

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 161 OF 2019

REPUBLIC.....APPLICANT

VS

THE REGISTRAR, KENYA MEDICAL LABORATORY TECHNICIANS AND

TECHNOLOGIST BOARD.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4RD RESPONDENT

AND

JOHN ODUOR OWINO.....EX PARTE APPLICANT

JUDGMENT

The parties

1. The applicant is a male adult of sound mind residing in Nairobi.
2. The first Respondent, the Registrar of the Kenya Medical Laboratory Technicians and Technologists Board (the Board) is appointed under section 14 of the *Medical Laboratory Technicians and Technologists Act*^[1] (the Act). The Board is a body corporate established under section 3 (1) of the Act. Pursuant to section 3(2) of the Act, the Board is a body corporate with perpetual succession and a common seal. In its corporate name, it is capable of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) borrowing or lending money; and (d) doing or performing all such other acts necessary for the proper performance of its functions under the Act which may lawfully be done or performed by a body corporate.
3. The second Respondent, the Inspector General of Police (IG), is established under Article 245 (1) of the Constitution. Pursuant to Article 245(2) of the Constitution, the IG— (a) is appointed by the President with the approval of Parliament and he exercises independent command over the National Police Service, and performs any other functions prescribed by national legislation.
4. The third Respondent is the Director of Public Prosecutions (the DPP), established under Article 157 of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.^[2]
5. The fourth Respondent is the Hon. Attorney General (AG). Under Article 156(4) of the Constitution, the AG is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other function conferred on the office by an Act of Parliament or by the President.

Facts relied upon

6. The applicant states that in 2001 he was admitted at the Rift Valley Technical and Training Institute for a Diploma in Medical Laboratory Technology and completed in 2003, and in 2004, he re-sat for the examinations and qualified for a Diploma in Medical Laboratory Technology.
7. He also states that he applied and was granted a practising certificate as a Medical Lab Technologist in 2005 but later the Registrar of the Board declined to issue him with his current certificate. He states he is employed at Kitengela Medical Services as a Medical Lab Technologist and he requires the license to discharge his duties. He also states that for one to qualify for a practising certificate as a Medical Lab Technologist, he must have a certificate of Registration from the Board.

Legal foundation of the application

8. The applicant states that the IG, the DPP and the Registrar of the Board “may permanently, (sic) arbitrarily, unfairly and without any lawful reasons detain him, which decision is likely to be oppressive, unfair, unconstitutional, abuse of natural justice and condemning him unheard, and it would amount to circumventing Articles 24 (3), 25 (1) (b) of the Constitution. He states that he has a right under Articles 22 & 23 of the Constitution to institute these proceedings

The prayers sought

9. The applicant prays for:-

- a. An order of Mandamus to compel the Registrar of Medical Laboratory Technicians and Technologist Board to issue a Certificate of Registration and the practicing license to the ex parte applicant.
- b. Spent.
- c. That an order of costs of this application be granted to the applicant.

First respondent’s Replying Affidavit

10. Abdulatif Ali, the Board’s Registrar swore the Replying affidavit dated 15th July 2019. He averred that the application is tainted with *mala fides* and material non-disclosure. He deposed that pursuant to section 5 of the Act, the Board’s functions are to exercise general supervision and control over the training, business, practice and employment of Laboratory Technicians and Technologists in Kenya and to advise the government in relation to all aspects thereof.

11. Further, he averred that pursuant to section 5(2) of the Act, the Board is mandated to *inter alia* consider and approve the qualifications of Laboratory Technicians and Technologists for the purpose of registration under the Act, to license and regulate the business and practice of registered Laboratory Technicians and Technologists and to take such disciplinary measures as may be appropriate to maintain proper professional standards.

12. He averred that pursuant to its statutory mandate, the Board closely works with the training institutions and indexes the candidates who have been admitted to various training institutions to pursue courses in various fields of medical laboratory sciences and upon completion of their studies, the Board administers examinations to candidates who apply for registration as a condition to such registration.

13. Mr. Ali deposed that pursuant to its regulatory mandate and in furtherance of its mission to protect the health of Kenyans, the Board maintains a register of all professionals registered by the Board and regularly inspects them in their various places of employment. He deposed that section 17 of the Act mandates him as the Registrar to remove from the register, *inter alia* any fraudulently or erroneous entries. Further, he deposed that pursuant to section 19(5) of the Act, any person who in his application wilfully makes a false or misleading statement or utters a false certificate, commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or both.

14. Mr. Ali deposed that the applicant presented himself before the Board requiring to be issued with the annual practising license and as required he presented to the Board a registration certificate number A 01228 dated 1st January 2005 together with a practising license purporting that the same were issued by the Board. He averred that on verification in the Board’s internal register, it emerged that the certificate did not belong him but one Harun Ndayala Luvus, hence, the Board had reasonable cause to believe that he had forged the registration certificate and practising license.

