



**Mwisa & others v Pharmacy and Poisons Board & another (Constitutional Petition 346 of 2013)
[2022] KEHC 13590 (KLR) (Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 346 OF 2013
AC MRIMA, J
SEPTEMBER 30, 2022**

BETWEEN

JOSEPHAT MWISA & OTHERS PETITIONER

AND

PHARMACY AND POISONS BOARD 1ST RESPONDENT

REGISTRAR PHARMACY & POISONS BOARD 2ND RESPONDENT

RULING

Background And Applicants' Case:

1. On October 1, 2020, this court found the registrar of the pharmacy & poisons board, (hereinafter referred to as 'the 2nd respondent' or 'the registrar' or 'the applicant') in contempt of this court's judgment delivered on December 18, 2013.
2. In that judgment, the court ordered the respondents to consider the applications of Josephat Mwisa & others, the respondents/original petitioners herein, for enrolment as pharmaceutical technologists irrespective of their college of training.
3. In its quest to discharge the said contempt orders of October 1, 2020, the registrar herein instituted the application by way of notice of motion dated August 30, 2021, the subject of this ruling.
4. The application is supported by the affidavit of Dr Fred Moin Siyoi, the registrar. The affidavit was deposed to on an even date.
5. The applicants jointly sought the following reliefs:



1. The court does discharge the 2nd respondent having complied with the orders of the court of October 1, 2020 – by issuance of the unconditional undertaking to admit the petitioners once the board is constituted, in accordance with the affidavit of compliance sworn on June 2, 2021;
2. Costs of the application be provided for.
6. To justify the grant of the foregoing prayers, it was the respondents case that the applicant had issued an unconditional undertaking to comply with the orders of October 1, 2020 to submit the names of the petitioners for enrolment as pharmaceutical technologists upon the Constitution of the 1st respondent’s board of directors.
7. It was its case that the 1st respondent was not constituted as by law required since the term of the previous board of directors lapsed on May 3, 2020 and once its duly reconstituted the registrar will unconditionally present the names of the petitioners to the board for enrolment.
8. To demonstrate performance of the foregoing, reference was made to an undated and unsigned affidavit of compliance deposed to by Dr Fred Moin Siyoi detailing the unconditional undertaking.
9. In the said affidavit, Mr Siyoi reiterated that he will comply with the orders of the court arising from the judgment delivered on December 18, 2013 and submit the names of the petitioners upon constitution of the board for adoption and subsequent enrollment.
10. It was his deposition that the 1st respondent herein, the pharmacy and poisons board lack quorum as there is only one director, Dr Beatrice Amugune, whose term still subsist but she cannot make any decision for and on behalf of the 1st respondent.
11. In view of section 3 of the Pharmacy and Poisons Act, which vests appointment of board members in the ministry of the health and the presidency, it was his case that he had written to the appointing authority bringing to its attention the urgent need to have the board appointed.
12. To that end, he referred to the vacancies created as of March 3, 2020 upon the lapse the term of the board members who were appointed to serve for a period of 3 years effective March 8, 2017 as per gazette notice No 2194.
13. It was the applicants case that they are yet to receive feedback on when fresh appointments will be made.

The Submissions:

14. The applicants further urged their case through written submissions dated October 15, 2021. They largely reiterated the contents of the application and the depositions of Dr Siyoi.
15. They, however, hastened to add that under section 6(2) of the Pharmacy and Poisons Act, the 2nd respondent/applicant is mandated to keep the roll of pharmaceutical technologists in the prescribed form and the consideration of any application for enrollment rests with the 1st applicant, the pharmacy and poisons board.
16. They further stated that any addition corrections or alterations to the roll is made by the 2nd respondent with the direction of the board and as such the orders issued on October 1, 2020 arising from the judgment of December 18, 2013, directing the respondents to enroll the petitioners could only be complied with by the pharmacy and poisons board.
17. On the foregoing, it was their case that it was not true for the petitioners/respondents to argue that the power of the pharmacy and poisons board is only limited to satisfying that they hold diploma in pharmacy of any college approved by the board.



