



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL CAUSE NO. 214 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY MR RONALD OJUKU**

**(*The Ex parte Applicant*) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR THE ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE REGISTRAR AND CHAIRMAN OF PHARMACY AND POISONS BOARD, THE PERMANENT SECRETARY OF THE MINISTRY OF MEDICAL SERVICES AND THE DIRECTOR OF NATIONAL QUALITY CONTROL LABORATORY (*"The Respondents"*)**

**IN THE MATTER OF: THE DECISION BY THE 1<sup>ST</sup> RESPONDENT**

**(REGISTRAR) TO APPOINT AND GAZETTE THE BOARD OF MANAGEMENT OF NATIONAL QUALITY CONTROL LABORATORY IN CONTRAVENTION OF SECTION 35(F) 1 OF PHARMACY AND POISONS ACT (CAP 244) LAWS OF KENYA ON 4<sup>TH</sup> MARCH, 2011**

**IN THE MATTER OF: THE PHARMACY AND POISONS ACT (CAP 244) LAWS OF KENYA**

**IN THE MATTER OF: THE REPORT ON THE MANAGEMENT SYSTEMS AUDIT OF PHARMACY AND POISONS BOARD (PPB), MARCH 2011 BY EFFICIENCY MONITORING UNIT (EMU)**

**BETWEEN**

**MR RONALD OJUKU MOMANYI.....APPLICANT**

**VERSUS**

**THE REGISTRAR, PHARMACY AND POISONS BOARD.....1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY, MEDICAL SERVICES MINISTRY.....2<sup>ND</sup> RESPONDENT**

**THE CHAIRMAN, PHARMACY AND POISONS BOARD.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 20<sup>th</sup> September, 2011 the *ex parte* applicant herein **Ronald Ojuku Momanyi** seeks the following orders:

**1. An Order of Certiorari to have the decision of the Registrar of Pharmacy and Poisons Board made on 4<sup>th</sup> March 2011, in appointing and gazetting the Board of Management of the National Quality Control Laboratory removed into the High Court for the purposes of its being quashed;**

**2. An Order of Mandamus be issued to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to issue a public alert notice henceforth and recall the medicines that failed National Quality Control Laboratory tests but were irregularly registered as recommended in the evaluation and Monitoring Units Report (EMU) report and compel the Respondents to abide by the Evaluation and Monitoring Units (EMU) report's recommendation of dissolving the illegal Board of Management of National Quality Control Laboratory (NQCL) and appoint a new Board in accordance with the law.**

**3. THAT an order of Prohibition do issue against the Board of Management of National Quality Control Laboratory prohibiting the said Board henceforth from carrying on the functions of the Board of Management of National Quality Control Laboratory.**

**4. That the costs of Application be provided for.**

**Applicant's Case**

2. The application was supported by a verifying affidavit sworn by the applicant on 30<sup>th</sup> August, 2011.

3. According to the deponent, as a citizen of the Republic of Kenya he became aware of the health hazards posed by the introduction to the Kenyan market of substandard drugs and medicines which pose a threat to the people of Kenya and that this situation has been occasioned by irregularities perpetuated by various officials in the Ministry of Public Health.

4. He deposed that by a Gazette Notice No. 2064 dated 24<sup>th</sup> February 2011, and contained in VOL. CX111 – No. 21 of 4<sup>th</sup> March 2011 the 2<sup>nd</sup> respondent herein **K.C. Koskei** as the Registrar, Pharmacy and Poisons Board (hereinafter referred to as the Board) in exercise of powers purportedly conferred under Section 35 F(1) of the **Pharmacy Act** Cap 244 Laws of Kenya (hereinafter referred to as the Act) purported to appoint 9 persons to be members of the Board of Management, National Quality Control Laboratory for a period of three (3) years with effect from 4<sup>th</sup> March 2011. The applicant contended that the purported appointment was done unilaterally and did not follow the procedure provided for under the relevant law and was intended to establish a Board which would implement the devious designs of the officials at the Ministry of Health to which the importation of substandard medicines to the Kenyan market. Following accusations at the Ministry and the Department, the then Permanent Secretary in the Ministry of Health invited an investigation in or about March 2011 from the Evaluation and Monitoring Unit of the Prime Minister's Office (hereinafter referred to as EMU) to investigate and make recommendations and a month or so later in April, the EMU forwarded their report with recommendations among which were that the Registrar of the Board through gazette notices appointed previous and current Board of Members of National Quality Control Laboratory contrary to provisions of Section 35 (F) and that EMU recommended for immediate dissolution of the current Board of Members of National Quality Control Laboratory and appointment of a new one in conformity with the Act.

