REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURT

MISCELLANEOUS APPLICATION NO. 347B OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY

ELIZABETH WAIRIMU GICHIMBA T/A KENYATTA ROAD MEDICAL LABORATORY.

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND

TECHNOLOGISTS ACT, 1999 LAW OF KENYA.

AND

IN THE MATTER OF THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD.

AND

IN THE MATTER OF KENYATTA ROAD MEDICAL LABORATORY.

AND

IN THE MATTER OF A DECISION BY THE KENYA MEDICAL

LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD TO CLOSE KENYATTA ROAD MEDICAL LABORATORY SITUATED AT UMOJA II OPPOSITE MAMA LUCY KIBAKI HOSPITAL ON 30.8.2014.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE KENYA MEDICAL LABORATORY TECHNICIANS &

TECHNOLOGISTS BOARD…….....…..…1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF HEALTH.....……2ND RESPONDENT

EX PARTE: ELIZABETH WAIRIMU GICHIMBA T/A KENYATTA

ROAD MEDICAL LABORATORY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th September, 2014 the *ex parte* applicant herein **Elizabeth Wairimu Gichimba T/A Kenyatta Road Medical Laboratory** seeks the following orders:

> **(1) AN ORDER OF CERTIORARI to remove into this Honourable Court for purposes of the same being quashed the decisions of the Respondents contained in the Respondents' letter dated 30.8.2014 to close Kenyatta Road Medical Laboratory situated at Umoja II within Nairobi City County.**
>
> **(2) AN ORDER OF MANDAMUS to compel the Respondents to return the seized Auto Hematology Analyser machine the property of Kenyatta Road Medical Laboratory.**
>
> **(3) AN ORDER OF PROHIBITION, prohibiting the Respondents from interfering with the lawful running of the Applicant's Medical Laboratory Technologists private practice in the name and style M/S Kenyatta Road Medical Laboratory situated at Umoja II within Nairobi City County pursuant to the Respondents decision contained in a letter dated 30.8.2014.**
>
> **(4) THAT Costs of this application be provided for.**

Applicant's Case

2. The application was supported by affidavits sworn by the applicant, **Elizabeth Wairimu Gichimba**.

3. According to the deponent, the 1st Respondent carried out inspection on the **Kenyatta Road Medical Laboratory** facility situated at Umoja II in Nairobi City County (hereinafter referred to as "the Laboratory") and found the same to be conformity with the required standards for medical laboratory tests, hence issued a certificate of private laboratory registration No.G953 on 12.7.2012 and she has maintained and improved the standard of the facility over the period of time.

4. However, the 1st Respondent by their decision vide a letter dated 30th August, 2014, for closure of my the Laboratory indefinitely for no apparent reasons, and or without granting her an opportunity to be heard is indeed in breach of fair administrative action guaranteed under the Constitution of Kenya, 2010.

5. The deponent disclosed that on 28th June, 2013 she purchased the Business name Kenyatta Road Medical Laboratory registered under the ***Registration of Business Names Act*** under No. BN/2013/223914 from **Wilson Muchangi Gichimba** as an ongoing concern. To the Applicant, she is a qualified Medical Laboratory Technologists and was registered as such and her name entered in the Register of Medical Laboratory Technologists on 1st January, 2005 and issued with a Certificate of

Registration No. A01496, by the Registrar of the 1st Respondent. However despite having paid for the Annual Registration Certificate for the year 2014, the Respondent's have not issued her with the same. The said payment according to her was made vide the Respondents' M-pesa Paybill Number and the deponent got a Confirmation vide a text message as "FP48MS858 Kes. 1350.00 sent to KMLTTB for Ao1419 on 4th September, 2014 at 12.48pm".

6. The deponent however disclosed that whereas she is not directly involved in carrying out the medical laboratory test, her employee, **Evans Anyimu Aminga**, is. The said employee was arrested on 30th August, 2014 and taken to Buruburu Police Station where he was released on a cash bail of Kshs. 10,000.00 for an alleged offence of forgery but has not been arraigned in Court for plea. On 3rd September, 2014, the said employee was once again arrested by the Special Crime Police from the old Kilimani **CID** headquarters for an alleged non-existent offence of Pharmacy and Poisons Board, for which offence he is yet to be taken to court for plea taking. However, the Auto Haematology Analyzer was seized by one **Wilson Njeru Kaara** a member of the Respondent.

