



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 665 OF 2017

IN THE MATTER OF AN APPLICATION BY ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AGAINST THE KENYA MEDICAL LABORATORIES AND TECHNICIANS BOARD.

AND

IN THE MATTER OF REGISTRATION AND LICENSING OF LABORATORIES WITHIN HEALTH FACILITIES.

AND

IN THE MATTER OF SECTIONS 3, 5, 20, 25 AND 40, MEDICAL LABORATORY AND TECHNICIANS AND TECHNOLOGISTS ACT, CHAPTER 253A, LAWS OF KENYA AND IN THE MATTER OF SECTION 15 OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT, CHAPTER 252, LAWS OF KENYA.

AND

IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES, 2010.

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA MEDICAL LABORATORIES

TECHNICIANS AND TECHNOLOGISTS BOARD.....RESPONDENT

AND

ARCHDIOCESE NAIROBI KENYA

REGISTERED TRUSTEES.....EX PARTE APPLICANT

JUDGMENT

The Parties.

1. The *ex parte* applicant, the registered Trustees of the **Archdiocese Nairobi Kenya Registered Trustees**, is a body corporate with a common seal and perpetual succession registered in accordance with the provisions of the *Trustees (Perpetual Succession) Act*.^[1] It owns and operates health institutions and within those institutions it has established hospital and medical laboratories, and employs laboratory technicians and laboratory technologists.

2. The Respondent, the **Kenya Medical Laboratories Technicians and Technologists Board** (herein after referred to as the Board), is a body corporate established pursuant to section 3 of the *Medical Laboratory Technicians and Technologists Act*^[2] (hereinafter referred to as

"the Act"), with perpetual succession and a common seal and by its corporate name, capable of—suing and being sued; taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; borrowing or lending money; and doing or performing all such other acts necessary for the proper performance of its functions which may lawfully be done or performed by a body corporate.

The Dispute.

3. The objects and functions of the Boards as stipulated in section 5 of the act is 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 relations to all aspects thereof. The Board is also mandated to prescribe, in consultation with the College and such approved training institutions as the Board may deem appropriate, the courses of instruction for laboratory technicians and technologists; consider and approve the qualifications of laboratory technicians and technologists for the purposes of registration under the Act; approve institutions for the training of laboratory technicians and technologists; licence and regulate the business and practice of registered laboratory technicians and technologists; and technologists; and regulate the professional conduct of registered laboratory technicians and technologists and take such disciplinary measures as may be appropriate to maintain proper professional standards.

4. The Boards' statutory mandate enumerated above is the subject of challenge in these proceedings. The contestation is whether or not the above mandate extends to licensing and regulating the *ex parte* applicants' hospital and medical laboratories established within private institutions, and licensing the laboratory technicians and laboratory technologists employed in those facilities.

The *ex parte* applicant's case.

5. The *ex parte* applicant sued the Board seeking orders to prohibit the Board from requiring it to undertake an independent registration and licensing of its laboratories operating within its health facilities. It also seeks to Prohibit the Board or its agents or officers from demanding fees and harassing its agents or servants when conducting their quarterly supervision visits and inspections. It also prays for costs of this case.

6. Its core grounds are:- (a) *that its health facilities have been obtaining annual operating license as mandated by Section 15 of the Medical Practitioner's and Dentists Act;*^[3] (b) *that one pre-condition of obtaining such registration is an approval from the County Health Management Team comprising of members of the Respondent;* (c) *that its laboratories are not stand alone facilities but are located in its health institutions.*

7. Further, *ex parte* applicant complains that its health facilities have been receiving notices of compliance from the Respondent demanding that they pay and have their laboratories issued with an alleged valid certificate of registration issued under the Respondents' seal, and that, the Respondents' officers have been harassing its employees at its health facilities during the inspection visits. It also avers that the above actions are an abuse of power, unreasonable and cause it undue hardship, and that the payment will amount to double registration contrary to the law.

Respondent's Response.

8. In response to the application, **Abdullatif Ali**, the Boards' Registrar swore the Replying Affidavit dated 12th January 2018. He averred that the Respondents' objects and functions is to exercise general supervision and control over the training, business, practice and employment of laboratory and Technicians and Technologists in Kenya and to advise the government in relation to all aspects thereof as provided under section 5 of the Act.

