**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 263 OF 2014**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT, CAP 253**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF HEALTH…….....1ST RESPONDENT**

**KENYA MEDICAL PRACTITIONERS AND DENTISTS BOARD…….2ND RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3RD RESPONDENT**

**AND**

**TRANSGENDER EDUCATION AND ADVOCACY (Suing through its officials)**

**AUDREY MBUGUA ITHIBU (Chairperson)**

**MAUREEN MUIA (Secretary)**

**ANNET JENNIFER THIAYA ( Treasurer).....EX PARTE APPLICANTS**

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 10th July, 2014, the *ex parte* applicants herein, **Transgender Education and Advocacy,** which describes itself as a support group for people with Gender

Identity disorders (Transexuals) in Kenya seeks the following orders:

**1. An order of mandamus to compel the Respondents to carry out their statutory mandate by developing and implementing National Guidelines for the Management of Gender Identity Disorders.**

**2. Costs of to the application be provided for.**

**3. Such further and other reliefs that the Honourable court may deem just and expedient to grant.**

**Applicant's Case**

2. The Application was supported by a verifying affidavit sworn by **Audrey Mbugua Ithibu**, the applicant's Chairperson on 4th July, 2014.
3. According to the deponent, the Applicant is an Organization formed for advocating for human rights and preventing stigma facing transsexual people in Kenya and internationally whose members have sought medical services for gender identity disorder from various public institutions without success largely due to lack of national guidelines for management of gender identity disorders in the country.
4. It was contended that since the Respondents are mandated to advise the Government, and formulate policies and guidelines on matters pertaining to health care in the county, the Applicant approached the Respondents with a view of establishing national guidelines to address the concerns of the members of the Applicant and on the 17.10.2012, the 1st Respondent wrote to the Applicant requesting for written and oral presentations for the development of National Guidelines for management of Gender Identity Disorders (GID) which the applicant did on 8th November, 2012.
5. The deponent deposed that on 10th June, 2012 he made oral representations on behalf of the Applicant before the Technical Committee established by the 1st Respondent to develop the national guidelines for management of gender identity disorders and that having submitted both oral and written presentations as requested by the 1st Respondent, the Applicant had the legitimate expectation that the 1st Respondent would develop the National Guidelines for the Management of Gender Identity Disorders as promised. The deponent further made a follow up of the issue on 14th October, 2013 and 17h February, 2014 and 7th May, 2014, but no response was forthcoming.
6. It was contended that the failure and or refusal by the 1st Respondent to develop the National Guidelines for the Management of Gender Identity Disorders is an act of failure by the 1st Respondent to discharge its functions and mandate which refusal and or failure is unfair, unreasonable, unjustified and in breach of the rules of natural justice and has resulted in inability by the transsexuals in Kenya to access appropriate medical services hence this application seeking to compel th1st Respondent to discharge its statutory function in favour of the Applicant.
7. There was a supplementary affidavit filed on 10th November, 2014 sworn by the same deponent on 17th November, 2015 which did not contain anything new but was simply a repetition of the averments in the earlier affidavit.

**1st and 3rd Respondents' Case**

8. In opposing the application the 1st and 3rd Respondents filed the following grounds of opposition:

1. **That the 1st Respondent has no statutory mandate as alleged; the ex-parte applicant has**

**not stated under which specific statutory provisions the 1st Respondent is required to make the rules as alleged.**

2. **That the 2nd Respondent is a body corporate constituted under section 4 of the Medical Practitioners and Dentist Act capable of suing and being sued in its own name; independent and distinct from the 1st Respondent.**
3. **That the application is not based on any grounds that would support the issuance of the judicial review orders sought.**
4. **That the annextures to the verifying affidavit of Audrey Mbugua Ithibu contradict the averments in the same verifying affidavit; annexture 'AMI clearly proves that it is the 2nd Respondent who initiated the conversation with the applicants and not the other way around as alleged, the same annexture disproves the allegation that it was the 1st Respondent who requested the applicant for written and oral presentations for development of the guidelines.**
5. **That the annextures to the verifying affidavit of Audrey Mbugua Ithibu, contradict the averments in the verifying affidavit that the 1st Respondent established a technical committee to develop the national guidelines.**
6. **That the annexture marked 'AMI3' clearly disproves the allegation that the applicant wrote to the 1st Respondent and that the 1st Respondent refused to respond thereto.**
7. **That the applicant in its annexture marked 'AM-2' has indicated that, there are before Parliament, health and Mental Health care bills, it would be absurd for the Respondents to be compelled to come up with regulations whereas the very Acts to which they are expected to give effect to are subject to are yet to be passed.**
8. **That the application is bad in law.**