15. He averred that the Board reported the applicant to the police and upon investigation the applicant was charged in Nairobi Criminal case number 552 of 2017 with two counts of making a document without authority contrary to section 357 (a) of the Penal Code^[3] and he was convicted on 28th September 2018 and fined Ksh. 25,000/= for each count in default to serve six months imprisonment. He deposed that in view of the above, the applicant is abusing the court process and that this application is tainted with material non-disclosure because he deliberately failed to disclose that he was convicted and sentenced for the offence of making the certificate of registration number A 01228 which he relied on in this application. He further deposed that the board cannot issue the applicant with the license because he is not registered and further and his certificate is forged.

First respondent’s further affidavit

16. Mr. Ali swore the affidavit dated 22nd October 2019 in which he annexed copies of proceedings and judgment in criminal case number 552 of 2017 in which the applicant was tried and convicted with two counts of making a document without authority contrary to section 357(a) of the Penal Code.^[4]

Second and third Respondents’ grounds of opposition

17. The second and third Respondent filed grounds of opposition dated 13th November 2019 stating that the application discloses no cause of action against them. They also stated that the applicant was convicted in criminal case number 552 of 2017 with the offence of making documents without authority contrary to section 357 (a) of the Penal Code.^[5]

Fourth Respondent’s grounds of opposition

18. The fourth Respondent filed grounds of opposition on 15th October 2019 stating *inter alia* that the application is unmerited and an abuse of court process.

Applicant's advocates submissions

19. Mr. Wachana, the applicant's counsel argued that despite the applicant having satisfied the registration requirements under section 15 (1) (a) (b) (c) (d) of the Act, the Board declined to issue him with a practising certificate under section 21 of the Act, hence it acted *ultra vires* its statutory mandate and in violation of the principle of proportionality by failing to strike a balance between the adverse effects of the decision and the refusal to register the applicant. He submitted that the applicant acted in bad faith and in breach of the principle of legitimate expectation since the applicant satisfied the statutory criteria. To buttress his argument, he relied on *Municipal Council of Mombasa v Republic & Umoja Consultants*[6] and argued that the impugned decision is tainted with illegality, since there are no legitimate reasons to warrant the refusal. He urged the court to compel the Board by way of *Mandamus*. As for the applicant's conviction, he submitted that there is a pending appeal and maintained that the applicant is not challenging the merits of the decision

The first Respondent's advocates submissions

20. Mr. Githinji, the first Respondent's counsel submitted that the writ of *Mandamus* is not available to the applicant to commit an illegality. He submitted that upon verifying the records the Board established that the certificate he presented belonged to someone else and reported the matter to the police culminating in his prosecution and conviction. He argued that the applicant wants this court to recognize a forged document.

The second and third Respondents' advocates submissions

21. Miss Mwenda, counsel for the second and third Respondent submitted that the application is an assault on the constitutional mandate of the DPP. He cited *Matululu v DPP*[7] for the holding that the DPP's power can only be reviewed in limited instances such as if he acts in excess of his constitutional and statutory power, or acts in bad faith, or he acts in abuse of the process or he has fettered his discretion with a rigid policy.

22. Miss Chimau, counsel for the fourth Respondent cited *Kenya National Examinations Council v Republic*[8] which laid down the circumstances upon which judicial review orders can issue and argued that the application does not qualify for the orders sought.

Determination

23. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. A distinctive feature of judicial review remedies is that the court has discretion to withhold them from a claimant even if the defendant public authority is held to have acted unlawfully.

24. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable. Examples are where the applicant has unreasonably delayed in applying for judicial review or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. Lord Justice Hobhouse in *Credit Suisse v Allerdale Borough Council* [9] said:-

“The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy...”

25. In addition to the above factors, the judicial review court may also consider the following when exercising its discretion- if the claimant failed to make proper disclosure; if the application is, or becomes, 'academic' (that is to say if the claimant suffers no actual injustice as a result of the public body's decision, or if the issue is a wholly hypothetical one); if there is an alternative remedy available to the claimant. Others factors that may be taken into account in determining the balance of convenience include the importance of upholding the law of the land and the duty placed on certain authorities to enforce the law in the public interest.

26. Applying the above tests to this case, the first question that comes to mind is whether the applicant is guilty of material non-disclosure and whether he acted in bad faith. The applicant was charged, tried and convicted of the offence of making documents without authority. The documents in question are the same documents he presented to the Board seeking to be registered. The board as per its mandate undertook a verification process and established that the documents belonged to another person. In conformity with the law, the Board reported the matter to the police who investigated and charged the applicant in court. The trial culminated in the conviction which has not been overturned on appeal. The alleged pendency of the appeal is not a ground to open the door to the applicant to seek judicial review orders in this court.

