

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO. E284 OF 2024**

**KENYA PHARMACEUTICAL ASSOCIATION.....  
PETITIONER**

**VERSUS**

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

**RESPONDENT**

**THE CABINET SECRETARY**

**MINISTRY OF HEALTH .....2<sup>ND</sup>**

**RESPONDENT**

**AND**

**PHARMACEUTICAL SOCIETY OF KENYA.....INTERESTED  
PARTY**

**JUDGMENT**

*Introduction*

1. Kenya Pharmaceutical Association, (the petitioner), is a registered professional organization of enrolled pharmaceutical technologists enrolled under the Pharmacy and Poisons Act to practice pharmacy in the country. The petitioner filed this petition on behalf of its members against the Pharmacy and Poisons Board and the Cabinet Secretary Ministry of Health as the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Pharmaceutical Society of Kenya was joined into the proceedings as the interested party.

2. The petition was brought to challenge the decision by the 1<sup>st</sup> respondent to exclude pharmaceutical technologists from superintending pharmacies at level 4 hospitals and above as being unconstitutional illegal and violative of the petitioner's members' right. The petition is supported by affidavits sworn

by Eric Gichane, the Secretary General of the petitioner.

### *Petition*

3. The gravamen of the petition is on the decision by the 1<sup>st</sup> respondent dated on 22<sup>nd</sup> May 2024 stopping pharmaceutical technologists from superintending pharmacies at level 4 hospitals and above. The petitioner asserted that the 1<sup>st</sup> respondent licensed qualified pharmaceutical technologists to superintend pharmacies at level 4 hospitals and above up to 2023. In 2024 the petitioner's members were surprised to learn that the 1<sup>st</sup> respondent had introduced an informal directive intending to reject applications from its members seeking to superintend pharmacies at level 4 hospital

Pharmacies and above, a directive that was implemented and continued to be implemented.

4. The petitioner held meetings with the 1<sup>st</sup> respondent where several issues were raised, including the decline to licence superintendent licences for pharmaceutical technologists in pharmacies in level 4 hospitals and above; potential implications of the decline on the affected hospitals and pharmaceutical technologists and public health in light of article 43(1)(a) of the Constitution. The petitioner proposed interim measures to prevent further losses and suggestions for evaluating future applicants for superintendent licenses.

5. The petitioner asserted that the 1<sup>st</sup> respondent ignored the petitioner's pleas necessitating it to seek the intervention of the 2<sup>nd</sup> respondent and

raised concerns about being excluded from decisions affecting its members; the impact and engagement with the 1<sup>st</sup> respondent and unfulfilled expectations. The Principal Secretary in the 2<sup>nd</sup> respondent's Ministry promised to review those concerns and take necessary action.

6. Despite these efforts, the 1<sup>st</sup> respondent engaged in a selective process of approving applications for level 4 superintendence licenses based on a system akin to lottery. In so doing, the 1<sup>st</sup> respondent approved applications for some of its members while rejecting others without justification. The petitioner asserted, regarding the Norms and Standards for Health Service Delivery, that the Human Resources for Health Norms and Standards Guidelines for the Health Sector, 2014 does not prohibit the

petitioner's members from superintending pharmacies in level 4 and above hospitals.

7. The petitioner asserted that the decision of 22<sup>nd</sup> May 2024 is arbitrary; was made without consultation and is inimical to the livelihood and careers of its members. The decision also hampers access to healthcare services. The petitioner further asserted that the decision violated articles 10 (1) (c), (2); 20, 21(1), 27(1), 35, 43(1) (a) and 47 of the Constitution and its members' legitimate expectation.

8. Based on the above concerns, the petitioner sought several reliefs including declarations of invalidity and orders quashing the impugned decision.

*1<sup>st</sup> respondent's response*

9. The 1<sup>st</sup> respondent opposed the petition through a replying affidavit. The 21<sup>st</sup> respondent contended that the petition is not founded on justiciable grounds; offends the political doctrine question, the doctrines of constitutional avoidance and ripeness.

10. The 1<sup>st</sup> respondent asserted that interpretation of articles of the Constitution on socio economic rights including those article 43(1) of the Constitution, lies within the executive and legislature; that section 48 of the Health Act provides for a dispute resolution mechanism and the petitioner invoked jurisdiction of the court prematurely when facts had not fully crystallized.