**2nd Respondent's Case**

9. On behalf of the 2nd Respondent (hereinafter referred to as the Board) a replying affidavit was filed sworn by **Daniel Yumbya** the Board's Chief Executive Office on 6h October, 2014.
10. According to the deponent, the Board is a Statutory Body established under ***Medical Practitioners and Dentists Act***, Chapter 253 of the Laws of Kenya (hereinafter "**the Act**") whose functions as set out in the Act include the licensing and registration of medical practitioners and dentists and conducting disciplinary proceedings on complaints lodged against medical or dental practitioners or medical institutions in Kenya, among other functions as set out under the Act. According to him, the Board is a regulator of medical practitioners and dentists in Kenya and is not mandated with the formulation of health policy and guidelines yet the issues raised by the *ex parte* Applicant herein deal with health policy and under the Fourth Schedule of the Constitution of Kenya 2010, formulation of Health Policy is the mandate of the National Government which is this instance is the Ministry of Health.
11. It was therefore contended that there is no statutory mandate vested upon the Board to legislate, formulate policies or guidelines on matters pertaining to health care in the County and that the Applicant has not stated the specific statutory provisions under which the 2nd Respondent is required to make the polices and guidelines as alleged.
12. It was deposed that the Board received a complaint that there is no law or policy that addresses the issue of Gender Identity Disorders (GID) in Kenya and as a regulator, the Board is a stakeholder in the health sector and where necessary advices the National Government on matters pertaining to health care. Being a novel issue in the County, the Board upon receipt of the complaint opted to call stakeholders with the aim of advising the Ministry of Health on a way forward on the issue and the applicant was identified as an important stakeholder and by a letter dated 17th October 2012, the Board wrote to the Applicant requesting written representations on the issue with a view of developing National Guidelines for handling GID in line with the

Constitution of Kenya. Via a letter dated 8th November 2012 and addressed to the deponent, in his capacity as the Chief Executive Office of the Board, the Applicant submitted its contributions towards the National Guidelines for GIDs and made oral representations before the Board's Technical Committee through **Audrey Mbugua Ithibu**, the Applicant made oral representations before the Board's Technical Committee that was formed to make recommendations to the Full Board. However, the Technical Committee is yet to complete its work in order to enable the Board make recommendations to the Ministry of Health.

13. It was reiterated that there is no statutory mandate or function to develop the National Guidelines for the management of Gender Identity Disorders that the Board has failed, refused or neglected to perform that requires the intervention of this Honourable Court to compel the performance of.

**Applicant's Submissions**

14. It was submitted on behalf of the applicant that the 1st Respondent has the duty to develop policy for the health sector as outlined in the Constitution and the relevant statutes which duty is reinforced by the conduct of the parties. It was however conceded that the 2nd Respondent has no duty to develop the policies but is an initiator of the process by asking the relevant stakeholders to submit representations on the issues with a view to developing the guidelines on behalf of the 1st Respondent.
15. It was submitted that though the Respondent argue that they have not completed the process there was no indication on the amount of time required to do so. It was therefore submitted that the delay is inordinate which delay can only be interpreted as a refusal to act hence the orders sought.

**1st and 3rd Respondents' Submissions**

16. It was submitted on behalf of the 2nd and 3rd Respondents that since there is no claim against the 1st and 2nd Respondents, the claim against them must fail.
17. A for the 1st Respondent, it was submitted that the applicant has not set out the specific statute under which the said Respondent Is obliged to make, develop the said guidelines and that is due to the fact that there is no such statutory regime.
18. It was submitted that since the technical committee of the Board is yet to make recommendations to the full Board and thereafter to the Ministry based on the consultations which consultations were themselves initiated by the Board, the application is premature.
19. It was contended that it would be amiss to compel the development of guidelines when the substantive statutory enactments are yet to be made by Parliament. To the Respondents there was no evidence that lack of the said guidelines has acted as a bar to the treatment of gender identity disorders hence the application ought to be dismissed.

**2nd Respondent's Submissions**

20. It was submitted on behalf of the 2nd Respondent that no allegation was made against the 2nd respondent hence the 2nd respondent was wrongly sued. To the 2nd Respondent it has no mandate to formulate National Policies or Guidelines for the management of Gender Identity Disorders or otherwise hence cannot give to itself powers it does not have. As the Committee which was formed by the Board has not completed its work, it was submitted that the application ought to fail.

**Determinations**

21. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.
22. First and foremost, it is important to consider the circumstances under which judicial review order of mandamus do issue. The scope of the an order of *mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

**"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way…These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

23. In this case what the applicant seeks is an order compelling the Respondent to carry out their statutory mandate by developing and implementing National Guidelines for the Management of Gender Identity Disorders. However as correctly submitted on behalf of the Respondents the Applicant has not pinpointed the specific statute which compels the Respondents to develop and implement the said guidelines. Mandamus only issues to compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. In this case without the applicant showing the public duty imposed on the Respondents to order the Respondents to perform an act which they are not under any legal duty to perform may well amount to compelling them to act in excess of or without jurisdiction.
24. It was further contended that the application is prematurely made as the Committee appointed to look into the matter has not reported its findings for consideration by the Board and for onward transmission to the Ministry. If that position is correct and it has not been seriously controverted, the respondents' duty assuming there was one has not matured and therefore it would be premature to grant the orders sought.
25. It was further contended that the parent statutes under which the guidelines are to be

promulgated are yet to be enacted. Section 28 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

***Subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette.***

26. Therefore even if the guidelines were to be made the same would be incapable of implementation until the parent legislation are enacted. The Court however does not grant orders in vain and being discretionary remedies, the Court would not grant orders of mandamus even if merited where to do so would not serve any useful purpose.

**Order**

27. I accordingly find no merit in the Notice of Motion dated 10th July, 2014 which I hereby dismiss with costs to the Respondents.

**Dated at Nairobi this 4th day of February, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Ouko for Mr Munge for the 2nd respondent***

***Miss Odhiambo for the 1st Respondent***

***Cc Patricia***