9. He also averred that pursuant to its statutory mandate, the Respondent conducts regular inspections throughout the Republic of Kenya to confirm conformity with the law in accordance with section 40 (e) & (f) of the Act, and, that it charges appropriate fees payable by medical laboratories. He averred that section 19 (1) of the Act prohibits a person to act as a laboratory technician or technologists in any health institution in Kenya unless such a person is registered under the Act. He cited section 19 (3) of the Act which prohibits anyone in charge of a health institution or any medical laboratory in Kenya from employing a person as a laboratory technician or technologists who is not registered under the Act. He also averred that section 19 (4) and (5) of the act provides for penal consequences for violation of the said provisions.

10. **Mr. Ali** further averred that section 21 of the Act mandates the Respondent to issue certificates and annual licences to medical and technologists to engage in private practice. He also averred that the question of the Respondents' power to grant licences was settled by the Court in *Republic vs Kenya Medical Laboratory Technicians and Technologists Board & Another ex parte Anil Tailor & 4 Others.* ^[4] Further, he averred that the *ex parte* applicant is guilty of material non disclosure in that it has not disclosed that he has complied with the regulatory mandate of the Respondent in several of its Medical Laboratory facilities as listed in paragraph 18 of his affidavit. Further he averred that the County Health Management team has no role in the statutory mandate of the Respondent.

***Ex parte* applicant's further affidavit.**

11. **Magdalene Kamau**, the *ex parte* applicants' medical co-ordinator, swore the further affidavit dated 8th February 2018. She averred that the Respondents' mandate conferred by section 5 (2) and 40 (e) and (f) is expressly ousted by section 20 (2) (b) (iii) of the Act in that the *ex parte* applicants institutions do not fit within the meaning provided under section 20 (2) (a) and (b) of the act because its personality under the law is that of a trust incorporated for charitable purposes. She averred that the proviso to section 20 (2) (b) (iii) covers the *ex parte* applicants' position and the persons working therein enure to the benefit of the Trusts beneficiaries.

12. Further, she averred that the form used by the Respondent only cover sole proprietorship, partnership or company and does not have a provision for other categories of ownership of Medical Laboratories, hence, the *ex parte* applicant is left to practice under the Medical

Practitioners and Dentists Board under whose definition of private practice covers the *ex parte* applicant. She also averred that the Respondents' actions of demanding licensing fees is premised on an error of law, which is a ground for Judicial Review.

Respondents' further Affidavit.

13. **Mr. Abdulatif Ali** in response to the *ex parte* applicant's further affidavit, swore the further affidavit dated 2nd March 2018. He averred that the Respondents' statutory mandate extends to Medical Laboratory facilities and Technicians and Technologists working in those facilities irrespective of the mode of registration of those medical facilities. Also, she averred that the Respondents' statutory mandate over the said facilities is not dependant on the ownership of those facilities or whether the facilities are registered as trusts, companies, sole proprietorships or any other mode of registration. He also averred that there is no provision under the law exempting a trust operating a medical laboratory facility from the regulatory mandate of the Respondent. Also, she averred that the Respondent also exercises regulatory mandate over facilities ran by the Government as those listed in paragraph 11 of her affidavit.

Issues for determination.

14. From the opposing facts presented by the parties herein, the core issue that distils itself for determination is the scope of the Boards' mandate under section 5 of the Act and a proper construction of the exceptions provided under section 20 (2) (b) (iii) of the act. Also relevant is the question whether the Boards' mandate to license and regulate private hospital and medical laboratories, and the laboratory technicians and laboratory technologists employed therein has received prior judicial construction. It will also be necessary to address the question of the application or otherwise of the *Medical Practitioner's and Dentists Act*[5] in licensing and regulating private hospital and medical laboratories, and the laboratory technicians and laboratory technologists employed in those facilities.

15. The *ex parte* applicants' counsel submitted that since 2000, it has been registering its facilities under the Medical Practitioners' and Dentists Board, a body established under the *Medical Practitioners and Dentists Act*[6] which registers institutions after thorough inspection, and grants licenses to operate as private medical institutions. He also submitted that Rule 2 of the Medical Practitioners and Dentists Rules defines private practice to include clinical laboratory fee, and, that Section 20 (2) of the act does not cover the *ex parte* applicants, hence, the Respondent has no power to levy the license fees.[7]

16. The Respondents' counsel cited the mandate Board under section 5 of the Act and argued that the mandate extends to training business and employment, which entails regular inspections and charging appropriate fees payable by medical laboratories in Kenya. He also submitted that section 19 (1) of the Act prohibits a person from acting as a laboratory or technologist in any health institution in Kenya unless such a person is registered under the Act, and added that the provision prohibits any person in charge of a health institution or any medical laboratory from employing an unregistered person. Further, he submitted that to enable performance of its mandate, the Respondent accesses private medical laboratories to confirm compliance with the law.