11. The 1<sup>st</sup> respondent relied on sections 3, 3B (3), 9A of the Pharmacy and Poisons Act, the Guidelines for

Registration and Licensing of Premises, 2023, Good Pharmacy Practice (GPP) standards, Clause 6 of the Medical Practitioners and Dentists (Medical Institution) Rules and the Code of Ethics for Pharmacists, 2019 that on its mandate and pharmaceutical practice in the country.

12. The 1<sup>st</sup> respondent asserted that the petition does not meet the threshold for granting conservatory orders; that the petitioner raised a number of issues affecting pharmaceutical technologists in the letter dated 7<sup>th</sup> March 2023 which were adequately responded to in the letter dated 16<sup>th</sup> March 2023.

13. According to the 1<sup>st</sup> respondent, the petitioner was assured that it executes its mandate without discrimination and is committed to protecting the

rights of all players in the practice of pharmacy. The 1<sup>st</sup> respondent maintained that its decisions were not only anchored in the law but were also geared towards promoting the practice of pharmacy with a view to providing the highest attainable standards of healthcare as well as re-orienting pharmacy practice with universal health coverage and the overall needs of the country.

14. It is the 1<sup>st</sup> respondent's case that the respondent had requested for a meeting through a letter dated 2<sup>nd</sup> February 2024, to address the challenge surrounding the decline to grant superintendent licenses for pharmacies at level 4 hospitals. A meeting was held on 12<sup>th</sup> February 2024 and deliberated on several issues, including applications

for licenses to superintend levels 4 and 5 hospital pharmacies that had been declined.

15. According the 1<sup>st</sup> respondent, the petitioner in a letter dated 13<sup>th</sup> February 2023 the petitioner proposed that its members who were at the time superintending pharmacies in level 4 hospitals should not be affected by the new changes; new applications be evaluated for approval based on the years of experience and the 1<sup>st</sup> respondent to formerly communicate its position on the subject matter to stakeholders.

16. The 1<sup>st</sup> respondent maintained that the issues raised by the petitioner were in a meeting held on 19<sup>th</sup> April 2024 and various resolutions made. One of the resolutions was that superintendents of

pharmacies at level 4, 5 and 6 medical facilities should be duly registered pharmacists. The 1<sup>st</sup> respondent having considered the issues raised, resolved that effective 1<sup>st</sup> January 2025, it would be mandatory to comply with the human resource requirements for pharmaceutical services prescribed under the Norms for the Health Sector issued by the Ministry of Health together with other factors. The 1<sup>st</sup> respondent further directed that the position be communicated to all relevant stakeholders.

17. On 22<sup>nd</sup> May 2024, the 1<sup>st</sup> respondent communicated the resolution to the petitioner; Council of Governors; all Medical Facilities; County Directors of Health; Kenya Medical Practitioners Pharmacists and Dentists Union (KMPU), Kenya National Association of Pharmaceutical

Technologists, Pharmaceutical Society of Kenya, Kenya Medical Association (KMA), Kenya Private Hospitals Association and Kenya Health Professions Oversight Authority.

18. The 1<sup>st</sup> respondent maintained that the impugned directive as in compliance with the law and was issued in a transparent manner. In as much as some members of the petitioner previously superintended level 4 hospitals, under the Norms for Health Sector issued by the Ministry of Health, one has to be a registered pharmacist to superintend pharmacies level at level 4 hospitals and above. The 1<sup>st</sup> respondent maintained that the directive does not preclude pharmaceutical technologists from offering pharmaceutical services at levels 4, 5 and 6

hospitals but they can only work under the supervision of registered pharmacists.

19. According to the 1<sup>st</sup> respondent, the basic principles guiding definition of levels of care, include units of service delivery, equity in access and utilization and relevance and acceptability. Under section 25 of the Health Act, the rationalization of the staff requirements at level 4 hospitals and above is anchored on the need for specialized services at the respective facilities.