5. It was deposed that the said findings and recommendations by EMU have been ignored by the Minister/Permanent Secretary of Medical Services Ministry and contrary to the rules of the Act, the said Registrar registered medicines that failed National Quality Control Laboratory tests as highlighted on the table 2 of page 30 of the EMU report.

6. According to the applicant, the registered medicines, which failed National Quality Control Laboratory tests are dangerous to the unsuspecting general public, some of which like Penicillin 250 mg is used in the Intensive Care Unit (ICU) in hospitals, and indeed it has been a matter of serious public concern since the patients may die due to use of such medicine.

7. According to the applicant, despite the EMU report findings which were submitted in March 2011, the said Registrar, Minister, Permanent Secretary, Chairman of the Pharmacy and Poisons Board, have not bothered to issue a public notice to the public for caution nor withdraw the said medicines from the market – thus the general public continues to consume the dangerous drug to date and this is despite the fact that an official at National Quality Control informed the PS to ensure National Quality Control Board is appointed legally. Instead the said officer was interdicted by the PS for what was termed “insubordination”.

8. It is the applicant’s case that the Registrar licences medicines to be imported from companies that failed Good Manufacturing Practices (GMP) inspection thus further exposing the general public to dangerous medicines. Further, the EMU noted numerous financial misappropriations running into millions of shillings that should be recovered by surcharging those involved in the scam. To the applicant, the same Registrar practices nepotism in posting officers to the Board thus ensuring that dangerous medicines easily enter the country through patronage hence the Board has in continued conferment of the law to import substandard drugs which matter has attracted the attention of the National Assembly Subcommittee of Health.

9. As a result of the mounting pressure from the bad practices in the department, the members of the illegal committee including the Chairperson have recently rendered their resignations from the Board.

10. It was therefore concluded by the applicant that the continued existence of the committee continues to hazard the public as the Board has failed to implement the recommendations of the EMU report.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents’ Case**

11. In response to the application the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a replying affidavit sworn by **Dr Kipkerich Koskei**, the Registrar and the Secretary of the Board on 26<sup>th</sup> October, 2011.

12. According to the deponent, the Notice of Motion by the Applicants is fatally defective, incompetent and a total abuse of the law and Order 53 of the **Civil Procedure Rules** and as it thoroughly fails to comply with the mandatory fundamental tenets of Judicial Review.

13. According to him, the Board is a corporate body established under the Act to regulate and oversee Pharmaceutical services in the country and under the Act the Board is also mandated to appoint a Board of Management for National Quality Control Laboratory pursuant to Section 35 F(1) of the Laws of Kenya. To him, the Applicant is not an expert in pharmaceutical products on such matters but a busy body hence cannot claim that the drugs and medicines in the Kenyan market are substandard and pose a threat to the people of Kenya in that the Applicant failed to provide any particulars on this fact; he failed to give any evidence on the damages caused; and there is no connection on this fact. He then proceeded to deny the allegations made out under paragraph 3 of the Supporting Affidavit and the irregularities perpetuated by the officials in the Ministry of Public Health and averred any such irregularities if they exist are not within the premises of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

14. According to the deponent, on 7<sup>th</sup> February 2011 the Director of National Quality Control Laboratory vide a letter Ref **No. DNQCL/PPB-11/-2001** informed the Board that the term of the Board of

Management, National Quality Control Laboratory (NQCL) had expired and submitted nine (9) nominees for consideration and gazette. Following the vetting of the nominees by the Permanent Secretary (PS) Medical Services Ministry, the 3<sup>rd</sup> Respondent and the deponent, four (4) nominees were considered for appointment to the Board of Management of National Quality Control Laboratory while the remaining five (5) nominees were rejected based on conflict of interest, diverse skills and expertise, knowledge of good corporate governance having served for more than two (2) terms at the time, gender balance, institutional memory stake holders representation and regional balance. He contended that by powers conferred to the Board under Section 35 F(1) of the Act in consultation with the Permanent Secretary Medical Services and the 3<sup>rd</sup> Respondent herein, he gazetted new members of the National Quality Control Laboratory Board vide *Kenya Gazette Vol. CXIII-NO 21* which decision was endorsed by the members of the Board.

15. According to the deponent, the EMU report neither indicated anywhere that the National Quality Control Laboratory Board of Management had been appointed contrary to the Provisions of Section 35 F(1) nor that the said Board of Management, National Quality Control Laboratory be dissolved as the same was done above board and the persons appointed were of high moral value and expertise.

