



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**CONSTITUTIONAL PETITION NO. 2 OF 2019**

**IN THE MATTER OF: ARTICLES 22 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 10, 27, 47, 73 & 232 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF PROVISIONS OF THE PHARMACY AND POISONS ACT AND THE PUBLIC SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF: AN APPLICATION BY MR. WAMBUA MAITHYA FOR ORDERS OF COMMITTAL FOR CONTEMPT OF COURT ORDERS AND JUDGMENT AGAINST**

**DR. FRED MOIN SIYOI; DR. JACKSON KIOKO; DR. ROGERS ATEBE; DR. MARY N. KISINGU; DR. BEATRICE AMUGUNE; DR. ALFRED RUGENDO BIRICHI AND MR. ABDI OMAR JUMA**

**BETWEEN**

**WAMBUA MAITHYA.....APPLICANT/PETITIONER**

**VERSUS**

**PHARMACY AND POISONS BOARD.....RESPONDENT**

**AND**

**PHARMACEUTICAL SOCIETY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**DR. PIUS WANJALA..... 2<sup>ND</sup> INTERESTED PARTY**

**DR. KAMAMIA WA MURICHU.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. On 17<sup>th</sup> June, 2020, I delivered a ruling in this Petition after hearing the application dated 18<sup>th</sup> October, 2019 in which the Petitioner sought the following orders:

1) **THAT** the Court be pleased to certify this Application as extremely urgent;

2) **THAT** with the leave of court the Application be served on Respondents' Advocate.

3) **THAT** Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma have singularly and jointly disobeyed and/or willfully disregarded the Orders and Judgment of this Court made and delivered on the 26<sup>th</sup> September, 2019.

4) **THAT** Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma be arrested and committed to civil jail for a period of six (6 months) or such other period as the Court may determine for the contemptuous disobedience of the Orders and Judgment of this Court made and delivered on the 26<sup>th</sup> September, 2019.

5) A Declaration that any official/executive activity undertaken by Dr. Fred Moin Siyoi or any other officer while Dr. Fred Moin Siyoi is in the office of the Registrar/CEO of and at the Respondent, including any expenditure is unlawful and Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma will singularly and jointly be held responsible for the said unlawful undertaking/activity.

6) A Declaration that Dr. Fred Moin Siyoi; Dr. Jackson Kioko; Dr. Rogers Atebe; Dr. Mary N. Kisingu; Dr. Beatrice Amugune; Dr. Alfred Rugendo Birichi and Mr. Abdi Omar Juma have singularly and jointly violated Articles 10 and 73 of the Constitution by failing to adhere to the rule of law in the sense that they have singularly and jointly brazenly disobeyed the orders and Judgment of this Court made and delivered on the 26<sup>th</sup> September, 2019.

7) **THAT** costs be provided for.

2. In the said ruling I dismissed the said application while expressing myself as hereunder:

“This Court having removed into this court and quashed the Respondent’s decision contained in the daily Newspapers of 25<sup>th</sup> January, 2019 of advertisement for the vacant position of Registrar/CEO of the Pharmacy and Poisons Board; and any other consequent attendant process or decision including final appointment of Registrar/CEO of the Pharmacy and Poisons Board, it follows that the *status quo ante* the said decision prevailed. Before the said decision was made, it was the position that Dr. Fred Moin Siyoi was the acting CEO of the Pharmacy and Poisons Board. After the decision of this Court it would follow that unless his appointment in the said acting position was revoked, he reverted to the same status. Whether or not his acting was unlawful, is another matter altogether since that issue was not determined by this Court. In this application it has not been contended that Dr. Fred Moin Siyoi undertook any powers which could only be undertaken by him as a confirmed CEO and not as an acting CEO. In other words, strictly speaking, if Dr. Fred Moin Siyoi reverted to his position as the acting CEO of the Pharmacy and Poisons Board and undertook the duties which he was empowered to undertake as such, he cannot be found to have been in contempt of the orders of this Court. Similarly, the cited persons would not be in contempt.”

3. The Petitioner is once again before this court vide an application dated 17<sup>th</sup> July, 2020 seeking an order that the said decision be Reviewed and/or Varied and/or set aside so as to meet the ends of justice.

4. In this application the Petitioner contends that this court in arriving at the said decision, erroneously found that there was no replying affidavit filed by the Respondent when there was one on record. According to the Petitioner, that patent mistake and or error apparent was fatal to the Application as the said vacuum left the court to speculate whether **Dr. Fred Moin Siyoi** was in office of Registrar/CEO on acting capacity or substantively. It was averred that according to the said Replying Affidavit of the Respondents, **Dr. Fred Moin Siyoi** occupies the office of Registrar/CEO of the Respondent substantively on the strength of an Order by the Employment and Labour Relations Court, which, to the Respondent, “Stayed” the Order of certiorari issued by this honourable Court on 26<sup>th</sup> September, 2019; the subject of these proceedings.

5. In light of the foregoing averments deposed by Respondent that **Dr. Fred Moin Siyoi** is in office as Substantive Registrar/CEO on strength of ELRC Order issued on 11<sup>th</sup> October, 2019, it was the Petitioner’s position that the court patently erred in holding that **Dr. Fred Moin Siyoi** reverted to “his” acting appointment as Registrar/CEO upon this Court’s Decree nullification of his appointment on 26<sup>th</sup> September, 2019.

