



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO. 190 OF 2014**

**THE REGISTRAR, PHARMACY & POISONS BOARD.....1ST APPELLANT**

**THE CHAIRMAN, PHARMACY & POISONS BOARD.....2ND APPELLANT**

**AND**

**THE PERMANENT SECRETARY, MEDICAL SERVICES MINISTRY.....1ST RESPONDENT**

**THE DIRECTOR, NATIONAL QUALITY CONTROL LABORATORY.....2ND RESPONDENT**

**REPUBLIC OF KENYA.....3RD RESPONDENT**

**RONARD OJUKU MOMANYI.....4TH RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Odunga, J.) dated 19th May 2014**

**in**

**HC MISC. C. NO. 214 "A" OF 2011-JR)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The central question in this appeal is the proper procedure for the appointment of members of the **Management Board** of the **National Quality Control Laboratory (NQCL)** established by the **Pharmacy and Poisons Act, Cap 244 Laws of Kenya (the Act)** and the validity of appointments made without adherence to the procedure prescribed by the Act. On 19<sup>th</sup> May 2014, the High Court, (**Odunga, J.**) held that the appointment of members of the NQCL Management Board on 4<sup>th</sup> March 2011 was *ultra vires* the Act and issued an order of *certiorari* to quash the said appointment and an order of *prohibition* barring the said Management Board from purporting to discharge the functions of the Board. **The appellants**, respectively the **Registrar** and the **Chairman** of the Pharmacy and Poisons Board, whom the High Court found to have been responsible for the unlawful appointments, were aggrieved and preferred the appeal now before us.

Before we delve into the merit of the appeal, it is apposite to place it in its proper legal and public interest context. The NQCL is a critical national institution that is charged with the responsibility of quality

control of locally manufactured and imported drugs and medical substances to ensure that they are safe for use by members of the public. It cannot be gainsaid therefore that, without the NQCL or without the NQCL properly discharging its statutory functions, poisonous, noxious, and dangerous substances or unregistered, substandard and counterfeit pharmaceutical products that are harmful to human beings could easily find their way into the market with dire consequences. We believe it is for that reason that the Act makes fairly elaborate provisions regarding the NQCL, in particular its membership, qualifications, mode of appointment, functions and powers.

**Section 3** of the Act establishes the **Pharmacy and Poisons Board (P&P Board)** made up of 9 members appointed by the Minister responsible for medical services. The P&P Board is chaired by the **Director of Medical Services** and is a body corporate with perpetual succession and a common seal. The **Chief Pharmacist** is a member of the P&P Board and by dint of **section 5** of the Act is also its **Registrar**. The duties of the registrar include keeping minutes of the P&P Board, a register of pharmacists, a roll of pharmaceutical technologists and such other duties as the P&P Board may direct.

**Part IIIB** of the Act makes provision for the NQCL, established by **section 35D**. The NQCL is a body corporate and is responsible for examination and testing of drugs and materials used in the manufacture of drugs, quality control of drugs and medical substances, undertaking chemical, biological, physiological and pharmacological analysis and testing of locally manufactured and imported drugs or medical substances to determine whether they comply with the Act.

By **section 35F**, the affairs of the NQCL are managed by a 9 person **Board of Management**, which is appointed by the P&P Board. The NQCL Board of Management is empowered to appoint a **director**, who is the Chief Executive Officer of NQCL, secretary to the NQCL Management Board, and in charge of the day-to-day management of NQCL. Members of the NQCL Board of Management hold office for a term of 3 years and are eligible for re-appointment. The quorum of the NQCL Board of Management is five members and it meets no less than four times each calendar year.

When the term of the previous NQCL Management Board appointed on 18<sup>th</sup> January 2008 expired, **Dr. Kipkerich C. Koskei (the 1<sup>st</sup> appellant)** who was the secretary of the Board caused **Gazette Notice No. 2064** of 24<sup>th</sup> February 2011 to be published, announcing appointment 9 new members of the NQCL Management Board. Because of the centrality that Gazette Notice has assumed in this litigation, it is appropriate to set it out.