17. He also submitted that the issues raised in this case were settled in *Republic vs Kenya Medical Laboratory Technicians and Technologists Board & Another ex parte Anil Tailor & 4 Others*[8] where the Court held that the Regulatory mandate of the Respondent is not limited to public institutions but extends to private medical laboratories and that the Respondent has a regulatory mandate over medical laboratories situate within private health facilities. He also argued that the *ex parte* applicant has complied with the regulatory mandate of Respondent in several of its facilities.

18. He submitted that the application does not meet the scope of Judicial Review [9] as stated in *Joram Mwenda Guantai vs The Chief Magistrate*. [10] He also argued that Judicial Review remedies are discretionary and can be denied even when warranted. [11]

19. Determining the issues raised herein calls for a close examination and interpretation of the relevant provisions of the Act. Accordingly, I find it imperative to briefly outline the governing principles of statutory interpretation.

Principles governing Statutory Interpretation

20. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. [12]

21. Statutory provisions must be construed purposively and in a contextual manner. Courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained" [13] but should avoid "excessive peering at the language to be interpreted.

22. As we do so, we must seek to promote the spirit, purport and objects of the legislation. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible meanings. It is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions in the statute as a whole. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

23. It is an elementary rule of statutory construction that no one provision of the statute is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. [14] It is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the legislation and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the purposes of the legislation.

24. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

25. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes *functus officio* so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

26. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

27. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.

28. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

29. It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. [\[15\]](#)

30. The Supreme Court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others* [\[16\]](#) observed that:-

“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

31. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning. To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one. Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean. If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others*:- [\[17\]](#)

“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

32. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

Applying the law to the facts of this case.

33. It is settled law that Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. It follows that for a

decision to be allowed to stand, it must be demonstrated that the same is grounded on law. Put differently, it must be demonstrated that the challenged decision has foundation in law. Discussing the principle of legality, the South African court in the case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* stated as follows:-

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law” [18]

34. It has by now become axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only. [19] The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful. [20] A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational. [21]

35. The *ex parte* applicant argued that it's registered health facilities have been obtaining annual operating license as mandated by Section 15 of the *Medical Practitioner's and Dentists Act* [22] which provides that:-

15. Licences for private practice

1. The Board may authorize the Registrar to issue to a medical practitioner or a dentist who has applied in the prescribed form and whom the Board considers has had suitable working experience in medicine or in dentistry, as the case may be, a licence to engage in private practice on his own behalf as a private practitioner or to be employed, either whole time or part time, by a private practitioner.

2. The Registrar shall issue, on payment of the prescribed fee, a licence in the prescribed form to persons who are authorized by the Board under subsection (1).

3. Licences shall be granted for a period of one year at a time and shall state whether the person so licensed may practise as a private practitioner on his own behalf or may be employed by a private practitioner.

4. The Board may refuse to issue or to renew a licence to engage in private practice to any person and may withdraw a licence it has issued.

5. No premises may be habitually used for the purposes of private practice unless they are authorized for such use by the Board.

6. The Board may refuse to issue or to renew a licence to engage in private practice to any person and may withdraw a licence it has issued.

36. The preamble to the *Medical Practitioner's and Dentists Act* [23] provides that it is "An Act of Parliament to consolidate and amend the law to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto." The act defines a **“medical practitioner”** as a person registered under the Act as a medical practitioner. My reading of the foregoing definition is that it refers to a person registered under the Act as a medical practitioner. This definition cannot by any stretch of imagination be extended to cover “laboratory technicians” and “laboratory technologists.” Differently put, the *Medical Practitioner's and Dentists Act* [24] is not applicable to the subject under consideration which is clearly governed by the *Medical Laboratory Technicians and Technologists Act*. [25] There is a deliberate attempt to confuse the mandate of the two acts which is clearly distinct from each other.

