



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.182 OF 2019**

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 21, 22, 23, 24, 25, 27(1), 28, 43, 47, 48, 55, 56, 165(3), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 20(2), 21(1), 22, 23, 24, 27(1), 28, 43, 47, 48, 55, 56, 165(3), 258, 259 & 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULES, 2013)**

**AND**

**IN THE MATTER OF: SECTION 3(1) (A) AND (C), 4(1) (2) (3) & (11) OF THE FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF: KENYA SCHOOL OF LAW ACT NO. 26 OF 2012 LAWS OF KENYA**

**BETWEEN**

- KIHARA MERCY WAIRIMU.....1<sup>ST</sup> PETITIONER**
- MWASHIGADI KEZIAH MBALA.....2<sup>ND</sup> PETITIONER**
- ABDI SAMIRA ALLY.....3<sup>RD</sup> PETITIONER**
- KANYI ALEX KARINGITHI.....4<sup>TH</sup> PETITIONER**
- SOMOW IBRAHIM HAMDIL.....5<sup>TH</sup> PETITIONER**
- KHANBHAI SARRAH MUSTANSIR.....6<sup>TH</sup> PETITIONER**
- MICHELLE WANJIKU WANYEE.....7<sup>TH</sup> PETITIONER**
- SARAH MWHIHAKI MWANGI.....8<sup>TH</sup> PETITIONER**

**VERSUS**

- THE KENYA SCHOOL OF LAW.....1<sup>ST</sup> RESPONDENT**
- THE COUNCIL FOR LEGAL EDUCATION.....2<sup>ND</sup> RESPONDENT**

KENYA NATIONAL EXAMINATION COUNCIL.....3<sup>RD</sup> RESPONDENT

KENYA NATIONAL QUALIFICATION AUTHORITY.....4<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL .....5<sup>TH</sup> RESPONDENT

AND

RIARA UNIVERSITY.....INTERESTED PARTY

## RULING

### Petitioner's Application

1. The petitioners through a Notice of Motion brought pursuant section 3A of Civil Procedure Act, and Section 5 of the Judicature Act and all enabling provisions of the law seek the following orders:-

- a) That the Honourable court be pleased to issue Notice to show cause to the 4<sup>th</sup> Respondent Director General/Chief Executive Officer Dr. Juma Mukhwana to show cause why the contempt of court proceedings should not be brought against him for disobedience of Limb 1 of the court orders made by the court on the 13<sup>th</sup> February, 2020.
- b) That in default of compliance an order of warrant of arrest be issued for the arrest and committal to civil jail of the 4<sup>th</sup> Respondent Director General/Chief Executive Officer Dr. Juma Mukhwana for a period not less than six months or to pay fine or both.
- c) That the OCS Central Police Station, Nairobi is ordered to forthwith arrest Dr. Juma Mukhwana and deliver him to the court for the meting out of the punishment above.
- d) That Dr. Juma Mukhwana the 4<sup>th</sup> Respondent Director General/Chief Executive Officer the contemnor herein be condemned to pay the costs of this application.

2. The application is based on the grounds on the face of the application inter-alia; that on 13<sup>th</sup> February 2020 this court made an amendment/correction of the judgment rendered on 28<sup>th</sup> November 2019 to read that:-

- i) A declaration be and is hereby issued that the petitioners do submit their international General certificate of Secondary Education (**IGSE, GSCE and GCE**) certificates together with equation letters (Secondary school qualification clearance letter) from Kenya National Qualification Authority together with **LLB** degree certificate from Riara University within 7 days, from the date of this order.
- ii. The petitioners upon complying with (i) above and upon meeting the qualification the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do register and forthwith admit the petitioners herein to undertake the Advocate Training Programme (ATP) in the Kenya School of law without any other conditions.
- iii. That no orders as to costs

3. It is petitioners' contention that they served the extracted orders to the 4<sup>th</sup> respondent through Dr. Juma Mukhwana, the Director General/Chief Executive officer to Kenya National Qualification Authority, the 4<sup>h</sup> Respondent.