**Gazette Notice No. 2064**

**THE PHARMACY AND POISONS ACT**

**(Cap. 244)**

**APPOINTMENT**

***IN EXERCISE of the powers conferred by section 35F(1) of the Pharmacy and Poisons Act, the Registrar, Pharmacy and Poisons Board appoints-***

***Grace N. Thoithi (Prof), Simeon E. O. Mitema (Prof),***

***Rashid A. Aman (Dr.),***

***Sarah Vugigi (Dr.),***

***Kagiri Kamatu, Beatrice Sabana (Ms.) Godwin Kitale, Moses Rugut (Dr.),***

***John M. Munyu (Dr.),***

***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.*

*Dated the 24<sup>th</sup> February, 2011 K. C. KOSKEI.*

*Registrar, Pharmacy and Poisons Board*

(Emphasis added)

The 4<sup>th</sup> respondent, **Ronald Ojuku Momanyi**, a member of the public, was convinced that the above appointments to the NQCL Management Board were irregular and contrary to the Act. He also managed to lay his hands on a report entitled **Report on Management Systems Audit of Pharmacy and Poisons Board** dated March 2011 and prepared by the **Efficiency Monitoring Unit (EMU)**. The report, which was commissioned on 1<sup>st</sup> March 2010 by the then Permanent Secretary, Ministry of Medical Services noted serious irregularities in operations of both the P&P Board and the NQCL Management Board and recommended, among other things, that the NQCL Management Board be appointed in accordance with the requirements of the Act.

On or about 20<sup>th</sup> day of September 2011, the 4<sup>th</sup> respondent, after duly obtaining leave, filed an application for judicial review in which he prayed for an order of *certiorari* to quash the appointment of the members of the NQCL Management Board; an order of *mandamus* to compel the 1<sup>st</sup> appellant, the **Chairman, P&P Board (the 2<sup>nd</sup> appellant)**, the **Permanent Secretary, Ministry of Medical Services (1<sup>st</sup> respondent)** and the **Director, NQCL (2<sup>nd</sup> respondent)** to dissolve the NQCL Management Board and appoint a new one in accordance with the Act; an order of *mandamus* to compel the respondents to recall all medicines irregularly registered after failing NQCL tests; and an order of *prohibition* to stop the Board appointed on 24<sup>th</sup> February 2011 from purporting to discharge the functions of the NQCL Management Board.

The grounds upon which the application was based were primarily that the NQCL Management Board was appointed in violation of the Act, that the continued operation of the said Board was in violation of the law, and that Kenyans were exposed to grave danger as a result of the irregular appointment and operations of the NQCL Management Board.

The appellants opposed the application vide two affidavits sworn by the 1<sup>st</sup> appellant on 26<sup>th</sup> October 2011 and 7<sup>th</sup> February 2012 contending that the 4<sup>th</sup> respondent was a busy body lacking *locus standi* to institute the proceedings and that the appointment of the NQCL Management Board was within the law.

As we have already stated, Odunga, J. found that the appointment of the NQCL Management Board was irregular and issued an order of *certiorari* to quash its appointment. He also issued an order of *prohibition* stopping the impugned Board from carrying out the functions of the NQCL Management Board and awarded the 4<sup>th</sup> respondent costs of the application. The respondents were dissatisfied with the judgment and preferred this appeal. For his part, the 4<sup>th</sup> respondent, on 23<sup>rd</sup> December 2014 filed a notice of grounds for affirming the decision, contending that the appellants had acted unreasonably, illegally and their decision was tainted by procedural impropriety.

By consent the Court directed the appeal to be heard and determined by written submissions and oral highlights. However, only the 1<sup>st</sup> and 3<sup>rd</sup> respondents filed their submissions in which they supported the appeal. The appellants and the 2<sup>nd</sup> and 4<sup>th</sup> respondents did not file their written submissions. At the hearing only counsel for the appellants and the 1<sup>st</sup> and 3<sup>rd</sup> respondents appeared and addressed us on the appeal.

**Mr. Rono**, learned counsel for the appellants, submitted that the learned judge erred by holding that the appointment of the NQCL Management Board was irregular. In his view, it was the P&P Board, and not the 1<sup>st</sup> respondent, which appointed the NQCL Management Board and that all that the 1<sup>st</sup> appellant did

was to implement the decision of the P&P Board in that regard. Secondly, it was contended that the order of *certiorari* issued by the learned judge was in vain because the period of the impugned NQCL Management Board had expired and or some of the members had voluntarily resigned. Lastly, counsel submitted that the learned judge erred by awarding costs to the 4<sup>th</sup> respondent whilst the matter before him was in the nature of public interest litigation.