20. The 1<sup>st</sup> respondent asserted that the threshold for public participation was met; the 1<sup>st</sup> respondent fully engaged the petitioner's members, the public and the relevant stakeholders before communicating the impugned directive with adequate notice for

compliance requiring superintendents of pharmacies in hospitals at level 4, 5 and 6 to be duly registered pharmacists. The requirement to have registered pharmacists superintend pharmacies at level 4 hospitals and above was necessitated by the need to have patient-oriented practice and the broader spectrum of specialized referral curative services.

21. The 1<sup>st</sup> respondent denied allegations of discrimination in violation of article 27 (1) of the Constitution or that the impugned directive was arbitrary. The 1<sup>st</sup> respondent maintained that annual practicing license applications by qualified members of the petitioner for the year 2024 were duly approved and reasons for decline to approve communicated to respective applicants. The petitioner's annexures demonstrate that the

applicants were unqualified to superintend pharmacies at level 4 hospitals and above and lacked the requisite experience in the hospital set up. The 1<sup>st</sup> respondent approved applications for premises that met the requisite threshold for wholesale and retail of pharmaceutical products.

22. It was the 1<sup>st</sup> respondent's position, that the claims that some of the petitioner's members who applied to be superintendents in level 4 facilities were approved while those for level 5 and above were declined are not true. There was material non-disclosure of facts that there are two different applications; one, as a practitioner and the other as superintendent. Approvals were made for those who applied for practitioner's license but approvals for those who applied for superintendent for level 4 and

above institutions were declined. The 1<sup>st</sup> respondent maintained that there was no legitimate expectation and that the threshold for a constitutional petition had not been met.

*Interested party's response*

23. The interested party opposed the petition through grounds of opposition, contending that the petition is asking the 1<sup>st</sup> respondent to engage in an illegality; the Pharmacy and Poisons Act does not contain any provisions for issuing superintendence licenses to pharmaceutical technologists and that by their training and knowledge, pharmacists compared to pharmaceutical technologists, superintend as directed by the 1<sup>st</sup> respondent, towards attainment of the highest attainable standard of health for the

people as required by article 43 (1) (a) of the Constitution.

24. The interested party asserted that the petitioner did not demonstrate the lacuna that would necessitate an extra ordinary necessity for issuing superintendence licenses to pharmaceutical technologists. interested party maintained that discrimination, if any, is positive based on reasonable standards guided by training and proficiency.

25. The interested party contended that the 1<sup>st</sup> respondent's action is an act in good faith and legal; legitimate expectation does not arise out of an illegality and the petition fails the specificity test required by the principle in *Anarita Karimi Njeru v Republic* [1979] eKLR.

26. The interested party again contended that the petition offends the doctrine of constitutional avoidance; the doctrine of strict scrutiny *vis a vis* rational basis; proportionality test and the doctrine of ripeness. The petitioner failed to demonstrate how the respondents violated articles 10, 35, 43 and 47 of the Constitution.

#### *Submissions*

27. The petition was disposed of through written submissions with oral highlights.

#### *Petitioner's submissions*

28. Mr. Abidha Nicholas, learned counsel for the petitioner submitted highlighting their written submissions, that the court has jurisdiction under

article 165 (3) (b) of the Constitution to determine this petition. Counsel relied on the decisions in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR and *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR). Learned counsel maintained that this court had made decisions in petition Nos. 140 of 2018 and 346 of 2018 and is handling petition No. 390 of 2018 against the 1<sup>st</sup> respondent to justify the argument that the court has jurisdiction.

29. Counsel submitted that the 1<sup>st</sup> respondent's actions violated the petitioner's members' legitimate expectation because its members are trained and

duly enrolled as pharmaceutical technologists pursuant to sections 3B (3) (c), 7 and 8(2) of the Pharmacy and Poisons Act. The Act ensures that all its members are duly issued with certificates of enrolment under section 9(2) of the Act and therefore the 1<sup>st</sup> respondent is under duty to process their licenses for practice under section 9(B) and 9(C) of the Act.

30. Mr. Abidha Nicholas argued that the 1<sup>st</sup> respondent admitted that the petitioner's members can and are at liberty to superintend level 4 hospitals if they meet the requisite conditions. Further, that section 9D of the Act envisages that expectations on licences ought not be breached and there is no law or regulation enacted in 2024 which

enjoins the 1<sup>st</sup> respondent to prohibit issuing licenses to the petitioner's members.