6. According to the Petitioner, this court was enjoined to pronounce itself as to whether the said ELRC order could stay the certiorari order of this Court issued on 26<sup>th</sup> September, 2019 more so the Court of Appeal having declined to stay the said certiorari order. It was his view that if the answer to the foregoing is that the ELRC order cannot Stay high court Certiorari Order issued earlier, more so when the court of Appeal has declined to stay the same, then the contemnors are and should be convicted for contempt of court on their own accord of admission.

7. According to the Petitioner, this honourable court made another patent mistake and or error on the face of record by holding that **Dr. Fred Moin Siyoi** is in office of the Respondent as **acting** Registrar/CEO upon certiorari order that set the circumstances back to where they began on 25<sup>th</sup> January, 2019.

8. It was therefore the Petitioner’s view that it is only fair and just that the court is enjoined to review its Orders/Ruling in the foregoing circumstances.

9. In opposing the application, the Respondent contended that though the Court had given directions on filing of responses on 30<sup>th</sup> April 2020, the Respondent did not comply within the timelines reason being that at the time there was no Board in place, the term of the Board having lapsed on 8<sup>th</sup> March 2020. This response was served out of time and it was within the discretion of the Court to consider it or not. It was the Respondent’s position that it was satisfied with the Ruling of the Court and has not moved the Court to have its response considered.

It is not in the place of the Petitioner to have the Court consider the Respondent's response.

10. According to the Respondent, the Court considered and evaluated the principle in relation to contempt proceedings and the Respondent's response would not have changed the outcome. It was its position that the Petitioner uses the said response which was not considered to ingeniously introduce other issues and arguments as to the capacity of **Dr. Fred Siyoi** to act as the CEO of the Board. These are new issues which were not part of the contempt proceedings and cannot be canvassed in a review application.

11. In its view, the alleged failure of the Court to interpret or consider **sections 2 and 34 of the Public Service Commission Act 2017** and related regulations when making a decision as to the ability of **Dr. Fred Siyoi** to act as CEO cannot be canvassed in the present review. These alleged errors can or should be canvassed on appeal to the Court of Appeal.

12. To the Respondent, the issues presented in the instant review application relate to other matters not before Court, specifically whether **Dr. Fred Siyoi** is acting in a lawful or unlawful capacity. Such issues are in our respectful view a reserve of another forum.

13. According to the Respondent, the said grounds set out in the Applicant/ Petitioner's instant Application for review offend the procedural rules guiding the applications for review of an order or a ruling of a Court.

#### **Determination**

14. I have considered the application herein which seeks a review of this court's decision. I have also considered the response and the submissions filed.

15. **The Code of Civil Procedure**, Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

*“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”*

16. In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004**, (**Okwengu, J** (as she then was) expressed herself as hereunder:

*“In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and *contra statute* which was the basis of the Defendant's application for striking out the plaint. It is the defendant's contention that the plaintiff is bound by his pleadings and could not therefore depart from the same...It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45 of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules.*

17. That was the Court of Appeal's decision in Court of Appeal case of **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

*“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible.”*

18. With respect to the other issues raised, the Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

*“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought*

**of long after the judgement or decision was delivered or made.”**

19. The decision whether or not to review a court’s decision was well captured by the Court of Appeal in **Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002**, where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

20. I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

21. In this case, if I understand the applicant correctly, it is his case had the court considered the contents of the replying affidavit, it would have found that the said **Dr. Fred Siyoi** was not occupying the position of the CEO in an acting position but was in fact in a substantive position. In the applicant’s view, the said person was installed in that position courtesy of the decision of the Employment and Labour Relations Court, according to the replying affidavit. Therefore, if the court were to consider the said affidavit, and agree with its contents, it would have to find that the said person was occupying the said position courtesy of a court order. If that was the position, it would not constitute contempt of court unless and until that order was set aside. It was a realisation of that position that the Petitioner argued that this Court ought to have pronounced itself as to whether the said ELRC order could Stay the Certiorari Order of this Court issued on 26<sup>th</sup> September, 2019 more so the Court of Appeal having declined to stay the said certiorari order. It was his view that if the answer to the foregoing is that the ELRC order cannot stay High Court certiorari order issued earlier, more so when the court of Appeal has declined to stay the same, then the Contemnors are and should be convicted for contempt of court on their own accord of admission.

22. In other words, the Petitioner argues that had this court made such a finding it would have allowed the application for contempt. With due respect that argument is fallacious for two reasons. First, assuming this court could make such an order, the same would only operate from the time of its issue and therefore the actions that took place before such a declaration cannot amount to contempt since the court cannot rely on its subsequent declarations to find a person guilty of contempt in respect of actions taken before the declaration was made. Contempt of court applies to existing orders and the state of affairs at the time when the order is given and not earlier.

23. Secondly, if the Petitioner is aggrieved by the decision of the ELRC staying the decision of this court, the appropriate action to take is to either seek to review that decision or appeal it. He cannot seek from this court an order whose effect would be to set aside the decision of the ELRC since this court has no power to do so.

24. Having considered the present application, it is my view that even had this court considered the said replying affidavit, which the Respondent admits was irregularly filed, it would not have come to a different conclusion as regards the application dated 18<sup>th</sup> October, 2019 from that it made on 17<sup>th</sup> June, 2020.

25. Consequently, I find no merit in the application dated 17<sup>th</sup> July, 2020 which fails and is dismissed but with no order as to costs.

26. It is so ordered.

**Read, signed and delivered in open Court at Machakos this**

**22<sup>nd</sup> day of February, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr. Ochola for Mr Mwangi for the Respondent***

***Mr Wanjala, the interested party and holding brief for Mr Kinyanjui for the Petitioner***

***CA Geoffrey***