



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 582 OF 2017

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLES 22(1), (2), (a), (b), (c)

AND

23(1), 27(1) (2) OF THE CONSTITUTION OF KENYA (2010)

AND

**IN THE MATTER OF: THE HIGH COURTS SUPERVISORY JURISDICTION: ARTICLE 165(5) 6, 7, CONSTITUTION OF
KENYA, 2010**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF NUTRITIONISTS AND DIETICIANS ACT NO. 18 OF 2007

AND

**IN THE MATTER OF APPOINTMENT TO THE INTERIM COUNCIL OF THE KENYA NUTRITIONISTS AND DIETICIANS
INSTITUTE BY THE CABINET SECRETARY OF HEALTH**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY OF HEALTH.....1ST RESPONDENT

KENYA NUTRITIONISTS AND

DIETICIANS INSTITUTE.....2ND RESPONDENT

EMILY WAHOME.....EX-PARTE APPLICANT
PROF. JUDITH WAUNDO.....1ST INTERESTED PARTY
DR. ROBERT MWADIME.....2ND INTERESTED PARTY
SAMUEL MAINA NYAKAMBA.....3RD INTERESTED PARTY
IRENE MAKORI.....4TH INTERESTED PARTY
HENRY MBURU NGETHE.....5TH INTERESTED PARTY
EDNA WARENTHO.....6TH INTERESTED PARTY
GLADYS MUGAMBI.....7TH INTERESTED PARTY
DR. DAVID SOTI.....8TH INTERESTED PARTY

JUDGMENT

1. In the notice of motion dated 28th September 2017 the exparte applicant **Emily Wahome** seeks from this court judicial review orders of:
 - 1) Certiorari to remove to this court to quash the appointment letter of Professor Judith Waudu; Dr Robert Mwadime, Samuel Maina Nyakamba Irene Makori, Henry Mburu Ngethe, Edna Warentho, Gladys Mugambi and Dr David Soti to the Interim Council of the Kenya Nutritionists and Dieticians Institute dated 11th February 2017.
 - 2) Prohibition prohibiting the 2nd respondent Kenya Nutritionists and Dieticians Institute from executing the direction contained in the letter dated 11th July 2017, appointing Professor Judith Waudu, Dr Robert Mwadime, Samuel Maina Nyakamba, Irene Makori, Henry Mburu Ngethe, Edna Warentho, Gladys Mugambi and Dr David Soti to the interim council of Kenya Nutritionists and Dieticians Institute.
 - 3) Costs be provided for.
2. The application is predicated on the grounds on the face thereof, the statutory statement and verifying affidavit sworn by Emily Wahome the applicant herein.
3. The applicant's case is that she is a nutritionist and dietician by profession registered as such under Nutritionists and Dieticians Act No. 18 of 2007 and a member of the 2nd respondent institute.
4. That on 11th July 2017 the 1st respondent Cabinet Secretary, Ministry of Health appointed an interim council of the 2nd respondent institute and issued appointment letters to the persons named in the prayers herein.
5. According to the applicant, the appointment violates the Nutritionists and Dieticians Act No. 18 of 2007 as the Act does not provide for appointment of an interim council hence the appointment letters are a nullity and amenable for quashing and prohibition by this court.
6. The 2nd respondent Institute filed a replying affidavit sworn by Dr David Okeyo its Chief Executive basically deposing that he had been advised by his advocate on record that the appointments to the council must adhere to the provisions of the Nutritionists and Dieticians Act No. 18 of 2007 which he annexed to the affidavit.
7. The 1st respondent Cabinet Secretary did not file any response to the application despite being served with the pleadings.
8. The application was canvassed orally on 7th February 2018 with Mr Gichamba submitting on behalf of the applicant, Professor Wangai for 2nd respondent and Mr Muiruri appearing for the 3rd, 5th and 7th interested parties who did not file any responses to the motion. Mr Gichamba reiterated the contents of the application and grounds contained in his client's statutory statement and verifying affidavit and submitted that the appointment of the interested parties was illegal and not provided for in the Nutritionists and Dieticians Act No. 18 of 2007. It was submitted that Section 5 of the Act establishes the institute and composition of the council and that under the 1st schedule to the Act, there are requirements stipulated for appointment of the Chairperson and Members of the Council.
9. Further, that all members of the council resigned after exceeding their maximum 3 years to about 7 years and that were such resignation occurs, only a special general meeting could be convened by the institute to find replacements.
10. In this case it was submitted that the interested parties were illegally in office and hence they must vacate as their appointment has no legal effect.

11. In addition, it was submitted that the appointment letters were ambiguous in that they are open ended until the Act is amended which means if the Act is not amended they could hold office perpetually and therefore the special general meeting would not be convened contrary to the Act, and the illegal council could set the mandate and agenda of the institute.