31. Learned counsel maintained that the petitioner's members had legitimate expectation that they would be treated fairly and equally but this was not done since the 1<sup>st</sup> respondent applied lottery like method in issuing superintendent licences exposing some of the petitioner's members to discrimination. The petitioner relied on the decisions in *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR and *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* [2015] eKLR for the position that a legitimate expectation had been created.

32. Learned counsel again relied on *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others* [2013] eKLR for the position that information was sought unsuccessfully from the 1<sup>st</sup> respondent regarding denial of license to the petitioner's members to superintend level 4 hospitals and above.

33. It was further submitted that while the 1<sup>st</sup> respondent had stated that it held a meeting on 19<sup>th</sup> April 2024, no resolution was annexed to show those involved in the meeting. Reliance was placed on the decision in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR for the position that the rights of the petitioner's members to fair administrative action was violated.

34. Learned counsel argued that there is no law barring the petitioner's members from superintending level 4 hospitals and above; the 1<sup>st</sup> respondent relied on instruments that were developed more than 6 years ago and do not bar pharmaceutical technologists from taking up superintendence positions and urged the court to allow the petition.

*1<sup>st</sup> respondent's submissions*

35. Mr. Omiti, learned counsel for the 1<sup>st</sup> respondent argued that the petition does not raise justiciable issues and relied on the decisions in *Kenya Airports Authority v Mitu Bell Welfare society & 2 others* [2016] KECA 432 KLR; *National Assembly of Kenya & another v Institute for social Accountability & 6*

*others* [2017] eKLR; *Olili v President of the Supreme Court of Kenya & another; Law Society of Kenya (Interested party)* [2024] KEHC 7182 (KLR); *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra)* and *KKB v SCM & 5 others* [2022] KEHC 289 (KLR).

36. Learned counsel argued that the court has no jurisdiction to hear the petition. It was learned counsel's position that the mere fact that the court has handled similar other petitions does not confer jurisdiction on the court. The 1<sup>st</sup> respondent relied on the decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Speaker of the National Assembly v Njenga Karume* [1992] eKLR.

37. I do not think the issue of jurisdiction is of any significance in this petition taking into account the nature of the claims raised herein which are on violation of the Constitution, the law and rights and fundamental freedoms.

38. Mr. Omiti argued that the law mandates the 1<sup>st</sup> respondent to manage pharmacy practice in the county and that pharmaceutical technologists assist and advise on the usage, side effects, contra-indications and storage of medication to patients and other members of the healthcare team under direct supervision of a pharmacist or pharmacists in charge. The 1<sup>st</sup> respondent is therefore mandated to evaluate applications and to confirm that those applying for registration either as pharmacists or as pharmaceutical technologists meet the necessary

entry requirements. The directive was issued within the law.

39. Learned counsel argued that the petitioner failed to demonstrate the real danger or prejudice the petitioner's members would suffer as a result of the alleged violation or threatened violation of the Constitution. Fears based on the implication of the implementation of the directive is unfounded because prior to the impugned directive, requisite procedures for policy formulation were followed as required under the Constitution. The requirement that pharmacists superintend pharmacies at level 4 hospitals and above is necessitated by the need to have patient-oriented practice and broader spectrum of specialized referral curative services. The directive does not bar pharmaceutical technologists from working in hospital pharmacies.

40. Mr. Omiti further argued that under section 3B (3) of the Act and the Guidelines for Registration and Licensing of Premises, 2023, a person cannot carry on pharmacy business in Kenya unless the premises has been approved and maintains regulatory compliance. Every registered premises should be under the supervision of a registered pharmacist or enrolled pharmaceutical technologist and under Clause 8.0 of the Guidelines for Registration and Licensing of Premises, 2023, pharmacists with valid licences are eligible to superintend over registered premises while pharmaceutical technologists can only superintend in accordance with the conditions stipulated therein.

41. Learned counsel again argued that under Clause 8.0 of the Guidelines for Registration and Licensing

of Premises, 2023 and the Norms for Health issued by the Ministry of Health, the 1<sup>st</sup> respondent is mandated to issue any additional requirements in respect of superintendence by pharmaceutical technologists. Given the nature and standard of care and skill needed in pharmacies at level 4 hospitals and above, superintendents of pharmacies in these hospitals must be highly qualified professionals.

