



**Kenya Pharmaceutical Association v Pharmacy and Poisons Board & another;
Pharmaceutical Society of Kenya (Interested Party) (Petition E284 of 2024)
[2025] KEHC 17154 (KLR) (Constitutional and Human Rights) (21 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E284 OF 2024
EC MWITA, J
NOVEMBER 21, 2025**

BETWEEN

KENYA PHARMACEUTICAL ASSOCIATION PETITIONER

AND

THE PHARMACY AND POISONS BOARD 1ST RESPONDENT

MINISTRY OF HEALTH 2ND RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA INTERESTED PARTY

The decision by the Pharmacy and Poisons Board to decline to issue superintendence licences to pharmaceutical technologists was not unconstitutional or illegal.

The petition challenged a decision by the Pharmacy and Poisons Board to decline to issue superintendence licences to pharmaceutical technologists. The court found that the petitioners, had been given notice of the directive and an opportunity to be heard on the same. Further, the court held that the fact that the petitioner's members previously superintended level 4 hospitals and above did not mean there could be no change in the management of pharmacies in those hospitals. The court found that there had been no violations of the right to fair administrative action, the right to equality and freedom from discrimination and also no violations of the constitutional requirements of public participation in the making of the impugned decision.

Reported by Beryl Ikamari

Constitutional Law - enforcement of fundamental rights and freedoms - rights to fair administrative action and equality and freedom from discrimination - whether a decision by the Pharmacy and Poisons Board to decline to issue superintendence licences to pharmaceutical technologists was made in breach of the rights to fair administrative action and equality and freedom from discrimination - whether the decision facilitated the



progressive realisation of the right to the highest attainable standard of health - Constitution of Kenya, articles 27, 43(1) and 47.

Administrative Law - *legitimate expectation - change in past practices - where a directive was issued by the Pharmacy and Poisons Board communicating a decision to decline to issue superintendence licences to pharmaceutical technologists – claim that the decision was made without consultations with stakeholders being done - whether the directive breached the legitimate expectation of pharmaceutical technologists that they would be issued with superintendence licences as had been the previous practice.*

Statutes - *interpretation of statutory provisions - licensing of pharmacy professionals and the Pharmacy and Poisons Act - claim that the Pharmacy and Poisons Board had no legal mandate to issue superintendence licences to pharmaceutical technologists - whether and to what extent did the Pharmacy and Poisons Board have the mandate of licensing of the practice of pharmaceutical technologies in the profession of pharmacy - Pharmacy and Poisons Act, (Cap 244) sections 3B(3)(b), 3B(3)(m) and 9A.*

Jurisdiction - *jurisdiction of the High Court - jurisdiction in claims for the enforcement of fundamental rights and freedoms and contravention of the Constitution - whether the High Court had jurisdiction in a matter where a directive under which the issuance of superintendence licences to pharmaceutical technologists was stopped, was said to have violated the right to fair administrative action, the right to equality and freedom from discrimination and the requirements of public participation under the Constitution - Constitution of Kenya, articles 23(1) and 165.*

Brief facts

The Kenya Pharmaceutical Association, the petitioner, filed the petition to challenge a decision by the Pharmacy and Poisons Board, the 1st respondent, to exclude pharmaceutical technologists from superintending pharmacies at level 4 hospitals and above, on grounds that it violated the rights of the members of the petitioner and was unconstitutional. The petitioners asserted that the decision was made without consultations, affected the livelihoods and careers of its members (pharmaceutical technologists) and hampered access to healthcare services.

The decision, dated May 22, 2024, was implemented through an informal directive wherein applications for superintendent licences for pharmaceutical technologists in pharmacies in level 4 hospitals and above were declined. When intervention was sought, the Principal Secretary in the 2nd respondent, the Ministry of Health, promised to review the concerns on licensing and its impact on the health facilities. According to the petitioner, the Norms and Standards for Health Service Delivery, that the Human Resources for Health Norms and Standards Guidelines for the Health Sector, 2014 did not prohibit the petitioner’s members from superintending pharmacies in hospitals at level 4 and above.

