REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

Miscellaneous Application 280 of 2007

REPUBLIC.. APPLICANT

AND

MINISTER FOR HEALTH.. 1ST RESPONDENT

THE MEDICAL PRACTITIONERS AND DENTISTS BOARD............................... 2ND RESPONDENT

EX-PARTE

AVENUE HEALTHCARE LIMITED

JUDGMENT

Introduction

1. By a Notice of Motion dated 27th March 2007, the *ex-parte* applicant, Avenue Healthcare Limited, ("the applicant") moved the court for the following orders;

(a) That an order of mandamus be issued to compel the first respondent to establish a Central Board of Health provided for under Section 3(1) of the Public Health Act (Chapter 242 of Laws of Kenya).

(b) That an order of prohibition be issued to restrain the second respondent from licensing regulating and charging fees upon Private Hospitals Nursing Homes and other health institutions pursuant to rules made under Section 23 of the Medical Practitioners and Dentists Act (Chapter 253of the Laws of Kenya) vide Legal Notices No. 182 of 1979, 288 of 1979 and 289 of 1979.

(c) That an order of certiorari be issued to remove to this Honourable Court for the purpose of being quashed rule 18(1) of the Medical Practitioners and Dentists (Private Practice) Rules made under Section 23 of the Medical Practitioners and Dentists Act (Chapter 253 of the Laws of Kenya).

2. The application is supported by the statutory statement dated 16th March 2007 and the verifying affidavit of Diana Patel, the applicant's managing director, sworn on the 16th March 2007. The applicant also relies on written submissions dated 16th July 2012.

3. The application is opposed by the 1st respondent. No affidavit was filed on its behalf but reliance was placed on written submissions dated 14th September 2012. The 2nd respondent relies on the replying affidavit of Professor Julius Kiambi, the Chairman of the Medical Practitioner and Dentists Board (MPDB), sworn on 16th October 2007 and written submissions filed on 25th July 2012.

4. Mr Ligunya drew the court's attention that **Part IV** of the ***Medical Practitioners and Dentists (Private Practice) Rules*** was revoked by **section 14** of ***Legal Notice 25 of 2000***. All the parties duly conceded to this position with the result that prayer 2 of the motion has been overtaken by events.

Applicant's Case

5. The applicant's case concerns the provisions of the ***Public Health Act (Chapter 242 of the Laws of Kenya)*** **Section 3** of the Act provides as follows;

3. (1) There shall be established a Central Board of Health (hereinafter referred to as the board), having its seat at Nairobi, which shall consist of the Director of Medical Services (who shall be chairman), a sanitary engineer, or such person as may be appointed by the Minister to perform the duties of sanitary engineer, a secretary, and such other person or persons not exceeding six (three of whom shall be medical practitioners) as are appointed from time to time by the Minister.

(2) In the absence of the Director of Medical Services the board shall elect a chairman from the members present.

6. Under **section 8** of the ***Public Health Act*** ("***PHA***"), the function of the Board shall be to advice the Minister upon all matters affecting the public health and particularly the functions of the Medical Department mentioned in **section 10(2)** of the Act and which are, ***"…..to prevent and guard against the introduction of infectious disease into Kenya from outside; to promote the public health and the prevention, limitation or suppression of infectious, communicable or preventable diseases within Kenya; to advise and direct local authorities in regard to matters affecting the public health; to promote or carry out researches and investigations in connexion with the prevention or treatment of human diseases; to prepare and publish reports and statistical or other information relative to the public health; and generally to carry, out in accordance with directions the powers and duties in relation to the public health conferred or imposed by this Act."***

7. All parties concede that the Central Board of Health ("the CBH") has never been established and it is the applicant's case that the Minister has failed to discharge the statutory duty imposed by **section 3** of the ***PHA*** to establish the Board. Counsel for the applicant, Mr Kibe Mungai, submits that the obligation is mandatory and this failure to act is breach of the Minister's his statutory duty.

8. Mr Mungai, relied on the case of ***Kenya National Examination Counsel Republic ex-parte Geoffrey Gathenji Njoroge & Others*** **Nairobi CA Civil Appeal No. 266 of 1996 (Unreported)** for the proposition that an order for mandamus was appropriate in the circumstances to enforce the Minister's statutory obligation to constitute the CBH.