42. Counsel submitted that superintendence deals with overall supervision such as overseeing provisions of services and taking overall professional responsibility for the institution. This does not preclude pharmaceutical technologists from offering pharmaceutical services in levels 4, 5 and 6 facilities. Counsel urged that the 1<sup>st</sup> respondent's actions are constitutional and legal.

43. Mr. Omiti relied on the decision in *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR for the position that the 1<sup>st</sup> respondent's decision is not discriminatory; members of the petitioner submitted applications for license on various dates some of which were issued while others were not successful and the affected applicants were informed of the results.

44. Counsel maintained that the law requires the presence of registered pharmacists in hospital pharmacies at level 4 and above and that article 43 (1) (a) and (c) of the Constitution amplifies the need for the 1<sup>st</sup> respondent to regulate qualifications for superintendents.

45. Regarding legitimate expectation, learned counsel argued that the 1<sup>st</sup> respondent acted within the law and the petitioner did not prove that there was legitimate expectation. The directive was within the respondent's mandate for the regulation of the practice of pharmacy. Reliance was placed on the decisions in *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* (supra) and *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* [2022] KEHC 5 (KLR).

46. Learned counsel maintained that article 47 of the Constitution was not violated and the requirements for public participation were met as evidenced by annexures KK-5 (a) & (b). reliance was placed on *British America Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet*

*Secretary Ministry of Health & 2 others: Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR. Counsel urged the court to dismiss the petition.

#### *Interested party's submissions*

47. Mr. Akusala, learned counsel for the interested party, submitted highlighting their written submissions, that the 1<sup>st</sup> respondent's directive as within section 21 of the Pharmacy and Poisons Act and article 43 (1)(a) of the Constitution. Learned counsel argued that the petitioner did not cite any section in the Act that allows its members to superintend any level of hospital. The petitioner is

therefore asking the 1<sup>st</sup> respondent to engage in an illegality.

48. Learned counsel again argued that the 1<sup>st</sup> respondent acted in compliance with article 47 of the Constitution and the Fair Administrative Action Act; issuing superintendence licenses to pharmaceutical technologists would be illegal and that the 1<sup>st</sup> respondent's action was within the law.

49. It was Mr. Akusala's position that the Act gives the 1<sup>st</sup> respondent discretion and it exercised that discretion lawfully and, in the manner, authorised by law. Learned counsel relied on the decisions in *Republic v Institute of Certified Public Accountants of Kenya Exparte Vipichandra Bhatt T/A J V Bhatt & Company* [2008] eKLR; *MacFoy vs United Africa Co.*

*Ltd* [1961] 3 All ER 1169; *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR and *Josephat Mwita & 24 others v Pharmacy and Poisons Board & another* [2013] eKLR for the proposition that the petition is not merited and urged the court to dismiss it.

50. The 2<sup>nd</sup> respondent, though served, did not take part in these proceedings.

### *Determination*

51. I have considered the petition, responses and arguments by parties. The issue for determination is whether the 1<sup>st</sup> respondent's directive of 22<sup>nd</sup> May 2024 that only registered pharmacists should superintend pharmacies at levels 4 hospitals and

above and failure to approve applications by pharmaceutical technologists for licences to superintend such hospital, is unconstitutional, illegal and violated rights of pharmaceutical technologists. The petitioner argued in the affirmative maintaining that since pharmaceutical technologists had been licenced to superintend these facilities up to 2023, the impugned directive was not based on any new law that had changed the practice.

52. The 1<sup>st</sup> respondent took the opposite view, arguing that it acted within the law in that given the level of these facilities, and in compliance with the constitutional requirements of provision of highest standards of attainable healthcare, pharmacies in these facilities have to be superintended by registered pharmacists and pharmaceutical

technologists working in those hospitals have to work under the supervision of pharmacists.

53. The 1<sup>st</sup> respondent maintained that pharmaceutical technologists are still licenced to practice pharmacy and can work in level 4 hospitals and above but under the supervision of registered pharmacists, a position that was supported by the interested party.