Issues

- i. Whether the Pharmacy and Poisons Board had the mandate to license pharmaceutical technologists to practice the pharmacy profession.
- ii. Whether the High Court had jurisdiction to hear and determine a claim of violation of fundamental rights and freedoms arising from a decision by the Pharmacy and Poisons Board to decline to issue superintendence licences to pharmaceutical technologists.
- iii. Whether pharmaceutical technologists had a legitimate expectation that the Pharmacy and Poisons Board would issue superintendence licences to pharmaceutical technologists.
- iv. Whether a decision by the Pharmacy and Poisons Board to decline to issue superintendence licences to pharmaceutical technologists was made in breach of the rights to fair administrative action and equality and freedom from discrimination and in violation of public participation requirements under the Constitution.
- v. Whether a decision by the Pharmacy and Poisons Board to decline to issue superintendence licences to pharmaceutical technologists helped to ensure the progressive realisation of the right to the highest attainable standard of health.



Held

1. One of the functions of the 1st respondent as recognized under section 3B(3)(h) of the Pharmacy and Poisons Act was to license the practice of pharmacists and pharmaceutical technologists. Under section 3B(3)(m) of the said legislation the 1st respondent performed any other function relating to the regulation of the profession of pharmacy.
2. Pharmacists were 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 Pharmacy and Poisons Act required 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.
3. Under section 9A of the Pharmacy and Poisons Act, the Registrar issued a practising licence authorizing registered pharmacists or enrolled pharmaceutical technologists to practice as registered pharmacists or enrolled pharmaceutical technologists. That meant that while pharmacists were registered to practise as pharmacists, pharmaceutical technologists were enrolled to practice the pharmacy profession, demonstrating some level of difference. Section 9D of the Pharmacy and Poisons Act gave the 1st respondent discretion to deny or refuse to issue or renew a license if it determined after due process, that an applicant had failed to comply with the requirements of the Act or the rules.
4. Article 23(1) provided that that the High Court had 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. For an action to amount to a violation or threatened violation of the Constitution, the law or rights, it had to be a legal wrong or 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 was imposed in contravention of any constitutional or legal provision or without the authority of the law. Where such legal wrong or injury was threatened, the court had powers to grant appropriate reliefs to obviate the wrong or legal injury.
5. In a constitutional 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. The petitioner should plead with precision, the constitutional rights violated, the provisions infringed and demonstrate the manner of violation so as to establish a link between the alleged violation, the rights infringed and the constitutional provisions involved and to give the respondent notice of the petitioner's claim so as to allow the respondent to respond appropriately.
6. Registered pharmacists and enrolled pharmaceutical technologists were professionals authorized to practice pharmacy but it must be acknowledged that their levels of training and experience were different. It must also be appreciated that level 4 hospitals and above were different from those at level 3 and below.
7. The impugned directive did not bar pharmaceutical technologists from working in level 4 hospitals and above. It only restricted those who could superintend pharmacies in those hospitals to registered pharmacists so that pharmaceutical technologists working in pharmacies in level 4 hospitals and above, worked under the supervision of registered pharmacists.
8. The petitioner's claim that its members had a legitimate expectation since they had been allowed to superintend pharmacies in level 4 and above hospitals was not properly grounded. The 1st respondent issued the directive which gave notice on what would happen. Correspondence was exchanged and meetings were held to discuss the issue. The petitioner was given notice and an opportunity to be heard on the issue.
9. At clause 2.3.2. of the Norms and Standards, on rationalization of staffing, level 4 and 5 hospitals were to work towards having specialised services at each district hospital. Medical officers were to run the specialised clinics at level 4 hospitals while medical specialists were to be concentrated at level 5 facilities to ensure they provided specialised care at that level. It would therefore be disingenuous for the petitioner to argue that pharmaceutical technologists should superintend pharmacies in level 4,



- 5 and 6 while clinics were run by medical officers and medical specialists (degree holders) when the facilities were 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.
10. There was 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 brought out the distinction between the two groups. It was shown that the 1st 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.
 11. The court was not persuaded that the 1st respondent violated any legitimate expectation or the requirements for public participation in the circumstances of the case. The fact that the petitioner's members previously superintended level 4 hospitals and above, that did not mean there could be no change in the management of pharmacies in those hospitals.
 12. The directive of May 22, 2024 was to take effect on January 1, 2025 and it was a culmination of an engagement between the petitioner and its members and the 1st respondent. The directive was in writing and it gave reasons. It was not made in violation of the right to fair administrative action under article 47 of the Constitution.
 13. The impugned directive that pharmaceutical technologists should not superintend pharmacies in levels 4 hospitals and above, imported differential treatment that was not based on discrimination but on professional standards required in order to guarantee the highest attainable standard of health for the people in the country as required under article 43(1) of the Constitution.