18. On the inability of the pharmacy and poisons board to make any decision on quorum, the respondents relied on the Court of Appeal decision in *Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 4 others* (2017) eKLR.
19. The applicants submitted further that the petitioners' contention that their applications could be considered by the 1st respondent's training and assessment technical committee (TACT) was not accurate since it is a separate and distinct entity from the board. It is an internal creature not established by the statute and would not have the powers and mandate of the pharmacy and poisons board as provided for under sections 3 and 4 of the *Pharmacy and Poisons Act*.
20. In conclusion, they maintained the position that once the pharmacy and poisons board was constituted, the names for enrollment would be presented forthwith. It urged that it was in the interest of justice that the application be allowed as prayed and accordingly discharge the 2nd respondent/ applicant from contempt.

The Petitioners' Case:

21. The petitioners opposed the application through the replying affidavit of Joseph Mbithi Mwisu deposed to on September 17, 2021.
22. He imputed malice on the applicants for failing to comply with court orders since December 18, 2013, a period of over eight (8) years.
23. He deposed that the applicants ought to have purged the contempt order rather than frustrate compliance through the present application. It was his case that the issuance of an unconditional undertaking was not tantamount to compliance with the court's orders of October 1, 2020 and as such, the 2nd respondent cannot be discharged by these proceedings.
24. The petitioners discredited the respondents' allegations that the previous board's term lapsed on February 3, 2020 by deposing that in the year 2020, the board was available to consider the petitioners' applications for enrollment through its technical committee on October 30, 2020.
25. For the foregoing presupposition, the petitioners relied on the respondents' application dated November 3, 2020 in paragraphs 10 and 11 and stated that respondents were being dishonest when he attributed non-compliance to non-constitution of the board.
26. Based on the 2nd respondent's affidavit sworn on November 3, 2020, it was the petitioners' case that the board had considered the applications and what was outstanding was their legal mandate of enrolling the petitioners.
27. While rebutting the role of the pharmacy and poisons board as asserted by the applicants, Mr Mwisu deposed that according to section 8 of *Pharmacy and Poisons Board Act*, the board's role is limited to satisfying that the applicants hold diploma in pharmacy of any college in Kenya approved by the board.
28. He further deposed that an application for enrollment is made to the 2nd respondent who enters the applicants in the roll of pharmaceuticals technologists and pursuant to section 6 is required to keep the said register.
29. It was the petitioners' case that that according to section 4 of the *Pharmacy and Poisons Act*, vacancy in the board does not affect its powers and that the president does not have any role to play in the *Constitution* of the board.



30. Finally, the petitioners deposed that the [Health Laws \(Amendments\) Act, 2019](#) remains suspended pursuant to petition No 284 of 2019. In that regard, the provisions encapsulated in the [Pharmacy and Poisons Act](#) remains undisturbed.
31. They urged this court to dismiss the application.

The Submissions:

32. The petitioners further urged its case through written submissions dated October 27, 2021. They reiterated that the application was bad in law and an abuse of process of court.
33. It was submitted that the respondents are seeking to mislead the court that the 2nd respondent had complied with court orders whereas the orders required the 2nd respondent to enroll the petitioners as pharmaceutical technologists.
34. It was its case that the 2nd respondent has the only option of enrolling the petitioners or present himself for sentencing by the court.

Analysis:

35. From the foregoing recount of the respective parties' cases, this court will consider the following two areas of discussion: -
 - i. Discharge of contempt of court orders.
 - ii. Whether the application is merited.

Discharge Of Contempt Of Court Orders:

36. The [Black's Law Dictionary](#), Bryan A Garner, thomson reuters publishers, 11th edition defines contempt of court at page 397 as follows;

The act or state of despising. The quality, state, or condition of being despised. Conduct that defies the authority or dignity of a court or legislature.
37. The court has carefully perused the judgment in this matter which was delivered on December 18, 2013. In its ruling of October 1, 2020, this court found the applicants herein to be in disobedience of the orders made in the judgment.
38. In the judgment, the court made the following orders: -
 - a. Let the respondents within 30 days grants each of the petitioner the right to apply in the prescribed form addressed to the registrar to be licensed to practice as pharmaceutical technologist.
 - b. Let the pharmacy and poisons board consider each application, the qualifications of the applicants and consider whether they are qualified to practice as pharmaceutical technologist irrespective of their college of training.
 - c. Thereafter, a report to be filled in this court within 60 days for final orders to be made.
39. On October 1, 2020, the applicants were found to be in contempt of the orders of the court. They were to appear before court for sentencing on November 10, 2020.