54. The 1<sup>st</sup> respondent is a body corporate established under section 3(1) of the Pharmacy and Poisons Act. One of the functions of the 1<sup>st</sup> respondent under section 3B(3)(h) is to license the practice of pharmacists and pharmaceutical technologists; (i) approve and license premises for the practice by pharmacists and pharmaceutical technologists and

(m) perform any other function relating to “regulation of the profession of pharmacy.”

55. The Act defines a "registered pharmacist" to mean a holder of a degree in pharmacy from a university recognised by the 1<sup>st</sup> respondent and whose name is entered on the register. "specialist pharmacist" means a registered pharmacist who has completed an approved postgraduate training programme in a particular field of pharmaceutical sciences, and who has gained sufficient experience and demonstrated to the 1<sup>st</sup> respondent's satisfaction, adequate knowledge and skill in his or her chosen field. On the other hand, a pharmaceutical technologist should have a diploma in pharmacy.

56. There is no doubt that the 1<sup>st</sup> respondent is responsible for regulating the practice of pharmacy and the conduct of pharmacists and pharmaceutical technologists in the country. The 1<sup>st</sup> respondent approves and licences premises to be used by pharmacists and pharmaceutical technologists for the practice of pharmacy. Hospitals operating pharmacies are premises in the context of section 3B (3)(i) of the Act and have, therefore, to be approved and licensed for the purpose of being used for the practice of pharmacy. The question really is whether the 1<sup>st</sup> respondent violated the Constitution; the law or even rights and fundamental freedoms in directing that pharmaceutical technologist should not superintend pharmacies in level 4 hospitals and above. To answer the above broad question, one has to look at the relevant sections of the Act.

57. As already seen, pharmacists are in two categories. Registered pharmacists who must hold a degree in pharmacy and pharmaceutical technologists who hold a diploma in pharmacy. Section 6 of the Act requires the Registrar to keep a register of pharmacists and specialist pharmacists in a prescribed form and a Roll of pharmaceutical technologists also in a prescribed form. This means that whereas pharmacists' names are entered onto a register, pharmaceutical technologists' names are entered to a Roll, signifying the difference between the two professional groups. The difference is further appreciated in section 7 of the Act in that applications for registration by the two categories of professionals are made differently.

58. Under section 9A of the Act, the Registrar issues a practising licence authorizing registered pharmacists or enrolled pharmaceutical technologists to practice as registered pharmacists or enrolled pharmaceutical technologists. This again means that while pharmacists are registered to practise as pharmacists, pharmaceutical technologists are enrolled to practice the pharmacy profession, demonstrating some level of difference.

59. Section 9B is on applications for practising licence while section 9C is on issuing of practising licences to registered pharmacists and enrolled pharmaceutical technologists. Section 9D gives the 1<sup>st</sup> respondent discretion to deny or refuse to issue or renew a license if it determines after due process,

that an applicant has failed to comply with the requirements of the Act or the rules.

60. The gravamen of this petition is the 1<sup>st</sup> respondent's directive in the letter of 22<sup>nd</sup> May 2024 that only registered pharmacists should superintend pharmacies at level 4 hospitals and above while pharmaceutical technologists can superintend pharmacies up to level 3 hospitals. Pharmaceutical technologists working at level 4 hospitals and above have to work under the supervision of registered pharmacists. That is; registered pharmacists with valid licences are to manage premises registered and operating pharmacies at level 4 hospitals and above while pharmaceutical technologists should only superintend in accordance with the certain conditions, including under the supervision of

registered pharmacists in the identifies categories of hospitals.

61. The petitioner took issue with the directive arguing that it is not only unconstitutional and illegal but that it also violates certain of its members' rights, a claim the 1<sup>st</sup> respondent denied contending that it acted within the law.