7. The deponent reiterated that **Evans Anyimu Aminga** is duly qualified to practice as a medical Laboratory Technologist and hold a valid Certificate of Registration No. A04450 issued by the Respondent on 31st May, 2011 and an Interim Annual Registration Renewal certificate for the year, 2014, SR No. 006456/14.

8. It was the deponent's view based on legal counsel that the Respondents by their decision on **30.8.2014** to unilaterally close indefinitely her Medical Laboratory Facility was unreasonable and the subsequent confiscation of the Auto Haematology Analyzer Machine therefrom on 3rd September, 2014 and threatening and keeping in abeyance the charging of her employee in court was arrived at without observing the principles of natural justice in that they failed to give her sufficient or any reasonable notice of any charges preferred against him and/or the proceedings (if any) by the Respondents before closure of her medical laboratory facility; they failed to give her a fair opportunity to present her case and to enable her to correct or contradict any relevant statements and/or allegations prejudicial in her view; they failed to avail to her and/or show her and/or apply any evidence, whether written or oral in support of the allegation made prior to closure of her medical laboratory facility; they made and reached a decision unilaterally leading to the closure of her medical laboratory, which decision was merely rubber stamped; and by failing to charge the Applicant or the Applicant's employee; **Evans Anyimu Aminga** since 30th August, 2014 and 3rd September, 2014 and the continued holding of the Haematology Analyzer machine threatens the practice as a Medical laboratory technologists and livelihood of the Applicant and her employees directly and indirectly.

9. According to the deponent, the Respondents acted *ultra-vires* as the law governing the closure of the Applicant's business and seizure of the Laboratory test machine and in particular breach of the schedule to the Act on provisions as to conduct of business and affairs of the Board; acting without following the prescribed procedure therein; and failure to adhere to the institutional frame work and or composition and or the conduct of affairs and business of the Kenya Medical Laboratory Technicians and Technologists Board.

10. It was therefore averred that the Respondents' actions were in abuse of power and with improper motive in its decision to condemn the Applicant on non-existent allegations and in closing her private practice as a medical laboratory practitioner, which practice the Applicant has always carried in observance and in line with the ***Kenya Medical Laboratory Technicians and Technologists Act, 1999*** Laws of Kenya (hereinafter referred to as "the Act"). To her, the Respondents acted without substantive fairness and irrationally and without regard to the principles applicable in its decision making process. Further, the Respondents' decision and actions are in law unreasonable as enumerated in the case of **Associated and Provincial Picture Houses vs. Wednesbury Corporation (1148) I ud 273** in that**:**

(a) The Respondents' decision and action in light of the material known to it were outrageous and were mere unwarranted allegations.

(b) The Respondents' decision and actions were unreasonable in failing to provide any evidence to her to support their decision to close her medical laboratory.

(c) The Respondents acted in breach of the Principle of proportionality and in particular failed to strike a fair balance between the adverse effects its decision and action would have upon her vis-à-vis their decision contained in its letter dated 30th August, 2014, leading to an indefinite closure of her medical laboratory, thus risking her livelihood and that of her employees and the well being of the society at large.

11. To the deponent, the Respondents in its decision and actions acted in breach of their duty to act in good faith in her interest in that the Respondents failed to produce any evidence pursuant to arriving at their decision and prior to closure of her medical laboratory facility and thus acted with mala fide. To her, the actions of the Respondents violate the legal principle of legitimate expectation since like every other medical technologists practitioner, running a private medical laboratory practice and who satisfies the criteria under the, she had the expectations that the 1st Respondent's Board as established under the Act**,** would act in line with the regulations governing the conduct of its business and to fairness and principle of law and honour its assurance to that effect; that she would continue to operate her private medical laboratory facility in conformity to the Act; and that he Respondents owes her a concrete reason for the closure of her private medical laboratory practice, within the meaning of the Act and in their ultimate seizure of her laboratory Auto Haematology Analyzer Machine.

