided for circumstances when rights may be limited. **Article 24(1)** provides that:-

**“(1) A right or fundamental freedom in the Bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-**

**a) The nature of the right or fundamental freedom;**

**b) The importance of the purpose of the limitation;**

**c) The nature and extent of the limitation;**

**d) The need to ensure that the enjoyment of rights and fundamental freedoms of others; and**

**e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. (Emphasis mine)**

94. The right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. The law that clearly sets out the limits in this matter is the Medical Practitioners and Dentist Act, which provides requirements for one to practice dentistry in Kenya. The Limitation has a purpose and the purpose is connected to the limitation being to ensure that those applying for registration have the necessary qualification and have been registered by the regulatory body of their country of origin, more so considering that after registration the Applicant would treat and manage patients, hence the need to eliminate risk associated with quacks or incompetent **“medical or dental practitioners”** handling or managing patients or the general public in Kenya. The same is also justifiable as the objective of the limitation is to ensure that a person has a valid license from their country of origin and to prevent those who are debarred in their Country of origin from using their original registration to seek a temporary license or the reciprocal registration to practice in Kenya, which may jeopardize lives of patients or the general public in Kenya.

95. From the evidence on record, it is clear that the Respondent while reviewing the Petitioner’s application for registration, it acted within the law, without violating any of the Petitioner’s rights as alleged or at all. I further find that **Article 73(2) of the Constitution** was not violated as alleged by the Petitioner as the Respondent acted within the law.

#### **E. WHETHER PRAYERS SOUGHT CAN BE GRANTED.**

96. The Petitioner urged that he decision by the Respondent herein to deny the Petitioner herein registration as a dentist has denied the applicant herein the right to earn a living and live a dignified life and has exposed the applicant to a lot of humiliation and suffering. The Petitioner is a registered Dentist in Rwanda and had his qualification recognized by the Commission for University Education and on the said strength, applicant herein had been issued with temporary license for foreign doctors and that the Petitioner has a legitimate expectation that he will be issued with reciprocal registration in Kenya.

97. It is Petitioner’s contention that the Respondent to arbitrarily deny issuing the applicant herein a practicing license was done in clear violation of the provisions of the law and in particular the protocol for the establishment of the East African Community and the Medical Practitioners and Dentists Act.

98. The Petitioner urged that the monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights; and that such claim is based on strict liability; such claim is distinct from, and in addition to remedy in private law for damage for tort; This remedy would be available when it is the only practicable mode of redress available against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable. Reliance on this proposition is placed in the case of **Jamlik Muchangi Miano v Attorney General [2017] eKLR** where he Court opined that:-

“when exercising this constitutional jurisdiction the Court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the Court will articulate the fact of the violation, but in most cases more will be required than words. **If the person wronged has suffered damage, the court may award him compensation.** The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”

99. The Petitioner in instant Petition contended, that he lost his permanent and pensionable employment in March 2020 where he was being paid a gross salary of kshs. Three Hundred and Fifty Thousand (Kshs.350,000/=). He would otherwise be leading a more comfortable life and contributing to the building of the nation. It is contended that the Petitioner continues to suffer and sought monetary compensation of at least Kshs.10,000,000/= with costs.

100. The Respondent urged the Petitioner in this Petition also seeks for orders of Certiorari to quash the decision of the Medical Council, and an Order of Mandamus to compel the medical Council to issue him with a permanent reciprocal registration certificate and license, and to admit and register the Petitioner as a dentist.

101. The Respondent on issue of an order of Certiorari seeks reliance in the case of **Council for Civil Service Unions vs. Minister for Civil Service (1985) A.C 374 at 401D** where the Court classified grounds for consideration before issuing certiorari orders as: proof of illegality, irrationality and procedural impropriety. The Court stated, inter alia, that:-

“...by ‘illegality’ as a ground for judicial review I mean that the decision maker must understand correctly the law that regularizes his decision making power and must give effect to it... by ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’... 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... 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.”