40. By a notice of motion dated November 3, 2020, the applicants sought to review the orders made on October 1, 2020. The application was duly considered and dismissed on March 24, 2021.
41. Determined to get off the hook, the applicants were back to court *vide* the current application under consideration.
42. As a preliminary requirement, a person found to be in contempt of court must first purge that contempt before he/she/it may be granted audience.
43. That was so found in *Hadkinson v Hadkinson* [1952] 2 ALL ER 562, where it was observed that: -

“Held (per Somervell and Romer, LJ)...that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.

“Held Per Denning LJ, The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.”

44. In Ontario *Attorney General v Paul Magder Furs Ltd* 10 OR (3d) 46 it was observed that: -

As previously observed, even following the finding of contempt of court and while invoking the court’s jurisdiction in appealing the order of Chilcott J, the appellant persisted in its defiance of the law.

It is in this context that the appellant seeks to have the discretion of the court exercised in its favour and to stay the hands of the crown from enforcing the penalties imposed by Chilcott J.

This is not a case of an appellant who has been found to have committed an act of contempt and is fined, who has a record of committing such offences in the past and who, while the appeal is pending, has ceased to commit the act which is the subject matter of the contempt proceedings. Under those circumstances, it may well be that the fine should not be enforceable until the appellant has had a reasonable opportunity to exercise its right of appeal.

In this case for a period of over 11 years the appellant has exhibited a brazen disregard for the rule of law, has shown contempt for the orders of the superior trial court of this province and sought to make a mockery of the administration of justice. At the same time, it seeks to invoke the judicial process to suspend the operation of the very orders that it has defied for years. To stay the order of Chilcott J. pending appeal would be to countenance that conduct and to bring the administration of justice into disrepute.



45. In affirming its position in not countenancing acts of disobedience of court orders, the Court of Appeal in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* observed thus: -

In deserving cases, this court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in article 25 of the Constitution, we affirm with this court in *AB & Another v RB* 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court.

46. What comes to the fore, therefore, from the foregoing, is that for a court to allow a contemnor audience, it must ensure that the contemnor has purged their contempt except where the exceptions to the general rule apply.
47. Having so said, I will now look at the next issue.

Whether The Application Is Merited:

48. The determination of the instant application is fairly simple.
49. The record has it that the applicants are in contempt of the orders of the court. They attempted to set-aside the orders of the court to that end in vain. They now allege that they are unable to comply with the orders of the court for the non-composition of the board.
50. There is no doubt that, at the moment, the orders of the court are not purged since 2013.
51. This court has, as well, perused the rulings delivered on October 1, 2020 where the applicants were found to be in contempt of court and the one delivered on March 24, 2021 where an application to set-aside the contempt orders was declined.
52. In the said applications, the applicants never raised the issue of the composition of the pharmacy and poisons board. It, therefore, appears that the issue is now raised for the first time in this matter. The applicants have also not given any reason why they failed to raise the issue earlier.
53. To this court, the impression created by the applicants is that they are dealing with the matter in piece meal. They try to discharge the contempt and if unsuccessful, they retreat to look for other reasons to again make another attempt.
54. The applicants' conduct cannot be countenanced by the court. It is apparent that the applicants are hell-bent not to comply with the orders of the court. The applicants cannot, going by their conduct, be excused from complying with the orders of the court, for their conduct threatens the very foundation of the rule of law. At the same time, the applicants seek to invoke the judicial process to suspend the operation of the very orders that it has defied since 2013. To allow the instant application would be to bring the administration of justice into disrepute.



55. The applicants are at liberty to raise the issue of the composition of the board at sentencing. The court, if convinced, will issue appropriate orders to take the status quo into account.
56. In the end, the applicants have neither purged the contempt nor demonstrated that they ought to be exempted from complying with the orders. The application is, hence, not merited.

Disposition:

57. As I come to the end of this judgment, I must profusely apologize for its late delivery. The delay was mainly occasioned by the number of election-related matters which were filed in the constitutional and human rights division from December 2021. From their nature and given that the country was heading to a general election, the said matters had priority over the rest, hence, the delay.
58. Deriving from the foregoing, the following final orders of the court do hereby issue: -
 - a. The notice of motion dated August 30, 2021 is hereby dismissed with costs.
 - b. The Hon Deputy Registrar of the division shall issue a notice to the registrar of the pharmacy and poisons board to attend court on a date to be given and in line with the court's ruling of October 1, 2020 for sentencing.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022.

A. C. MRIMA

JUDGE