9. The application for the order of prohibition to restrain the MPDB from licensing, regulating and charging fees upon Private Hospitals, Nursing Homes and other institutions pursuant to rules made under **section 23** of the ***Medical Practitioners and Dentists Act (Chapter 253 of the Laws of Kenya)*** ("***MPDA***") is direct consequence of the failure of the Minister to form the CBH under **section 3** of the ***PHA***.

Section 153 of the PHA provides as follows;

153.(1) The Minister, on the advice of the board, may make rules for the conduct and inspection of nursing homes, convalescent homes, private hospitals, private mental hospitals, maternity homes, infirmaries or any institutions where invalids, convalescents or children are treated or received upon payment of fees or charges and no person shall open or keep open, any such premises unless the

premises and the keeper thereof are licensed by the board.

(2) The Director of Medical Services, on the advice of the board, may authorize a medical practitioner to visit and inspect any such premises, as are mentioned in subsection (1) and to report to the board upon any matter or thing connected with such premises or the use thereof.

(3) Any person who knowingly obstructs an authorized medical practitioner in any inspection authorized by the Director of Medical Services, under subsection (2), shall be guilty of an offence.

(4) The board may refuse to grant a licence and may cancel any licence which has been granted under this section on any of the following grounds—

(a) that the premises in respect of which a licence is sought or has been granted are unsuitable or otherwise do not conform with the requirements of any rules made under this section;

(b) that the granting or continuance of a licence would be contrary to the public interest;

(c) that the person in respect of whom a keeper's licence is sought or has been granted has failed to satisfy the board that he or she is a fit and proper person to be trusted to conduct or to continue to conduct the premises for which the keeper's licence is sought or has been granted.

10. The applicant urges that apart from giving the Board an advisory position **section 153** of the ***PHA*** specifically empowers it to *"grant a licence (or) cancel any licence."* Mr Kibe Mungai argued that in the absence of the CBH, the MPDB has stepped into the lacuna and purported to make rules pursuant to **section 23** of the ***MPDA*** where it purports to licence hospitals, charge fees and give directives.

11. **Section 23** of the ***MPDA*** provides as follows;

The Minister may, after consultation with the Board, make rules generally for the better carrying out of the provisions of this Act and any such rules may, without prejudice to the generality of the foregoing power-

(a) Prescribe anything required by this Act to be prescribed;

(b) Provide for the procedure to be followed by the Board in an inquiry under section 20;

(c) Provide for enforcing the attendance of witnesses and the production of books and documents at an inquiry held by the Board;

(d) Prescribe forms to be used in connection with this Act or fees to be charged under this Act.

12. Mr Mungai submitted that the purpose of the ***MPDA*** as its name suggests is to deal with medical personnel and not institutions which are a subject of the ***PHA***. The applicant therefore submits that the rules made under the ***MPDA*** in so far as they purport to regulate medical institutions are *ultra vires* and are without any statutory basis.

1st Respondent's Case

13. The 1st respondent does not deny that a Central Board of Health as contemplated by **section 3** of the ***PHA*** has not been established. Its case is that ***"shall"*** as used in **section 3** is not mandatory. According to counsel, Ms Sirai, the use of ***"shall"*** generally raises a presumption that the particular provisions are imperative but this prima facie inference may be rebutted by other considerations such as the objects and the scope of the enactment and the consequences following from such construction. Counsel relied on the case of ***Martin O. Oluoch and Others v Minister for Health and Kenyatta National Hospital Board*** **Nairobi HC Misc. Civil Appl. No. 417 of 2002 (Unreported)**to support this proposition.

14. Ms Sirai contended that the context of the section meant that the obligation imposed on the Minister was not mandatory as no time limit was set within which the Board should be established. Consequently, since establishment of the CBH was discretionary, an order of mandamus could not be issued in light of the ***Kenya National Examinations Council v R ex-parte Geoffrey Njoroge Gathenji and Others*** **(Supra).**

15. Counsel for the 1st respondent also submitted that for an order of mandamus to issue, there must be a specific duty and how that specific duty should be performed and that the **section 3** of the ***PHA*** is silent as to who should establish the Central Board of Health.

2nd Respondent's Case

16. The 2nd respondent's case is mainly focused on prayer (b) of the motion. However, as regards the prayer for mandamus against the Minister, Mr Ligunya, counsel for the MPDB, submitted that **section 3** is clear on the appointment of the CBH. He stated that in the event the court was minded to issue an order of mandamus, it should take into account the need for consultations among stakeholders.