Petition dismissed.

Orders

Each party to bear its costs.

Citations

Cases

1. Anarita Karimi Njeru v Republic (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR) — (Mentioned)
2. British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) Petition 5 of 2017; [2019] KESC 15 (KLR)) — (Mentioned)
3. Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR) — (Mentioned)
4. Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) — (Explained)
5. Dida v Debate Media Ltd & another Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) — (Followed)
6. Mwisu, Josephat & 24 others v Pharmacy and Poisons Board & Registrar, Pharmacy and Poisons Board Civil Appeal 172 of 2016; [2018] KECA 794 (KLR) — (Mentioned)
7. Judicial Service Commission & another v Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — (Followed)
8. Kenya Airports Authority v Mitu-Bell Welfare Society, Attorney General & Commissioner of Lands (Civil Appeal 218 of 2014; [2016] KECA 432 (KLR)) — Mentioned
9. KKB v SCM & 5 others (Constitutional Petition 014 of 2020; [2022] KEHC 289 (KLR)) — Mentioned



10. Macharia & another v Kenya Commercial Bank Ltd & 2 others (Application 2 of 2011; [2012] KESC 8 (KLR)) — Mentioned
11. Manani & 5 others v Attorney General & another (Petition 36 of 2018; [2018] KEHC 9395 (KLR)) — Mentioned
12. Mwai & 3 others v Kenya National Examination Council & 2 others (Petition 15 of 2011; [2011] KEHC 1696 (KLR)) — Mentioned
13. Mwau v Independent Electoral and Boundaries Commission & another (Petition 26 of 2013; [2013] KEHC 6762 (KLR)) — (Explained)
14. Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others (Petition 278 of 2011; [2013] KEHC 6054 (KLR)) — (Followed)
15. National Assembly of Kenya & another v Institute for Social Accountability & 8 others (Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR)) — Mentioned
16. Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023; [2023] KESC 113 (KLR)) — Mentioned
17. Nyarangi & 3 others v Attorney General (Petition 298 of 2008; [2008] KEHC 3906 (KLR)) — Mentioned
18. Olili v President of the Supreme Court of Kenya & another; Law Society of Kenya (Interested Party) (Constitutional Petition E027 of 2022; [2024] KEHC 7182 (KLR)) — Mentioned
19. Peter K Waweru v attorney General ([2006] eKLR) — Mentioned
20. Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] KEHC 10266 (KLR)) — Followed
21. Republic v Institute of Certified Public Accountants of Kenya Exparte Vipichandra Bhatt T/A J V Bhatt & Company (Miscellaneous Civil Application 285 of 2006; [2008] KEHC 3231 (KLR)) — Mentioned
22. Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) Judicial Review Application E023 of 2021; [2022] KEHC 5 (KLR)— (Mentioned)
23. Speaker of the National Assembly v Karume Civil Application 92 of 1992; [1992] KECA 42 (KLR) — (Mentioned)

South Africa

Fose v Minister of safety and Security [1997] ZACC 6) — (Followed)

United Kingdom

MacFoy v United Africa Co. Ltd [1961] 3 All ER 1169 — (Mentioned)

Statutes

1. Constitution of Kenya, 2010 — articles 10(1)(c), (2); 20; 21(1); 22; 23(1); 27(1); 35; 43(1)(a); 47; 165; 165(3)(b — d - (Interpreted)
2. Fair Administrative Action Act (cap 7L) — In general (cited)
3. Health Act (cap 241) — sections 25, 48 — (Interpreted)
4. Medical Practitioners and Dentists (Medical Institution) Rules (cap 253, Sub Leg) — clause 6 In general (Cited)
5. Pharmacy And Poisons Act (cap 244) — section 3, 3B (3); 6; 7; 8(2); 9(2); 9A; 9B; 9C; 9D; 21 — (Interpreted)

Texts

1. Pharmacy and Poisons Board (2019), Code of Ethics for Pharmacists, 2019
2. Pharmacy and Poisons Board (2025), Good Pharmacy Practice (GPP) standards
3. Pharmacy and Poisons Board (2023), Guidelines for Registration and Licensing of Premises, 2023