62. Article 22 of the Constitution allows a party to approach the court if there is a violation or threat to violate rights and fundamental freedoms and the court has jurisdiction in terms of article 23(1) read with article 165 to determine the issue. A party approaching the court in that regard, must place his claim within the ambit of article 23(1) in order for the court to respond. For clarity, article 23(1) is on

the authority of the court to uphold and enforce the Bill of Rights. It provides that that the High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

63. To amount to a violation or threatened violation of either the Constitution, the law or rights and fundamental freedoms, the action must be a legal wrong or a legal injury caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or a burden that is imposed in contravention of any constitutional or legal provision or without the authority of the law. Where such legal wrong or injury is threatened, the Court has powers to grant appropriate reliefs to

obviate the wrong or legal injury. The essence of the appropriate relief is not only to enforce the Constitution, but also to ensure that rights and fundamental freedoms enshrined in the Bill of Rights are protected and enforced-(*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.)

64. In this petition, the petitioner was required to point out the constitutional or legal provisions violated and demonstrate the nature and extent of violation or threatened violation to the satisfaction of the court. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR; [2014] KESC 53 (KLR), the Supreme Court stated that:

*[349]...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings*

*claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

65. The above statement of law means that a party claiming violation of rights and fundamental freedoms should plead with precision, the constitutional rights violated, the provisions

infringed and demonstrate the manner of violation so that there is a link between the alleged violation, the rights infringed and the constitutional provisions involved in order to put the respondent on notice over the petitioner's claim so as to respond appropriately.

66. As already pointed out, the 1<sup>st</sup> respondent regulates the practise of pharmacy and the conduct of registered pharmacists and enrolled pharmaceutical technologists as professionals. Although the two groups of professionals are authorised to practise pharmacy, it must be acknowledged that their level of training and experience is different. It must also be accepted that level 4 hospitals and above are different from those at level 3 and bellow. This is also appreciated in the **NORMS AND STANDS** for Health Service Delivery

which explains the services rendered by each level of hospitals from level 1 to level 6.

67. It must again be appreciated that the impugned directive does not bar pharmaceutical technologists from working in level 4 hospitals and above. It only restricts those who can superintend pharmacies in those hospitals to registered pharmacists so that pharmaceutical technologists working in pharmacies in level 4 hospitals and above, work under the supervision of registered pharmacists.

68. I have perused the letter dated 22<sup>nd</sup> May 2024 which was addressed to the petitioner's Secretary General. The letter pointed out that effective 1<sup>st</sup> January 2025, it was to be mandatory to comply with the human resource requirements for

pharmaceutical services prescribed under the norms for the Health Sector issued by the ministry of Health. In that regard, superintendents of pharmacies within medical facilities at level 4, 5 and 6 would be registered pharmacists. The 1<sup>st</sup> respondent would conduct assessments to ensure compliance; and the existing licence applications for level 4 facilities that had been paid for were to be considered for approval.

69. The petitioner argued that the directive violated its members' legitimate expectation. According to the petitioner, its members have a legitimate expectation that they would continue to superintend pharmacies at various levels of hospitals, including but not limited to level 4. The 1<sup>st</sup> respondent maintained that there is no legitimate expectation since it is required to act within the law and that

there can be no legitimate expectation in violation of the law.

70. Legitimate expectation is a principle rooted in fairness. The claim by the petitioner that its members had a legitimate expectation since they had been allowed to superintend pharmacies in level 4 and above hospitals is not properly grounded.

71. The 1<sup>st</sup> respondent issued the directive which gave notice on what was to happen. Correspondences were exchanged and meetings held to discuss the issue. The petitioner and its members were therefore aware of the notice regarding the directive. The Norms and Standards show the services levels 4, 5 and 6 hospitals offer, including referral cases and surgeries. Hospitals at those level are not and cannot be equated to

hospitals at level 3 and below and services provided for are also different.

72. It follows, therefore, that the petitioner had to demonstrate the legitimate expectation that was violated when the 1<sup>st</sup> respondent issued the directive which was in compliance with its statutory mandate to regulate the profession and the petitioner was given an opportunity to be heard. The argument that the petitioner's members had previously superintended pharmacies in level 4 hospitals and above did not mean that the 1<sup>st</sup> respondent could not issue the directive as a way of bringing in effective ways of managing pharmacies in hospitals.

73. Moreover, the 1<sup>st</sup> respondent's directive made reference to the human resource requirements for pharmaceutical services prescribed under the norms

for the Health Sector that were issued by the Ministry of Health. The petitioner did not argue that it was not aware of the Norms and Standards and which has not been challenged. For instance, at clause 2.3.2 on rationalization of staffing, level 4 and 5 hospitals are to work towards having specialised services at each district hospital. Medical officers are to run the specialised clinics at level 4 hospitals while medical specialists are to be concentrated at level 5 facilities to ensure they provide specialised care at that level.