17. As regards prayer (c), Mr Ligunya, submitted that the Legal Notices referred to in prayer 2, that is ***Legal Notices No. 182 of 1979, 288 of 1979 and 289 of 1979***do not address themselves to medical institutions but to medical practitioners running those institutions. According to counsel, **section 15** of ***MPDA*** refers to premises which may be authorised by the Board under the Act and this provides the background for the rules promulgated under the Act. It is the case of the MPDB that the preamble to the Act, which provides, *"An Act of Parliament to consolidate an amend the law to make provision for the registration of medical practitioners and dentists and for purposes connected therewith and incidental thereto,"* must be taken together with the whole Act. Counsel submitted that the Act and the rules made thereunder address themselves to personnel running specific institutions therefore **section 15** and **23** means the rules are *intra vires*. Mr Ligunya emphasised that it would be impossible to realise the goals of **section 23** of the ***MPDA*** without considering the nature and state of their private practices.

18. Mr Ligunya submitted that the main purpose of the CBH is advisory and not regulatory as provided in **sections 8, 10(2)** and **153** and the rules made under the ***PHA*** and the ***MPDA*** are not mutually exclusive and therefore the actions of the 2nd respondent are not *ultra vires*.

Determination and Disposition

19. The issues in this matter can be distilled from the prayers in the motion,

(1) Whether an order for mandamus should be issued to compel the Minister to establish the Central Board of Health in accordance with **section 3** of the ***PHA***.

(2) Whether an order of prohibition should be issued to restrain the MPDB from licensing private hospitals, nursing homes and other health institutions.

Whether an order of mandamus should issue

20. The tenor of the 1st respondent's submission is that the court should ignore the statutory provisions that empower the Minister to appoint the CBH. It is a well-known canon of statutory interpretation that effect must be given to every word, phrase and clause in a statute. It is the duty of the court to avoid an interpretation that would render any part of the statute mere surplusage or nugatory. This is the presumption against statutory redundancy that a legislature did not intend to include superfluous provisions. Thus, in construing statutes, courts will be reluctant to adopt an interpretation that presumes the legislature to waste words when enacting laws. In the old case of **Montclair v. Ramsdell, 107 U.S. 147, 152 (1883),** the US Supreme Court stated that it was the duty of the court to, *"give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."*

21. Legislative provisions are not empty vessels. Thus, this court will be reluctant to adopt a statutory interpretation in a manner to suggest that the enacted provisions are a waste in the absence of repeal by the same legislative authority. If the law makers intended that the operationalization of certain provisions be put on hold, or that they commence on a later date then nothing would have been easier than to so legislate. The only way to give meaning to the words of the statute is make an order of mandamus.

22. I agree with counsel for the 1st respondent that whether the use of the word *"shall"* in a statute is mandatory or directory depends on the context in which it is used. In ***Martin Oluoch and Others v Minister of Health and Kenyatta National Hospital Board*** **(Supra)** the Court (Kuloba J) stated, *"the use of the word 'shall' does not always mean that an act is obligatory or mandatory; it depends upon the context in which the word occurs and any other circumstances. The word does not always necessarily connote a mandatory intent on the part of the lawmakers."*

23. The CBH plays an important role within the framework of the ***PHA*** as demonstrated in **sections 10(1)** and **(2)**. The fact that it is advisory in certain respects does not make it unnecessary, if anything, matters of health are better made in an atmosphere of consultation amongst stakeholders.

24. In considering this matter, I am also required to take into account the national values and principles set out in **Article 10** of the Constitution. The values include participation of the people, good governance, transparency and accountability and I find and hold that these values are enhanced by a Board such as that contemplation **section 3** of the ***PHA***. **Section 7(1)** of the **Sixth Schedule** to the Constitution requires that ***"all laws in force immediately before the effective date ….shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."*** Besides, the right to the highest standard of healthcare is now guaranteed by **Article 43(1)(a)** of the Constitution and the provisions of ***PHA*** go towards meeting this objective.

25. **Sections 152** and **153** gives the Board an advisory role to the Minister in making rules. To my mind **Section 153(4)** of the Act, which gives the Board licensing authority, negatives any legislative intention that the word ***"shall"*** as used in **section 3** of the Act is merely directory and not mandatory.