Advocate

Mr. Omiti for the 1st Respondent
Mr. Akusala for the Interested party,
Mr. Abidha Nicholas for the Petitioner

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 1st and 2nd 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 1st 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 1st respondent dated on May 22, 2024 stopping pharmaceutical technologists from superintending pharmacies at level 4 hospitals and above. The petitioner asserted that the 1st 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 1st 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 1st respondent where several issues were raise, 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 1st respondent ignored the petitioner's pleas necessitating it to seek the intervention of the 2nd respondent and raised concerns about being excluded from decisions affecting its members; the impact and engagement with the 1st respondent and unfulfilled expectations. The Principal Secretary in the 2nd respondent's Ministry promised to review those concerns and take necessary action.
6. Despite these efforts, the 1st 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 1st 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 May 22, 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.

1st respondent's response

9. The 1st respondent opposed the petition through a replying affidavit. The 21st 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 1st 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 1st 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 1st 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 March 7, 2023 which were adequately responded to in the letter dated March 16, 2023.
13. According to the 1st 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 1st 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 1st respondent's case that the respondent had requested for a meeting through a letter dated February 2, 2024, to address the challenge surrounding the decline to grant superintendent licenses for pharmacies at level 4 hospitals. A meeting was held on 12th 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 to the 1st respondent, the petitioner in a letter dated February 13, 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 1st respondent to formerly communicate its position on the subject matter to stakeholders.
16. The 1st respondent maintained that the issues raised by the petitioner were in a meeting held on April 19, 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 1st respondent having considered the issues raised, resolved that effective January 1, 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 1st respondent further directed that the position be communicated to all relevant stakeholders.
17. On May 22, 2024, the 1st 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 1st 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 1st 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 1st 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 1st respondent asserted that the threshold for public participation was met; the 1st 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 1st respondent denied allegations of discrimination in violation of article 27 (1) of the [Constitution](#) or that the impugned directive was arbitrary. The 1st 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 1st respondent approved applications for premises that met the requisite threshold for wholesale and retail of pharmaceutical products.
 22. It was the 1st 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 1st 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 1st 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 1st 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 1st 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 1st respondent to justify the argument that the court has jurisdiction.
29. Counsel submitted that the 1st 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 1st 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 1st 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 1st respondent to prohibit issuing licenses to the petitioner's members.
31. Learned counsel maintained that he petitioner's members had legitimate expectation that they would be treated fairly and equally but this was not done since the 1st 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 1st 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 1st respondent had stated that it held a meeting on April 19, 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 1st 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.

1st respondent's submissions

35. Mr. Omiti, learned counsel for the 1st 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 1st 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 1st 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 1st 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 1st 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 1st 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 1st 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 1st respondent to regulate qualifications for superintendents.
45. Regarding legitimate expectation, learned counsel argued that the 1st 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 1st 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 1st respondent to engage in an illegality.



48. Learned counsel again argued that the 1st 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 1st respondent's action was within the law.
49. It was Mr. Akusala's position that the Act gives the 1st 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 Ex parte Vipichandra Bhatt T/A J V Bhatt & Company [2008] eKLR; MacFoy v 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 2nd 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 1st respondent's directive of May 22, 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 1st 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 1st 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 1st respondent is a body corporate established under section 3(1) of the Pharmacy and Poisons Act. One of the functions of the 1st 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 1st 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 1st 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 1st respondent is responsible for regulating the practice of pharmacy and the conduct of pharmacists and pharmaceutical technologists in the country. The 1st 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 1st 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 1st 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 1st respondent's directive in the letter of May 22, 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 1st 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 1st 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 below. 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 May 22, 2024 which was addressed to the petitioner's Secretary General. The letter pointed out that effective 1st 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 1st 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 1st 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 1st 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 1st 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 1st respondent could not issue the directive as a way of bringing in effective ways of managing pharmacies in hospitals.
73. Moreover, the 1st respondent's directive made reference to the human resource requirements for pharmaceutical services prescribed under the norms for the Health Sector that were issue 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 1st 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 1st 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 1st 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 22nd May 2024 and was to take effect on



- 1st January 2025. The petitioner and its members were aware of the issue and had engaged the 1st respondent culminating with the directive of 22nd 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 21ST DAY OF NOVEMBER 2025

E C MWITA

JUDGE