For the 1<sup>st</sup> and 3<sup>rd</sup> respondents, **Ms. Wambui**, learned counsel, supported the appeal and associated herself with the appellants' submissions. She submitted that the judge erred by granting the order of *certiorari* in the circumstances of this case because the application had been overtaken by events, the members of the NQCL Management Board having been appointed for a term of 3 years with effect from 4<sup>th</sup> March 2011. Relying on the judgments of the High Court in **Republic v Tribunal of Inquiry, ex parte Tom Mbaluto, HC Misc. App. No. 666 of 2008**, and **Sangani Investments Ltd v Officer in Charge Nairobi Remand & Allocation Prison (2007) 1 EA 354**, counsel submitted that judicial review orders are discretionary and may be denied even when grounds exist, if in the circumstances they would not be efficacious or necessary.

Next, counsel submitted that the learned judge erred by issuing orders against the 1<sup>st</sup> respondent, who was not responsible for making the decision that was quashed. Lastly it was contended that the learned judge ought not to have issued an order of prohibition because prohibition looks to the future and since the term of the NQCL Management Board had expired, there was nothing in the circumstances to prohibit.

We have anxiously considered the appeal, the judgment of the High Court, the memorandum of appeal and the submissions by learned counsel. As we have already intimated, this appeal turns on whether the NQCL Management Board appointed on 24<sup>th</sup> February 2011 was validly appointed in accordance with the Act. Under section 35F of the Act, the P&P Board is responsible for appointing members of the NQCL Management Board. While the 4<sup>th</sup> respondent contended that the appointment was unlawful because it was purportedly made by the 1<sup>st</sup> appellant rather than the said P&P Board, the appellants' contended that the appointments were indeed made by the P&P Board.

What does the evidence placed before the learned judge show? In his replying affidavit sworn on 26<sup>th</sup> October 2011, the 1<sup>st</sup> appellant deposed that on 7<sup>th</sup> February 2011, the Director of the NQCL wrote to the P&P Board and advised that the term of the NQCL Management Board had expired and submitted 9 names for consideration for appointment. Subsequently, the Permanent Secretary, the Chairman, P&P Board and the 1<sup>st</sup> appellant vetted and approved 4 persons in the list for appointment. The 1<sup>st</sup> appellant subsequently gazetted the names of 9 persons as duly appointed members of the NQCL Management Board. At a meeting held on 30<sup>th</sup> March 2011, the P&P Board ratified the appointment of the members of the NQCL Management Board. The 1<sup>st</sup> appellant attached to his said affidavit the minutes of that meeting.

The minutes of the meeting of 30<sup>th</sup> March 2011 tell an interesting story, and with respect put to the lie the claim that it was the P&P Board, which appointed the members of the NQCL Management Board. The pertinent part of the minutes, being Min 7/30/011 on NQCL Board Members, states as follows:

***“The registrar informed the board members that the term for NQCL Board members had expired and the Director of NQCL had submitted the following lists of nine names to the registrar for gazettelement as members of the NQCL Board:***

- 1. Dr. Kagiri Kamau***
- 2. Prof. Grace N. Thoithi***
- 3. Dr. John M. Munyu***
- 4. Prof. Simon E. O. Mitema***

5. *Prof. Isaac O. Kibwage*

6. *Dr. Susam Magada*

7. *Dr. Kennedy O. Abuga*

8. *Dr. Wilberforce Wanyama*

9. *Mr. Jonah K. Keter*

**Due to the urgency of the matter and inability of the PPB**

**Board to meet, the registrar in consultation with the Minister, PS and DMS on the constitution of NQCL Board of**

**Management used the following considerations to appoint the NQCL Board of Management:**

- *Skills/expertise*
- *Knowledge of good corporate governance*
- *Not serving on more than 3 boards at the same time*
- *Gender balance*
- *Institutional memory*
- *Stakeholders representation*
- *Regional balance*

**The registrar informed the Board members that the following gazetted members were appointed to the NQCL Board after meeting the above considerations:**