16. In the deponent's view, this being a judicial review process, the Honourable Court has the fundamental jurisdiction to check any excesses emitted by any judicial body while making its decision or implementing its judicial authority. However in this case the Applicant has failed to demonstrate under what basis the 1<sup>st</sup> and 3<sup>rd</sup> Respondents acted contrary to the powers vested in them while appointing the National Quality Control Laboratory Board as alleged by the Applicant. To him, EMU is just an organ of the Government which conducts monitoring of the Government Departments on request and therefore its reports are not binding nor final but only persuasive.

17. It was contended by the deponent that all other issues claiming to do with financial misappropriation and nepotism as raised in the ex-parte Applicants Affidavit are all meant to frustrate the functions of the National Quality Control Laboratory as the matters raised in the EMU report were strictly administrative and that the Honourable Court cannot adjudicate on the same. With respect to the issue of resignation from the Board of Management, National Quality Control Laboratory it was deposed that the same is personal and the Board has no control over the same.

18. To the deponent, if the Orders sought are granted, operations of the National Quality Control Laboratory shall be paralysed as there will be no legal organ to oversee the operations of the laboratory as its functions are crucial to the analysis of drugs and medicines coming into the Kenyan market.

19. There was a further replying affidavit sworn by the same deponent on 9<sup>th</sup> February, 2012.

20. In the said affidavit it was reiterated that the applicant herein is a busy body is acting solely on malice and/or in bad faith and therefore lacks the locus standi to bring any action against the Board and or its Directors. He emphasized that the NQCL cannot call for a meeting without any agenda, and hence the said meeting held in the month March, 2011 had an agenda in place. To him, the applicant brought an action against the office of the Director, National Quality Control Laboratory, the 4<sup>th</sup> respondent herein as the officer in charge of the office in question and not in his individual capacity, as such, his transfer to a different department should be treated as an administrative action and not a tacit adjudgement of guilt whatsoever.

21. To him, the applicant's allegations are based on hearsay, rumours and unfounded information and/or findings should be invited to substantiate the same. He added that the members to the said Board were duly appointed in accordance with the provisions of the and at no time has the Board acted in contravention of the law while making appointments. He averred that the last meeting by NQCL was held in the month of March, 2011 before this suit was instituted hence all the allegations made are based on hearsay.

22. According to him, the Director, one **Dr. Hezekiah Chepkwony** had issued two conflicting

reports/certificates one indicating that the drugs had passed the tests but sent another one to EMU indicating that the drugs had failed the test hence his being requested to appear before the CDR to explain the discrepancies in the certificates issued.

23. The deponent reaffirmed the position that the 2<sup>nd</sup> respondent has no role in the Board of Management and this is crystal clear under Section 35(F)(1) of the Act though is regularly consulted as the accounting officer of the ministry and that the EMU report was an administrative tool intended to improve efficiency whose recommendations have so far been implemented. It was his view that the honourable court has at no particular point in time in his ruling declared and/or insinuated that the 2<sup>nd</sup> respondent is unfit to hold a public office.

24. With respect to the issue of import authorization he deposed that the same has been investigated by the Kenya Police, the EMU and the Parliamentary Departmental Committee on Health and he was found to be without blame for the donation and diversion and to him, he has no ties and/or personal connection to Ogra Foundation and as such has not infringed any policy whatsoever. He averred that the World Health Organization (hereinafter referred to as the WHO) was playing its role perfectly to assist the Board in finding out what was the problem and that upon receipt of the report by WHO, he put up in the local dailies a paid up advert alerting the public to beware of the moulded **Zidolam-N** in the market.

25. The delay in the inauguration of the Board, according to him was caused by the 1<sup>st</sup> and 3<sup>rd</sup> respondent is farfetched as indeed the said delay was squarely at the behest of the 4<sup>th</sup> respondent who kept on engaging the 1<sup>st</sup> and 3<sup>rd</sup> respondent in unnecessary correspondence instead of convening the Board.

26. It was emphasised that the members to the said Board were duly appointed in accordance with the provisions of the Act and at no such time has the Board acted in contravention of the law while making appointments.

27.

#### **4<sup>th</sup> Respondent's Case**

28. As for the 4<sup>th</sup> Respondent, he filed an affidavit in support sworn on 7<sup>th</sup> October, 2011.

29. According to him, on 19<sup>th</sup> January, 2011, he vide a letter Ref No. NDQCL/PPB-11/01001 notified the Registrar of the Board to facilitate the appointment of the new Board of Management of the National Quality Control Laboratory and on 7<sup>th</sup> February 2011, reminded him of the same and forwarded a list of the proposed board members for consideration. On or about 8<sup>th</sup> March, 2011, he learnt that the new Board of Management of the National Quality Control Laboratory had been gazetted vide Gazette number 2064 of Vol. CXIII – No. 12 dated 4<sup>th</sup> March, 2011.