12. It was therefore her case that any decision made in breach of the rules of natural justice are *ultra-vires*, irregular, null or void *ab initio* and are amenable to Judicial Review Jurisdiction of this Honourable Court and ought to be removed for purposes of being quashed. In the premises the Respondents decision as contained in the letter of 30th August, 2014 to close her private practice as a Medical Laboratory technologists and all issues arising therefrom are a nullity and devoid of legal effect. Further, the Respondents' actions are unlawful, arbitrary, malicious, capricious, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations against her lawful, legitimate and rightful expectations and taken in breach of the rules of natural justice.

13. According to the deponent, there is no provision under the law that requires taking out of a Renewal Licence for a business or company offering medical laboratory services, and that it would be illegal for the 1st Respondent to require her practice in the name of Kenyatta Road Medical Laboratory to take out an annual renewal licence and at the same time be required to take out her own licence as this would amount to double taxation, notwithstanding that she as well remit income tax to the national government.

14. To the deponent, sale of businesses in not government or regulated by the respondent or the law establishing it. She however denied having operated any medical facility in the name "Metropolis Medical Laboratory" or used any Auto Haematology Analyser with print out in such a name but averred that what the Respondents exhibited was authored by her competitor, **Metropolis Star Lab (K) Ltd,** in seeking to drive her out of business as the respondent does not authenticate the source while the same cannot be deciphered from the document and neither has the person whose test is alleged to have been carried sworn any affidavit or written to the KMLTTB to complain.

15. The deponent added that, premised on the present case the Respondent's allegations are actuated by high voltage imagination as there is no evidence of any tests from her medical facility annexed and or a report to show that her machine is faulty.

16. The deponent however disclosed that criminal case RMC PCR No. 6654 of 2014 was referred back to the Respondent pursuant to a court order therefrom issued on 26th September, 2014.

17. It was submitted that though the 1st Respondent relied on section 40(d) and (g) of the Act, those provisions do not permit unilateral closure of medical laboratories in the manner done here where no inquiry or hearing was done and the reasons therefor. It was therefore submitted that the action was *ultra vires* and breached the rules of natural justice, was unreasonable, was against the principle of

proportionality, was *mala fides* and violated legitimate expectation principle. In support of this submission the applicant relied on Article 47 of the Constitution as well as **Republic vs. Kenya School of Law exp Juliet Wanjiru Njoroge & 5 Others [2014] eKLR, Salim Juma Oditi vs. Minister for Local Government & Others [2008] eKLR, Republic vs. The District Land Adjudication & Settlement Suba District & Another [2013] eKLR, Republic vs. Kenya Revenue Authority exp Yaya Towers Limited [2008] eKLR and Republic vs. The Kenya Medical Laboratory Technicians and Technologists Board & Another exp Dinda [2014] eKLR.**

1st Respondent's Case

18. In response to the application the 1st Respondent filed replying affidavits sworn by **Abdulatif Ali**, the Registrar of the 1st Respondent herein.

19. According to the deponent, on 30th August 2014 officials from the 1st Respondent in fulfilment of the powers bestowed by sections 25 and 40 (d) & (g) of the Act, issued a Notice of Immediate Closure of the Kenyatta Road Medical Laboratory, on the basis that. (i) No Current Renewal License had been issued by 1st Respondent for the operation of Kenyatta Road Medical Laboratory, and (ii) **Mr. Evans Anyimu AMinga** was operating the laboratory without having complied with the provisions of Section 20(1)(d) of the Act, which matters had come to the attention of 1st Respondent upon complaints received from members of the public.

20. According to the deponent, it is not true that the ex parte Applicant **Elizabeth Wairimu Gichimba** is the owner of the Laboratory, since, according to the records held by 1st Respondent, the Kenyatta Road Medical Laboratory is registered as a business name under the name of the **Wilson Mucangi Gichimba** and as such, the 1st Respondent is a stranger to the contents of paragraph 5 of the replying affidavit referring to an agreement dated 28th June 2013 because the said agreement has never been brought to 1st Respondent's attention for updated records. Further, the 1st Respondent has also established that prior to Kenyatta Road Medical Laboratory being issued with a Certificate of Private Laboratory Registration, an inspection was carried out by the self same **Wilson Muchangi Gichimba**, which raises a serious issue of conflict in interest as a Board Member.

21. It was averred that the 1st Respondent's statutory authority and powers are exercised to safeguard the wellbeing, testing standards and safety of members of the public and at no time have those powers been exercised outside its mandate, as is contended by the ex parte Applicant.