1. *Prof. Grace N. Thoithi,*

2. *Prof Simeon E. O. Mitema,*

3. *Dr. Rashid A. Aman,*

4. *Dr. Sarah Vugigi,*

5. *Mr. Kagiri Kamatu,*

6. *Ms Beatrice Sabana,*

7. *Mr. Godwin Kitala,*

8. *Dr. Moses Rugut,*

9. *Dr. John M. Munyu.*

***The registrar requested the Board members to consider and confirm the above gazetted Board of Management of NQCL and the same was unanimously adopted.”***

Both the extract of the minute above, and the Gazette Notice No. 2064 leave no doubt that the NQCL Management Board was not appointed by the P&P Board as it should. Section 43 of the Interpretation and General Provisions Act, Cap 2 provides as follows:

***“43. Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.”***

Firstly, the gazette notice is explicit that it was the Registrar, Pharmacy and Poisons Board who purportedly appointed the impugned members of the NQCL Management Board. That appointment was purportedly done under section 35F(1) of the Act. But under that provision, the power to appoint members of the NQCL Management Board is vested in the Board, not in the Registrar. The Registrar is not the Board; he is but just one of the members of the Board.

Secondly, two of the persons who were responsible for the purported appointment of members of the NQCL Management Board, namely the Minister and the Permanent Secretary, are not members of the P&P Board under section 3(1) of the Act. There must be a reason why the Act deliberately prescribes specific membership of the P&P Board. In addition, the Minister as the person responsible for appointment of the P&P Board cannot purport to usurp its functions and exercise its power to appoint members of the NQCL Management Board. We are persuaded therefore that the involvement of persons who are not members of the P&P Board in the appointment of the members of the NQCL Management Board is a fundamental flaw, which completely vitiates the Board purportedly appointed, as it were by some strangers.

Thirdly, the Minutes are express that the appointment of members of the NQCL Management Board was the work of the Registrar, “in consultation with” the Minister, Permanent Secretary and the Director of Medical Services. This was purportedly because of the urgency of the matter and inability of the P&P Board to meet. As we have already stated, the Registrar is not the P&P Board and the Minister and the Permanent Secretary are not members of the P&P Board. There is no evidence of a resolution of the Board delegating the role of appointing the NQCL Management Board to the Registrar. We doubt, even if there was such a resolution, whether in view of the mandatory provisions of the Act, it would have been a valid delegation.

In the circumstances, even the purported ratification of the appointments by the P&P Board was of no effect, the appointments having been made by among others, persons who under the Act had no role to play in the appointment of the NQCL Management Board. What the evidence on record unfortunately paints is a picture of a P&P Board that completely abdicated its responsibilities and allowed parties unknown under the Act to usurp its roles and functions.

On the question of whether the learned judge erred in issuing orders of *certiorari* and *prohibition* in respect of a board whose term of office had expired, we agree with the appellants’ submission that the court should not issue an order that is in vain. In this case, granted the egregious disregard of mandatory provisions of the Act and its peculiar circumstances, it is understandable that the learned judge decided to err on the side of caution rather than allow the possible perpetuation of illegal appointments in an institution responsible for critical national health matters. In paragraphs 39 and 41 of the judgment, the learned judge expressed himself thus:

***“39. Although under section 35F of the Act, the tenure of office of the subject Board ought to have come to an end in March 2014 which is now past, the said provisions allow for their reappointment. Since their appointment was irregular, an order of certiorari ought to and is hereby issued quashing their said appointment.***  
...

***41. As I have found that the respondents acted ultra vires their powers in appointing the said Board, I hereby issue an order prohibiting the subject Board of Management of National Quality Control Laboratory if it is still in office henceforth from carrying on the functions of the Board of Management of National Quality Control Laboratory.”***

As regards the contention that the learned judge erred in awarding costs in public interest litigation, we do not think in the circumstances of this case there is much substance in the argument, coming as it does from the appellants who were found responsible for acting contrary to the dictates of the Act. Costs are at the discretion of the court and we do not see any grounds for holding that the learned judge acted injudiciously by awarding costs to the successful litigant. We must add that we know of no rigid or immutable rule that stipulates costs can never be awarded in public interest litigation.

We are satisfied that this appeal is bereft of merit and the same is hereby dismissed in its entirety. We award no costs to the 4<sup>th</sup> respondent who did not appear to oppose the appeal or to argue his grounds for affirming the decision of the High Court. It is so ordered.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of November, 2016**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**