74. It would therefore be disingenuous for the petitioner to argue that pharmaceutical technologists should superintend pharmacies in level 4, 5 and 6 while clinics are run by medical officers and medical specialists (degree holders) when the facilities are geared towards providing specialised

care. This would defeat, if not blur, the essence of the difference and categorisation between registered pharmacists and enrolled pharmaceutical technologists in the pharmacy profession.

75. In the circumstances, there would be no need for public participation in the context of article 10 of the Constitution since the level of training and experience of the two groups of professionals in the pharmacy practice brings out the distinction between the two groups. In any case, arguments from both parties showed that the 1<sup>st</sup> respondent engaged the petitioner and its members and the relevant stakeholders before communicating the impugned directive with adequate notice for compliance requiring superintendents of pharmacies in hospitals at level 4, 5 and 6 to be duly registered pharmacists.

76. The court is not persuaded that the 1<sup>st</sup> respondent violated any legitimate expectation or even the requirements for public participation in the context of this case.

77. It is also important to emphasize that even though the petitioner argued that its members had previously superintended level 4 hospitals and above, that did not mean there could be no change in the management of pharmacies in those hospitals. It may also be necessary to point out as regards the two professional groups, that registered pharmacists and enrolled pharmaceutical technologists are required to pay their roles as required by the Act; the rules and any other protocols and guidelines the 1<sup>st</sup> respondent may issue or direct.

78. Regarding violation of the right to fair administrative action, I do not see violation of article 47 right. At the risk of repeating, the impugned letter was issued on 22<sup>nd</sup> May 2024 and was to take effect on 1<sup>st</sup> January 2025. The petitioner and its members were aware of the issue and had engaged the 1<sup>st</sup> respondent culminating with the directive of 22<sup>nd</sup> May 2024. The directive itself was in writing and contained reasons.

79. Some of the rights guaranteed in the Constitution are not absolute and are subject to the rights of others and the legitimate needs of the society. It must be recognised that public health and democratic values sometimes justify imposition of restrictions on the exercise of these fundamental rights.

80. Even looking at this issue beyond the arguments by parties, when faced with the question of what would appear to be discrimination, one must ask whether the differential treatment amounts to discrimination. If the differentiation amounts to discrimination, one must go further and ask whether it amount to unfair discrimination based on a special ground so as to presume unfairness. Even where there is unfairness, there has to be determination on the unfairness, the test focusing on the impact of the discrimination on the party and others in that situation. Discrimination must be on the grounds prohibited by the Constitution. (See *James Nyasora Nyarangi & 3 others v Attorney General* [2008]; *peter K Waweru v attorney General* [2006])

*eKLR and Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR.)*

81. The state of affairs arising from the impugned directive that pharmaceutical technologists should not superintend pharmacies in levels 4 hospitals and above though may, on the face of, it appear to be unfair and differential treatment, that differential treatment is not based on discrimination but on professional standards required in order to guarantee the highest attainable standard of healthcare in those hospitals and the country at large as required under article 43(1) of the Constitution. The directive cannot therefore be impugned even on the basis of distinction and differential treatment because there is already differentiation in name and professional training.

82. In the present petition, the distinction, if discriminatory it be, is positive discrimination which is allowed by the Constitution. The discrimination and, therefore distinction, is founded on the level of training and not by the impugned directive. The law itself distinguishes between registered pharmacists and enrolled pharmaceutical technologists who have different levels of education, training and experience. Registration and licencing are also done differently. The court does not therefore agree with the petitioner that the directive is unconstitutional, illegal or introduced differentiation that would amount to discrimination prohibited by the Constitution.

### *Conclusion*

83. Having considered the pleadings, arguments by parties he constitution and the law, the conclusion I

come to, is that the petition has no merit. It is declined and dismissed. This being a public interest litigation, each party shall bear their own costs.

**Dated and delivered at Nairobi this 21<sup>st</sup> Day of November 2025**

**E C MWITA  
JUDGE**