22. It was disclosed that on or about 29/8/14 the 1st Respondent received complaints from **Dr. Bhavesh** and other members of the public that raised its concerns. Of particular concern was that test results of blood samples taken from one male Dominic showing "Zero Platelets" and, whereas the test results were obtained from Kenyatta Road Medical Laboratory, the details printed out by the Laboratory's Auto Haematology Analyzer Machine showed the name of "Metropolis Medical Laboratory". Upon taking cognizance of the complaint, and in view of the fact that (i) it is very irregular to obtain "Zero Platelets" from the blood sample of a live person, (ii) that every Laboratory Clinic ought to be individually licensed and its Certificate renewed annually, (which was not the case with Kenyatta Road Medical B=Laboratory) and that (ii) every testing equipment ought to be validated and issued with a certificate relating to its quality of test performance, the 1st Respondent took the action complained about by the ex parte complainant. On 30th August 2014, officers of the 1st Respondent visited the Laboratory, whereupon they found it being operated by one **Evans Anyimu Aminga** without supervision as is required under section 20(1)(d) of the Act.

23. To the deponent, although **Evans Anyimu Aminga** was issued with a certificate of Registration on 31st May 2011, he was not qualified to engage in private practice as a laboratory Technician or Technologist without first having served as such *"...under the supervision for a period of not less than five years"* in a Medical Laboratory well equipped with a qualified person to supervise him as is required under section 20(1)(d) of the Act, which could lead to his inability to interpret haematology print out

results. Considering the above stated facts, the 1st Respondent issued a notice of immediate closure of the laboratory. To the surprise of the 1st Respondent, on 3rd September 2014 it was discovered that **Mr. Evans Anyimu Aminga** had resumed operations of the laboratory in blatant defiance of the notice of immediate closure. Consequently he was arrested by the police and the Auto Haematology Analyzer Machine in use at the Laboratory was impounded as an exhibit for purposes of his prosecution as is required under the law.

24. According to the deponent, an Auto Haematology Analyzer is a machine used to count the number of red and white blood cells, blood platelets, haemoglobin and haematocrit levels in a blood sample, and its inaccuracy can pose a grievous public health risks to the unsuspecting patients who visit the laboratory. In his view, the grave exposure to danger posed to members of the public by the unlicensed clinic with an Auto Haematology Analyzer Machine reasonably believed to have been churning out invalid and erroneous results was great owing to the fact that the laboratory was situated opposite a busy government-owned hospital and the human traffic in and out the laboratory was relatively large.

25. According to the deponent, the reasons behind the 1st Respondent's decision to issue a notice of closure to the laboratory was tow-fold (i) to stop the contravention of the Act and (ii) to avert any impending health disaster from misdiagnosis that would have been the outcome of a laboratory being operated by unqualified staff using substandard and faulty equipment. In his view, it is grossly untrue and misleading to state that the 1st Respondent has not issued the ex parte Applicant with a Annual renewal Certificate as is claimed in paragraph 7 of her affidavit because, first, 1st Respondent has no records that **Elizabeth Wairimu Gichimba** is the Licensed proprietor of Kenyatta Road Medical Laboratory and Secondly, as is admitted in the supporting affidavit the payment of Kshs 1,350/= was made on 4th September 2014, way after the Notice of Immediate Closure had been issued. It was further disclosed that the ex parte Applicant, **Elizabeth Wairimu Gichimba** has not obtained her personal Annual Renewal Certificate for year 2014 and as such, it would be illegal for her to be in active practice and as such her allegations that her livelihood from the illegally run medical Laboratory are untrue and unmerited.

26. It was averred that in the process of enforcement its legal mandate above, 1st Respondent did also register a complaint with the Police, who took action by arresting **Evans Anyimu Aminga** and impounded the Auto Haematology Analyzer Machine as an exhibit, consequent to which criminal charges were opened under Makadara R.M.C PCR No. 6654 of 2014. He averred that the ex parte Applicant has made an application in the said Makadara R.M.C. PCR No. 6654 of 2014, following which the Magistrate's Court made orders which the 1st Respondent is not satisfied with and requested for copies of the proceedings in that matter, to enable it take action.