26. Ms Sirai submitted that **section 3** of the ***PHA*** did not provide a time period within which the Board should be established and as such the obligation bestowed upon the Minister could not be said to be mandatory. The fact that a statute does not provide a specific time frame within which a certain act is to be done does not give a *carte blanche* on the authority or person concerned to perform that act to carry it out whenever they please. It does not mean that such obligation is one that is discretionary in nature as contended by Ms Sirai. **Section 58** of the ***Interpretation and General Provisions Act (Chapter 2 of Laws of Kenya)*** provides that, "***Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."***

27. I take the position that the ***PHA*** is an old statute which is over half a century old, having commenced in the year 1921, and this time frame cannot by any standards be said to be reasonable delay as to oust the grant of the mandatory orders.

28. Finally, the argument that the Act does not provide who is to establish the Board is easily disposed of. A plain reading of the **section 3(1)** of the ***PHA*** is clear that the Minister is the appointing authority mandated to establish the Board. As to which Minister it refers to, **section 2** of the ***Interpretation and General Provisions Act*** provides, "***the Minister" means the Minister for the time being responsible for the matter in question, or the President where executive authority for the matter in question is retained by him, or the Attorney-General where executive authority for the matter in question has been conferred on him;.***\'

29. In the case of ***R v Kenya National Examinations Council*** **ex parte** ***Geoffrey Gathenji Njoroge & Others*** **(Supra),** the Court of Appeal rightly observed that "…*an order of mandamus will compel 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."* Taking into account the provisions of the Constitution and the

Act, I conclude that the requirement in **section 3** is a mandatory requirement in order to give effect to the objects of the Act, that is securing and maintaining health and since it is admitted that the CBH does not exist, an order of mandamus is an appropriate remedy to give effect to the statute.

Whether an order of prohibition should issue

30. The second issue framed for determination relates to the capacity of the MPDB to regulate private hospitals pursuant to rules made under **section 23** of the ***MPDA***.

31. In summary, the applicant's argument is that there are no provisions in the ***MPDA*** or any other law that allows the MPDB to licence, regulate or charge fees as the Act is concerned with medical personnel rather than institutions. A reading of the ***MPDA*** discloses that the Act not only deals with medical practitioners and dentists but also purposes connected therewith and incidental thereto. Apart from dealing with registration of medical practitioners and dentist, **section 15** of the Act empowers the Board to licence private practitioners. **Section 15** provides;

15 (1) The Board may authorise 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 authorised by the Board under sub-section (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 authorised for such use by the Board.

(6) A person aggrieved by a decision of the Board under this section may appeal to the High Court, and in any such appeal the High Court may annul or vary the decision as it thinks fit.[Emphasis mine]

32. It is instructive to note that **section 15(5)** of the ***MPDA*** specifically empowers the Board to authorise premises for private practise. It is in this respect that the rules promulgated under **section 23** of the Act must be read. I therefore agree with Mr Ligunya that licensing of practitioners must of necessity permit the Board to authorise premises for private practitioners and any regulations to this effect are incidental to the licensing of private medical practitioners. It may well turn out that premises *"habitually used"* by private practitioners are private hospitals or nursing homes and thus fall within the purview of the ***MPDA***. In summary, it is not *ultra vires* for MPDB to authorise private institutions by way of licences.

33. The applicant has made reference to ***Legal Notices No. 182 of 1997, 288 of 1979*** and ***289 of 1979***. These legal notices refer to the ***Medical Practitioners and Dentists (Private Practice) Rules*** as amended from time to time. These rules deal with the licensing of practitioners in private practice and approval of premises generally as permitted by **section 15(5)** of the ***MPDA***.

34. On the whole, I am satisfied that the Board has the authority to licence, regulate and charge fees upon private hospitals, nursing homes and health institutions in so far as the regulations relate to licensing of private practitioners and authorising premises for private practitioners and in the circumstances the *Medical Practitioner and Dentists (Private Practice) Rules* are *intra vires* the ***PHA*** and the ***MPDA***.

Conclusion

35. Since the applicant has succeeded in part, it shall have half the costs of the application.

36. The Notice of Motion dated 27th March 2007 is allowed on the following terms and to the following extent;

(a) An order of mandamus be and is hereby issued compelling the Minister to establish the Central Board of Health under section 3(1) of the Public Health Act (Chapter 242 of the Laws of Kenya) within six (6) months from the date hereof.

(b) The ex-parte applicant is awarded half the costs of these proceedings as against the 1st respondent.

DATED and **DELIVERED** at **NAIROBI** this 5th October 2012

D.S. MAJANJA

JUDGE

Mr Kibe Mungai, instructed by Kinoti & Kibe Advocates for the *ex-parte* applicant

Mr Sirai, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr S. Ligunya, instructed by Rachier and Amollo Advocates for the 2nd respondent.