37. The preamble to the *Medical Laboratory Technicians and Technologists Act* [26] reads "An Act of Parliament to provide for the training, registration and licensing of medical laboratory technicians and technologists, to provide for the establishment, powers and functions of the Kenya Medical Laboratory Technicians and Technologists Board, and for connected purposes." The act also has several important definitions worth noting in this determination. These are:-

“laboratory technician” and **“laboratory technologist”** mean a “medical laboratory technician” and a “medical laboratory technologist” respectively;

“medical laboratory technician” means a person holding a certificate in medical laboratory technology issued by the Kenya Medical Training College or other similar institution recognized by the Board;

“medical laboratory technologist” means a person holding a diploma, higher diploma or degree in medical laboratory technology issued by the Kenya Medical College or other similar institution approved by the Board;

38. Clearly, from the preamble to the two acts, the legislative intent of the two statutes is clearly demarcated. The later deals with *the training, registration and licensing of medical laboratory technicians and technologists, and provides for the establishment, powers and functions of the Kenya Medical Laboratory Technicians and Technologists Board, and for connected purposes, while the former provides for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto.* I see no confusion myself.

39. The Respondents' mandate is laid down in section 5 of the act which provides that:-

5 (1) The object and purpose for which the Board is established shall be 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 relations to all aspects thereof.

(2) Without prejudice to the generality of the foregoing, the Board shall—

- a. prescribe, in consultation with the College and such approved training institutions as the Board may deem appropriate, the courses of instruction for laboratory technicians and technologists;
- b. consider and approve the qualifications of laboratory technicians and technologists for the purposes of registration under this Act;
- c. approve institutions for the training of laboratory technicians and technologists;
- d. licence and regulate the business and practice of registered laboratory technicians and technologists; and
- e. regulate the professional conduct of registered laboratory technicians and technologists and take such disciplinary measures as may be appropriate to maintain proper professional standards.

40. Section 21 of the act provides that the Board shall issue in accordance with, but subject to, this Part and any rules made under this Act, certificates and annual licences authorizing the medical laboratory technicians and technologists named therein to engage in private practice. As stated earlier, a holistic interpretation of the statute entails bringing into view provisions covering the same subject and construing them together. Put differently, provisions of a statute touching on the same subject are to be construed together without one provision destroying the other but each provision sustaining the other. In this regard, section 5 (1) & (2) reproduced above must be appreciated and construed together with other relevant provisions of the Act. In this respect, Section 20 of the act is highly relevant. It provides that:-

20. *Qualifications for a private practice.*

1. *Subject to this Act, no person shall be qualified to engage in private practice as a laboratory technician or technologist unless such person—*

- a) *is a Kenya citizen;*
- b) *is registered under this Act;*
- c) *holds a valid practising certificate and annual licence issued under this Act;*
- d) *has served as a medical laboratory technician or technologist under supervision for a period of not less than five years in a medical laboratory; and*
- e) *holds such other qualification as the Board may prescribe.*

41. The caveat to the Respondent's wide mandate under the act is to be found in section 20 (2) (b) (iii) of the act reproduced below:-

2. *For the purposes of this Act, a person shall be deemed to engage in private practice if he practices as a laboratory technician or technologist—*

- a. *on his own account and is entitled to receive the entire amount of all fees and charges earned for his own financial benefit; or*
- b. *in partnership with others and is entitled to receive a share of the profits earned by such partnership for his own financial benefit and is liable to bear a share of any losses incurred by such partnership, **but no person shall be deemed to engage in private practice where he is employed**—*
 - i. *by the Government or any other public body; or*
 - ii. *by a State corporation as defined by the State Corporations Act (Cap. 446); or*
 - iii. *by any person or partnership engaged in his profession where all fees and charges earned by him enure to the benefit of his employer, notwithstanding that he is engaged in his professional capacity as a laboratory technician or technologist.*
- iv. *A person who engages in private practice as a laboratory technician or technologist contrary to the provisions of this section commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or to both.*

42. Section 20 (2) (a) defines the circumstances under which a person is deemed to engage in private practice. However, sub-section (b) of the same section provides the exception in the following terms:- **but no person shall be deemed to engage in private practice where he is employed**— *by the Government or any other public body; or by a State corporation as defined by the State Corporations Act (Cap. 446); or by any person or partnership engaged in his profession where all fees and charges earned by him enure to the benefit of his employer,*

notwithstanding that he is engaged in his professional capacity as a laboratory technician or technologist.

43. The operative word in the above provision is "**shall**." The Black's Law Dictionary, defines the word "**shall**" as follows:-

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

44. The definition goes on to say "*but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.*" So "**shall**" does not always mean "**shall**." "**Shall** sometimes means "**may**."

45. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.^[27] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.^[28] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

46. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

47. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.^[29] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.^[30]

48. The word "**shall**" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.^[31] The Longman Dictionary of the English Language states that "**shall**" is used to express a command or exhortation or what is legally mandatory.^[32]

49. Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:-

"... Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction..."^[33] - *Standard Bank Ltd vs Van Rhyn (1925 AD 266)*.