30. Subsequently, on 9<sup>th</sup> March, 2011, he brought the above to the attention of the Permanent Secretary, Ministry of Medical Services detailing to her the 4<sup>th</sup> Respondent's reservations to the said appointment and on 24<sup>th</sup> March, 2011, the Permanent Secretary, Ministry of Medical Services vide letter Ref No. EST/29/A/1 VOL IV (19) informed him on the criteria used to appoint the new Board of Management of the National Quality Control Laboratory and on 12<sup>th</sup> April, 2011, the Permanent Secretary Ministry of Medical Services vide letter Ref No. MED/27/1/1/ (15) inquired from the deponent whether the new Board of Management of the National Quality Control Laboratory had been inaugurated to start its operations.

31. In response thereto, the 4<sup>th</sup> Respondent on 12<sup>th</sup> April, 2011, vide letter Ref No. NDQCL/PS-11/04002 informed the Permanent Secretary Ministry of Medical Services that the appointing authority had not formally informed him on the said appointment and vide a letter dated 15<sup>th</sup> April 2011, copied to the 4<sup>th</sup>

Respondent, the Permanent Secretary Ministry of Medical Services informed the Registrar, to formally communicate to the National Quality Control Laboratory of the said appointment. The communication on the appointment was subsequently communicated to the 4<sup>th</sup> Respondent on 15<sup>th</sup> April, 2011, by the Registrar who directed the 4<sup>th</sup> Respondent to convene a meeting of the new Board of Management for the formal inauguration and the election of the chairman and pursuant to a request by the 4<sup>th</sup> Respondent, the Registrar provided postal addresses for his action. The 4<sup>th</sup> Respondent on 6<sup>th</sup> May, 2011, vide letter Ref No. NDQCL/PPB-11/05001 invited the Registrar of the Board to officiate the inauguration ceremony of the new Board of Management of National Quality Control Laboratory on 12<sup>th</sup> May, 2011 and the new Board was inaugurated on the 12<sup>th</sup> May, 2011 by the said Registrar. Since its inauguration, the 4<sup>th</sup> Respondent contended that the new Board since has had about five Board meetings.

32.

33. the 1<sup>st</sup> and 2<sup>nd</sup> Applicant through a Plaint dated 7<sup>th</sup> May 2009 instituted a civil claim against The Attorney General, The Ministry of Home Affairs Prisons Department and Tom Felix Logonjo in High Court Civil Case No.592 of 2004 Milimani. Pursuant thereto, the Court entered judgment on 26<sup>th</sup> September 2011 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in the sum of Kenya Shillings One Million, Three Hundred and Ninety one thousand, two hundred and twenty four shillings (Kshs.1,391,224/=). Thereafter the Applicants filed their Party to Party Bill of Costs dated 27<sup>th</sup> April 2012 which Bill of Costs was taxed on 31<sup>st</sup> October 2012 at Kenya Shillings Four Hundred and Seventy Thousand Three Hundred and One and Eighty cents (Kshs.470,301.80) and a Certificate of Costs dated 13<sup>th</sup> November 2012 was issued.

34. Pursuant to the Certificate of Costs issued on the 13<sup>th</sup> November 2012 the applicant's Advocate's on record wrote to the Respondents a letter dated 20<sup>th</sup> November 2012 demanding payment of the taxed costs and issued them with Notice of Intention to Commence Proceedings against them in the event of failure to do so.

35. According to the applicants' the Respondents have failed to pay the taxed costs of Kshs.470,301.80 despite being issued with demand and notice of intention to sue and in their view, the Respondents have no justifiable reason for failing to pay the decretal sum.

36. The application was not opposed by the Respondents.

37. I have considered the application, the verifying affidavit as well as the submissions filed on behalf of the applicants.

38. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Kosoro**, I expressed myself as hereunder:

**“...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public officers, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of**

Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

39. I adopt my reasoning in the said case.

40. In the absence of any replying affidavit, this court finds merit in the Notice of Motion dated 20<sup>th</sup> December, 2012 save for the fact that the costs are in respect of High Court Civil Suit No. 592 of 2004 as clearly indicated in the certificate of costs and not High Court Miscellaneous Application No.592 of 2004 as indicated in the prayers herein.

41. Accordingly, an order of *mandamus* is hereby issued directed at the Respondents compelling them to pay the ex parte Applicants Kshs 470,301.80/= being the taxed costs in High Court Civil Suit No. 592 of 2004 Nairobi. The applicants will have the costs of this application.

**Dated at Nairobi this day 13<sup>th</sup> day of March 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Ms Makovu for the applicant.***