27. The law as I understand it is that a court judgment remains final unless and until it is set aside, varied or reviewed by the issuing court or overturned on appeal. To the extent that the applicant seeks to compel the Board to register him on the basis of the same documents the geniuses upon which he was convicted, his application is a non-starter and on this ground alone it collapses.

28. The second ground upon which the application collapses is the bad faith manifested by the applicant by failing to disclose his trial and conviction to this court.

29. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of

the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.^[10]

30. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.^[11] The conviction involves the same documents the subject of this suit. In my view, the applicant was under a solemn duty to bring to the attention of this court the existence of the said conviction at the earliest opportunity possible and leave it to the court to determine the relevancy if any to the instant suit.

31. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court to know in dealing with the issues before the court. The duty of disclosure therefore applies not only to material facts known to the applicant, but also to any additional facts which he would have known if he had made inquiries. I find no difficulty in concluding that the applicant acted in bad faith by failing to disclose that he had been tried and convicted of a criminal offence in connection with the same documents.

32. The third ground upon which the applicant's case collapses is that it is an abuse of court process. Considering that the applicant submitted his documents to the Board and on the basis of the same documents he was tried and convicted, one wonders how he expects this court to sanitize the said documents and unleash judicial review writs. To me, this is a classic case of abuse of court process.

33. I have in numerous decisions^[12] observed that it is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."^[13]

34. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the judicial process or uses it to the irritation and annoyance of his opponents.^[14]

35. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.^[15]
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. ^[16]

36. Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexatious and oppressive.^[17] Abuse of process can also mean abuse of legal procedure or improper use of the legal process.^[18] Justice Niki Tobi JSC of Nigeria observed that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

37. The fourth ground upon which this case collapses is that the court may refuse to grant a judicial review order if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantial prejudice to the rights of, any person or would be detrimental to good administration. It is this last test that is relevant. This court respects and upholds the statutory mandate of the Board to maintain quality standards in the profession for the public good. The court can only intervene if the Board acts in excess of its powers or against its statutory mandate. So long as the Board remains within the areas assigned to it by Parliament, this court cannot intervene.

38. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a

means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the courts supervision in order to ensure the paramountcy of the law. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. [19]

39. The fifth ground upon which this case fails is that the applicant has not demonstrated any grounds to warrant the judicial review remedy sought. Broadly, in order to succeed in a judicial review application, an applicant needs to show either:-

- a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or
- b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

40. The above tests have not been established in this case. There is nothing to demonstrate that the Board unlawfully refused to act nor does it have a legal duty to register forged documents. There is nothing to show that the Board acted *ultra vires*. There is nothing to show that the Board or any of the Respondents acted illegally or outside their legal mandate. On the contrary, from the material before me, the Board acted *intra vires*. There is nothing to show that the decision is unfair or irrational[20] or unreasonable to warrant the exercise of this courts judicial review powers. Any other decision maker confronted with the same set of facts, circumstances and the law would have taken the same decision. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*:-[21]

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

41. The onus is on the applicant to establish irrationality, perversity or unreasonable. This onus has not been discharged.[22] I have carefully evaluated the material before the court and I am not persuaded that the applicant has demonstrated any grounds for the court to grant the order judicial review order(s) sought.

42. In view of my analysis herein above, I find and hold that the applicant has not established any grounds for this court to grant the Judicial Review order sought. The upshot is that the *ex parte* applicants' application dated 13th June 2019 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this 16th day of April, 2020.

John M. Mativo

Judge.

[1] Cap 253A, Laws of Kenya.

[2] Article 157 (6) of the Constitution.

[3] Cap 63, Laws of Kenya.

[4] Cap 63, Laws of Kenya.

[5] Cap 63, Laws of Kenya.

[6] Civil Appeal No. 185 of 2001.

[7] {2003} 4 LRC 712.

[8] Civil Appeal No. 266 of 1996.

[9] {1997} QB 306 at 355D.

[10] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[11] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188.

[12] See e.g. *Agnes Muthoni Nyanjui & 2 Others v Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others v Fina Bank Limited & Others*, Pet No. 82 of 2016

[13] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[14] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415.

[15] *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264

[16] (2007) 16 NWLR (319) 335.

[17] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[18] Ibid

[19] *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* {2014} eKLR

[20] See *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others v The County Government of Nyeri & Ano* JR No 17 B of 2015.

[21] {1948} 1 K. B. 223, H.L.

[22] See *Pastoli v Kabale District Local Government Council and Others* {2008} 2EA 300.