50. The above being the clear prescriptions of the meaning of the word shall, Parliament in its wisdom gave a definition of persons who shall be deemed to be engaged in private practice and proceeded to provide a clear exception to that definition. The question whether the "**laboratory technicians**" and "**laboratory technologists**" are exempted by the above exception is settled by the above provision. It is beyond any dispute that by dint of the said exception, they cannot **be deemed to be engaged in private practice**.

51. The next question is whether, the *ex parte* applicants' laboratories established within its private facilities are subject to the regulatory mandate of the Respondent. In other words, the question is whether by dint of its statutory mandate, the Board has powers to regulate and license the said facilities.

52. In this regard, it is my finding that the *ex parte* applicant appears to have misconstrued the provisions of section 20 (2) (b) (iii) of the act reproduced above to curtail the Boards' statutory mandate to regulate and license its laboratories established or operating within its facilities. As stated above, section 20 (2) (a) and (b) (iii) defines a private practitioner and those who are excluded from the definition. It does not talk or refer to the laboratories established within the private facilities. If that was the intention, Parliament could have done so in clear terms.

53. The act clearly defines a "**health institution**" to mean a hospital, nursing home, convalescent home, maternity home, health centre, dispensary or other institution where health or medical services are rendered. It defines a "**hospital laboratory**" to mean a facility in a health institution in which medical laboratory analysis and investigations are carried out. It also defines a "**medical laboratory**" to include any facility where medical laboratory analysis and investigations are carried out and includes a hospital laboratory.

54. The above definitions do **not exclude** laboratories established within private institutions. This takes us back to the Boards' mandate under section 5 (1) of the act reproduced earlier and the licensing and regulatory mandate conferred upon by the act. It is established 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 relations to all aspects thereof.

55. To the extent that the said facilities operated by the *ex parte* applicant fall within the definitions of “**health institution**” meaning a hospital, nursing home, convalescent home, maternity home, health centre, dispensary or other institution where health or medical services are rendered; or a “**hospital laboratory**” defined as a facility in a health institution in which medical laboratory analysis and investigations are carried out; or a “**medical laboratory**” which includes any facility where medical laboratory analysis and investigations are carried out and includes a hospital laboratory, then the facilities are subject to the statutory conferred regulatory mandate of the Respondent.

56. As stated earlier, the attempt to hide behind the exclusion prescribed under section **20 (2) (a) and (b)** of the act fails on grounds that the exclusion covers private practitioners but not private hospitals or private health institutions. The licensing and regulations of the laboratory facilities to ensure due compliance with the law is a statutory requirement regardless of whether they are privately owned or established or operating within private hospitals or separately. This mandate should not be confused with the mandate of the Board established under the *Medical Practitioners and Dentists Act*^[34]discussed earlier.

57. An administrative decision or a decision by a statutory body is flawed if it is illegal. A decision is illegal if it: - **(a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power or law; (d) contravenes or fails to implement a public duty.**

58. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative or statutory bodies to act within the “four corners” of their powers or duties. Courts also acting as guardians of Parliament’s will, seek to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

59. In view of the clear provisions of the law enumerated above, a unable to find any illegality in the impugned decision. An administrative decision or a decision rendered by a statutory body can only be challenged on grounds of **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Board.

60. The applicant seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

61. The discretionary nature of the Judicial Review remedies 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. Laboratories are critical to effective national health systems. Accurate and reliable laboratory services are essential for supporting clinical diagnosis, guiding treatment, and managing the spread of drug resistance.^[35] Trained laboratory personnel and well functioning laboratory systems are also important in helping countries comply with international commitments on establishing integrated disease surveillance systems. Thus, even if the grounds had been established in this case, the Court would be inclined to take into account health as a matter of great public interest while considering whether or not to grant the order sought.