12. In response, Professor Wangai submitted that the institute is established by Act No. 18/2007 and that the council of the institute had done 7 years instead of 3 years necessitating some members to petition Parliament then the 1st respondent the interim council and issued letters of appointment. It was submitted that the court is inclined to interpret the law to guide all parties on the mechanisms of appointment as stipulated in the Act where a special general meeting is expected to be convened whenever there is resignation as was the case here, to fill the vacant position in the council. Counsel therefore sought for directions of this court.

13. Mr Muiruri counsel for the interested parties conceived with submissions by the 2nd respondent's counsel and urged the court to give directions in the matter to enable the council to carry out its statutory mandate.

DETERMINATION

14. I have carefully considered the ex parte applicant's application and responses thereto by the 2nd respondent and interested parties who appeared.

15. The issue for determination is whether the application has any merit. The main complaint is that the Cabinet Secretary Ministry of Health appointed an interim council of the institute of Nutritionists and Dieticians and appointed members to the interim council on 11th July 2017 with letters that show that the interim council could exist perpetually since they are depended on the amendments to the Act, as opposed to a maxim of 3 years that the council members are expected to serve.

16. Further, that the Act provides for a mechanism of establishing the council and its members through a special Annual General Meeting where there are resignations to fill vacant positions but the provisions of the Act were never adhered to.

17. The institute of Nutritionists and Dieticians is established by Section 4 of the Act. Under Section 5, the Act establishes the Council and also provides for its composition. The Institute, under Section 4 (3) is governed by the Council. Under Section 5(a), the chairperson and members of the council, who are all representative of various institutions are elected or nominated in manner set out in the First Schedule.

18. Section 5(3) provides that the chairman and every member elected under Subsection (2) shall hold office for a term of 3 years and shall be eligible for reappointment for a further term of three years. Under subsection 4, all appointments under Section 5 shall be notified in the gazette.

19. The Minister, under Section 8 of the Act, approves/determines remuneration of council members. There is no provision for an interim council or interim council members and neither is there provision for appointments conditional upon amendments to the Act as is stipulated in the respective letters of appointment dated 11th July 2017 issued to the interested parties herein by the Cabinet Secretary.

20. Pursuant to the First Schedule to the Act, Section 2 stipulates that where the office of chairperson is vacant, then a special general meeting shall be convened upon which members of the institute may appoint a person to act as a chairperson during the said Special General Meeting. The rest of the members of the council can therefore only be appointed/elected in accordance with Section 5 of the Act.

21. From the above provisions of the law, I have no doubt in my mind that the 1st respondent had no powers under the law to establish an interim council and to unilaterally appoint members of the interim council until the time when the Act will be amended and a new Council is formed and give them the mandate to form the Council and carry out all functions of the Council as stipulated in the Act; and reviewing amendments to the Act. There is no discretion given to the Cabinet Secretary under the Act to appoint the interim council or to appoint members to the council other than in the manner stipulated in the Act and moreso, in the First Schedule to the Act.

22. The chairperson and members of the Council are elected in accordance with the procedure set out in the First Schedule and not handpicked by the Cabinet Secretary.

23. Accordingly, I have no hesitation in finding and holding that the appointment letters of the Cabinet Secretary dated 11th July 2017 were issued without jurisdiction and ultra vires the Nutritionists and Dieticians Act no. 18 of 2007.

24. Consequently, I hold and find that the actions by the Cabinet Secretary are illegal and cannot be allowed to stand. Certiorari and prohibition are judicial remedies that issue to quash and or prohibit illegal acts. And any illegal act is void and a nullity. It must however be so declared in order to wipe the slate clean.

25. I therefore find and hold that the appointment of the Interim Council of the Institute and the appointment of members thereto being the interested parties herein to serve for unspecified terms until amendments to the Act are effected is an illegal act on the part of the Cabinet Secretary responsible for the Ministry of Health.

26. In the end, ***I hereby issue certiorari to bring into this court for purposes of quashing and I hereby quash the decisions taken by the 1st respondent Cabinet Secretary Ministry of Health by letters of 11th July 2017 appointing the interested parties herein namely: Professor Judith Waudu; Dr Robert Mwadime, Samuel Maina Nyakamba Irene Makori, Henry Mburu Ngethe, Edna Warentho, Gladys Mugambi and Dr David Soti as members of the Interim Council of the Nutritionists and Dieticians Institute.***

27. In view of the extreme illegality of the appointments by the Cabinet Secretary, ***I hereby grant prayer No. 2 of the applicant***

prohibiting the 2nd respondent from executing the directives/decisions of the Cabinet Secretary dated 11th July 2017 appointing Professor Judith Waudu; Dr Robert Mwadime, Samuel Maina Nyakamba Irene Makori, Henry Mburu Ngethe, Edna Warentho, Gladys Mugambi and Dr David Soti as members of the Interim Council of the Kenya Nutritionists and Dieticians Institute.

28. Each party to bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 2nd day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Daido h/b for Miss Maina for the 1st Respondent

N/A for the 2nd Respondent

N/A for the Exparte applicant

N/A for the interested Parties

CA: Kombo