27. It was deposed that the 1st Respondent has the mandate to license and regulate the business and practice of registered laboratory technicians and technologists including these engaged in private practice as bestowed upon it by section 5(2)(d) and section 25 of the Act.

28. It was disclosed that upon filing the current proceedings, the ex parte Applicant made an un-successful application on 16th September 2014, when this court declined to grant an order for leave to operate as stay" of the 1st Respondent's decision to close Kenyatta Road Medical Laboratory and during the said arguments, the ex parte Applicant's counsel made un-successful submissions for the release of the ex parte Applicant's Auto-Haematology Analyzer impounded as a result of the 1st Respondent's decision but the Court declined to give an order for the release owing to serious reasons that the 1st Respondent explained. Thereafter, the *ex parte* Applicant's advocate made an application by Notice of Motion Application dated 25th September 2014 and filed on the same date at the Makadara Law Courts, applying for inter alia, the release of the impounded Auto-Haematology Analyzer Machine. In making that application, neither did the *ex parte* Applicant nor her Counsel, disclose to the trial magistrate before whom **Evans Anyimu Aminga** was to be tried for criminal offence the subject matter of this judicial review of the court orders made in this matter.

29. In the deponent's view, during the hearing of the application, the ex parte Applicant and her Counsel

intentionally and with dubious motive neglected to inform the magistrate at Makadara of the on- going Judicial Review application that they had filed and which had come up for inter-parties hearing just 10 days prior to said application being heard at Makadara Law Courts. Further, while knowing that this honourable court, being superior to the Makadara resident Magistrate handling the Criminal Case, had already declined to grant the Ex parte Applicant an order for the release of the Auto-Haematology Analyzer, the ex parte Applicant went ahead, to secure the Magistrate's order to have the same released from Police custody. It was averred the only reason the ex parte Applicant went to such lengths, was to avoid the Auto Haematology Analyzer being scrutinized, by using deceitful and unscrupulous means to bypass the authority of the court and the due legal process so as to tamper with it and ensure it no longer emits showing "Metropolis Medical Laboratory". **Elizabeth Wairimu Gichimba** who claims to own the business Kenyatta Road Medical Laboratory, it was deposed, has deliberately failed to submit the Auto Haematology Analyzer to the 1st Respondent for validation as required by sections 3(1)(2)(4) 12 & 13 (1), (2)d & (3) of the ***Medical Laboratory (Equipment & reagents Validation) Regulations***, Legal Notice No. 113 of 2011.

30. It was averred that despite the Notice of Closure issued upon Kenyatta Road Medical Laboratory, the Kenyatta Road Medical has been re-opened and is still being run by **Evans Anyimu Aminga** in contravention of not only the Act, but also the orders of this honourable court issued on 16th September 2014. To the deponent to grant the orders sought herein by the *ex parte* Applicant ought not to be granted as the same will not only perpetuate impunity and a blatant disregard of the law, but also will endanger the public.

31. It was therefore averred that the 1st Respondent's decision was in no way unreasonable since the closure was issued in the interest of general public health and the application before the court ought to be dismissed with costs.

32. The 1st Respondent in support of their position relied on ***Halsbury's Law of England***, 4th Edn. Vol. 1 at page 90 para 74.

33. It was submitted that the conduct of the Applicant following the denial of the stay herein by seeking an order for release of the Auto Haematology Analyzer before the Magistrate's Court militates against the grant of the order for mandamus. However the said machine having been released to the said Applicant's employee to grant the orders sought herein would be in vain.

Determinations

34. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.

35. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others** Civil Appeal No 266 of 1996 in which the said Court held *inter alia* as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of**

> ***mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

36. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

37. It therefore follows that this Court has no jurisdiction to determine the issues raised herein on their merits as opposed to the process by which the decision was arrived at.

38. The Applicant contends that she was never afforded a hearing before the decision in question was made. Article 47 of the Constitution provides:

> ***Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

39. Therefore the 1st Respondent was under a constitutional obligation to afford the person whose interests would be affected by the closure of the Laboratory an opportunity of being heard. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all

administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or material evidence.

40. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> "**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

41. The 1st Respondent has relied on the need to protect the public to justify the action it took. It istrue that in certain cases the right to a hearing may be restricted. As is stated by **Michael Fordham** in ***Judicial Review Handbook***; 4thEdn. at page 1007:

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

42. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"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."**

43. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

> **"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."**

44. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

> **"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."**

45. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

46. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

47. In order to determine the degree of procedural fairness owed in a given in case, the court in in **Simon Gakuo vs. Kenyatta University and 2 Others** (supra) set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

48. It is however my view that it is upon the person arguing that the conditions were not conducive to a hearing before the decision affecting the rights of another person was taken to prove that that was in fact so.

49. Public interest however is just like public policy. Whereas the Courts have recognised that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See **Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.**

50. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** thus:-

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the

law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

51. In my view the rights and fundamental freedoms enshrined in the Constitution can not be shoved aside simply because public authorities and bodies believe that they are acting in the public interest. The public interests and the rights and fundamental freedoms must be balanced so as not to sacrifice such rights and freedoms at the altar of what public authorities and bodies perceive to be public interests. As I have held hereinabove, the burden is upon the authority to justify taking an action in breach of rules of natural justice.

52. Therefore if the Applicant was the proprietor of the Laboratory, she was no doubt entitled to be heard before actions adverse to her interests were taken. Under Article 40(3)(b) of the Constitution the State is barred from depriving a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament.

53. However, in this case the Respondents deny that the *ex parte* Applicant **Elizabeth Wairimu Gichimba** is the owner of the Laboratory, since, according to the records held by 1st Respondent, the Kenyatta Road Medical Laboratory is registered as a business name under the name of the **Wilson Mucangi Gichimba** and the 1st Respondent is a stranger to the agreement dated 28th June 2013 because the said agreement was never been brought to 1st Respondent's attention to update its records. Although the Applicant has exhibited a copy of a document purporting to be an agreement between the Applicant and the said **Wilson Mucangi Gichimba** no document evidencing that there was a registration of change of particulars with the Registrar of Business Names was exhibited. To the contrary what was exhibited was a copy of a certificate which still indicates that the business is registered in the name of the said **Wilson Mucangi Gichimba.** In this case therefore without such evidence and in light of the denial by the 1st Respondent that the Applicant is the proprietor of the Laboratory, this Court cannot state with certainty that the Applicant's rights were adversely affected. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved.

54. It follows that this Court cannot quash the decision by the Respondents to close Kenyatta Road Medical Laboratory.

55. The Applicant seeks an order of mandamus to compel the Respondents to return the said Auto Haematology Analyzer. There are however conflicting evidence as to who seized the said machine. According to the Respondents the same was seized by the police and was meant to be exhibited before the trial Court. If that is the position the Court cannot compel a person who is not in possession of an item to produce the same. Secondly, it is contended which contention is not seriously contested, and is in fact proved by the proceedings before the trial Court that the said machine was in actual fact released to the accused in that case whom the Applicant claims is her employee. To now demand that the Respondents be compelled to return the same, with due respect, constitutes a mischief of the highest level. I wish to quote **Madan, J** in **N vs. N [1991] KLR 685,** when he expressed his disgust in the following terms:

"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

56. To seek from this Court an order compelling the release of an item which another Court has directed

be released to a different person is to insult the intellect of the Court. Courts do not grant orders and in particular judicial review orders in vain. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."**

57. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

> **"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."**

58. It follows that in the circumstances of this case an order of *mandamus* cannot issue.

59. With respect to an order of prohibition, it was contended by the 1st Respondent that the ex parte Applicant has not obtained her personal Annual Renewal Certificate for year 2014. The applicant has not exhibited such certificate. In fact the Applicant has averred that the Respondents denied her the certificate. To grant an order of prohibition as sought would amount to permitting the Applicant to unlawfully continue with the running of the said Laboratory without a certificate. This Court cannot under the guise of granting judicial review orders make orders whose effect would be to perpetuate an illegality.

60. In the result all the prayers sought herein cannot be granted.

Order

61. Consequently, Notice of Motion dated 17th September, 2014 fails and is dismissed but as there is no

evidence the 1st Respondent strictly followed the procedure stipulated in the closure of the Laboratory, there will be no order as to costs.

Dated at Nairobi this 9th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinaro for Mr Nzaku for the ex parte Applicant

Mr Mugambi for the 1st Respondent

Cc Patricia