62. The other important question is whether or not the High Court in *Republic vs Kenya Medical Laboratory Technicians and Technologists Board & Another ex parte Anil Tailor & 4 Others*^[36]determined the Boards mandate in the issues presented in this case. The dispute before the Court in the said case is captured in the following paragraphs:-

*9. The Applicants' case as set out in their statement of facts and elaborated in the submissions of their learned counsel..., is that the Respondent lacks the power to register or regulate private clinical laboratories, and contend that such power is in fact solely vested in the **Medical Practitioners and Dentists Board** established under the **Medical Practitioners and Dentists Act (Cap. 253 Laws of Kenya)**. The Applicants further state that as a result of the actions of the Respondent, they are exposed to arbitrary treatment and double jeopardy through regulation by two bodies.*

*10. It is the Applicants' contention that the Respondent has not only usurped the powers of the **Medical Practitioners and Dentists Board (hereinafter Medical Practitioners Board)** but acted *ultra vires* its mandate. They further contend that the Respondent flouted the rules of natural justice by failing to accord them an opportunity to be heard before the punitive decision and actions were reached.*

11. The Respondent on the other hand argues that it has the jurisdiction to issue licences and generally regulate all medical laboratory technicians and technologists and to enforce quality standards in all medical laboratories wherever situated. It insists that private hospital laboratories are not exempted from regulation by the Board.

63. The Courts' determination in the above case on the above issue is captured in the following words:-

40. "... I find that a contrary interpretation of the Act would lead to the undesired result that persons seeking medical laboratory services from private institutions would be left exposed to the perils of an unregulated practice and service delivery. That would not only be discriminatory but go against the public interest and make nonsense of the principle that law should serve the public interest.

64. It is my finding that similar issues were raised in the above case and the finding was that private laboratories are subject to regulatory mandate of the Board.

65. It is my finding and conclusion that laboratory technicians and laboratory technologists working in the *ex parte* applicants' facilities are exempted from undertaking an independent registration and licensing by dint of section 20 (2) (b) (iii) of the Act. However, I must hasten to state that this exception is specific and must be construed as such.

66. It is my finding that the *ex parte* applicants "**health institutions, "hospital laboratories" or "medical laboratories"** are subject to the licensing and statutory regulatory mandate conferred upon the Board by the act and must comply with all the prescriptions of the act. Accordingly, I find and hold that the prayers sought in this Judicial Review application are not available to the *ex parte* applicant. Consequently, I dismiss the *ex parte* applicants' application dated 18th December 2017 with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 16th day of July 2018

JOHN M. MATIVO

JUDGE.

[1] Cap 164, Laws of Kenya.

[2] Act No. 10 of 1999.

[3] Cap 253A, Laws of Kenya.

[4] {2013} eKLR.

[5] Cap 253A, Laws of Kenya.

[6] Cap 253A, Laws of Kenya.

[7] Counsel cited *Republic vs Nairobi City County ex parte Archdiocese of Nairobi* JR No. 326 of 2013.

[8] *Supra*.

[9] Citing *Republic vs Tanathi Water Services Board & 2 Others ex parte Senator Johnstone Muthama* {2014} eKLR.

[10] Nairobi Civil Appeal No. 228 of 2003 {2007} 2 EA 170. Counsel also cited and *Republic vs The Kenya Medical Laboratory Technicians and Technologists Board ex parte Christine Inokobia Limugi*, Nairobi JR No. Misc App No. 269 of 2016.

[11] Counsel relied on *Halsbury's Laws of England*, 4th Edition Vol 1 (1), para 12 at page 270.

[12] See Wallis JA dealt with the matter as follows in *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[13] Investigating Directorate: *Serious Economic Offences and Others vs Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[14] *South Dakota vs. North Carolina*, 192 US 268(1940)

[15] This rule is restated by Joubert JA in *Adampol (Pty) Ltd vs Administrator, Transvaal* 1989 (3) SA 800(A) at 804BC.

[16] {1987} 1 SCC 424.

[17] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72, while citing with approval **Lord Denning, *The Discipline of Law*** 1979, *London Butterworth* at page 12.

[18] *AAA Investments (Pty) Ltd vd Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

[19] As Ngcobo CJ said in *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49

- [20] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).
- [21] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).
- [22] Cap 253A, Laws of Kenya.
- [23] *Ibid.*
- [24] *Ibid.*
- [25] Act No. 10 of 1999.
- [26] Act No. 10 of 1999.
- [27] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).
- [28] *Ibid.*
- [29] *Subrata vs Union of India* AIR 1986 Cal 198.
- [30] See *DA Koregaonkar vs State of Bombay*, AIR 1958 Bom 167.
- [31] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .
- [32] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.
- [33] *Sutter vs Scheepers* [1932 AD 165](#), at 173 - 174.
- [34] Cap 253A, Laws of Kenya.
- [35] Boillot, F. 2009. *A Weak Link to Improving Health Outcomes in Low-income Countries: Laboratories, Health Systems for Outcomes* Publication, The World Bank, October 2009.
- [36] *Supra.*