102. In the instant Petition I have found no evidence placed before me by the Petitioner demonstrating how the Respondent acted in contravention of any statute or acted illegally, unreasonably or irrationally. I find to the contrary the evidence on record show that the medical Council has acted in accordance with the law, in requiring the Petitioner to provide proof of registration from his country of origin, being the Rwanda Medical and Dental Council.

103. Further the Petitioner seeks issuance of order of mandamus compelling the Respondent to issue him with a permanent reciprocal registration certificate and license, admit and register him as a dentist. The Respondent is opposed to granting an order of mandamus and seeks reliance from the case of **Republic vs. National Employment Authority and 3 others Ex-parte Middle East Consultancy Services Limited (2018) eKLR** where the Court citing the decision in **Apotex Inc. vs. Canada (Attorney General)** set out the test for the writ of mandamus, being:-

***“i. There must be a public legal duty to act.***

***ii. The duty must be owed to the applicants.***

***iii. There must be a clear right to the performance of that duty, meaning that:***

***a) The applicants have satisfied all conditions precedent; and***

***b) There must have been:***

***i) A prior demand for performance;***

***ii) A reasonable time to comply with the demand, unless there was outright refusal; and***

***iii) An express refusal, or an implied refusal through unreasonable delay***

***iv) No other adequate remedy is available to the applicants***

***v) The order sought must be of some practical value or effect;***

***vi) There is no equitable bar to the relief sought; and***

***vii) On a balance of convenience, mandamus should lie. (Emphasis mine)***

104. I now turn to consider whether the Petitioner has met the test for orders of mandamus to be issued as set out in the **Republic v. National Employment Authority & 3 others Ex-parte Middle East Consultancy Services Limited case (supra)**. Considering the instant Petition, I find that there is no public duty to licence the Petitioner as the requirements under the Act and the Rules have not been met. The duty accordingly is not therefore owed to the Petitioner. The Petitioner has no clear right and furthermore no demand was issued to the Respondent. It is in addition, noted that the remedy provided by the Act is for the Petitioner to provide a Certificate of registration from his country of origin. It is further noted on the remedy the Respondent required him to undertake pre-registration examination which he has not so far undertaken.

105. The Respondent on issue of issuance of an order of mandamus sought reliance in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & others Civil Appeal No. 266 of 1996**, where the Court stated that it cannot issue a mandamus in such terms of granting a license where there is a body mandated to do so. It stated that; -

**“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. In my view the only legal obligation on the Respondent is to consider an application for renewal of the license taking into account the relevant factors but not to grant the licence. (Emphasis mine)**

106. In addition thereto the Respondent placed further reliance in the case of **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, where the Court of Appeal held that:-

**“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.” (Emphasis mine)**

107. On issue for an Order of compensation the Petitioner seeks to have an order for the **“Respondent to pay for the loss of earning and employment from the month of March 2020 when the Respond failed to renew his practicing license and had his license revoked to-date at Kshs.350,000 per month being the monthly salary that the Petitioner would have otherwise be earning.”**

108. In the instant Petition the Court has already found that the Respondent has demonstrated that it acted in accordance with the law at all times and it demanded compliance with statutory requirements and hence it cannot be faulted. It is further noted that there is no evidence of violation of any of the Petitioner’s rights as the Petitioner failed to discharge the burden of proof placed on himself. It is further noted that the Respondent informed the Petitioner of the statutory requirement and sought that he remedies his application hence the recommendation to undertake pre-registration exams. In view the aforesaid the Petitioner has failed to demonstrate any justifiable or valid grounds to warrant an order for compensation for alleged violation of rights or loss of earning nor any of the other prayers in the Petition, especially where the Petitioner’s application show that he did not meet the statutory requirements, having failed to provide his certificate of registration from his country of origin or undertake pre-registration examination.

109. I find had the Petitioner succeeded in this Petition I would have awarded him compensation of Ksh.8,000,000/=.

**110. The upshot is that the Petition is without merits the same is dismissed with costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF JULY, 2021.**

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**J. A. MAKAU**

**JUDGE**