4. It is urged by the Petitioners/Applicants the 4<sup>th</sup> Respondent and/or intended contemnor have blatantly disregarded the court's orders by disobeying and declining to comply with the orders by refusing to issue a secondary school qualification clearance certificate as ordered by the court; but instead issued letters that were not equation/clearance letters.

5. It is petitioners' further averment that from the contents of the 4<sup>th</sup> Respondent/Contemnor letter of 19/2/2020 and 21<sup>st</sup> February 2020 it is seeking to reverse the whole litigation and gains in the matter into square one. It is urged the 4<sup>th</sup> Respondent is seeking to re-litigate the issues which this court had dealt with and finally determined. That the issues raised are similar to objection to the petition in their objection of 15<sup>th</sup> October 2019. That the petitioners risk to be locked out of Kenya School of Law unless this court intervene.

6. It is further stated by the petitioners that the rule of law requires the orders of this court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. That the contemnor actions undermine the authority and dignity of the court and as such must be dealt with firmly so that court's authority may not be brought into disrepute. It is further contended the court's orders are to be obeyed and complied with unless and until that order is discharged, reviewed, set aside or stayed. It is urged contrary to this court's order the 4<sup>th</sup> Respondent thinks that the petitioners were unqualified and pointed down as much in the letters dated 19<sup>th</sup> and 21<sup>st</sup> February 2020.

### The 4<sup>th</sup> Respondent Response

7. The 4<sup>th</sup> Respondent relies on Replying affidavit sworn by Dr. Juma Mukhwana on 28<sup>th</sup> February 2020 in opposing the petitioners' application. He avers that he was never personally served with the contempt application but was only informed of the same by his Advocates on record. He nevertheless admits the court made an amendment/correction of the judgment rendered on 28<sup>th</sup> November 2020 but denies having personally been served with the order referred to in the petitioners' paragraph 3 of the supportive affidavit and further points out the court order annexure ("MKM-1") do not bear the 4<sup>th</sup> Respondents stamp.

8. The intended contemnor states that he has not disobeyed the court's order as alleged neither has he declined to comply with the orders of this court. He urges from the ruling and judgment there were some steps that the petitioners ought to have undertaken before being admitted by the 1<sup>st</sup> Respondent.

9. The 4<sup>th</sup> Respondent contend that the petitioners are misrepresenting the court's order in that the court did not compel the 4<sup>th</sup> Respondent to unconditionally issue the petitioners with equation letters (*secondary school qualification clearance letters*). It is 4<sup>th</sup> Respondent's averment that his understanding was that the petitioners were supposed to apply to the 4<sup>th</sup> Respondent for equation of their qualifications and that the 4<sup>th</sup> Respondent was supposed to issue the petitioners with equation letters. The 4<sup>th</sup> Respondent aver that it did inform the petitioners through letters dated 19/2/2020 and 21/2/2020 the position of their qualifications.

10. It is further urged by the 4<sup>th</sup> Respondent that his Advocates were never served with the court's order referred to in paragraph 3 of the Affidavit of service.

11. The 4<sup>th</sup> Respondent's counsel Mr. Ndubi E. Mokuia through his affidavit sworn on 28<sup>th</sup> February 2020 aver that he was not served with any court order as alleged in the affidavit of service. It is urged had any order been served it would have been received and stamped and dated. It is further urged there is no averment as to whether the receipt of the order was acknowledged or not. It is urged that all pleadings from the petitioners were previously acknowledged receipt upon service and there is no reason why if at all service of the order was affected the 4<sup>th</sup> Respondent would have declined to receive the same. It is urged the petitioners counsel is misleading the court that she effected service of the court's order.

#### **Petitioners Reply to 4<sup>th</sup> Respondent Response**

12. The petitioners filed supplementary affidavit by Mwashigadi Keziah Mbela sworn on 2<sup>nd</sup> March 2020. It is petitioners' contention that the 4<sup>th</sup> Respondent was served with court's order on 17<sup>th</sup> February 2020 and service acknowledged by stamping the copy of the court order. It is further averred the 4<sup>th</sup> Respondent's Advocate was duly served. That the equation letters are wrong as they stated the petitioners had not qualified for direct university entry in Kenya. It is further asserted that the 4<sup>th</sup> Respondent had already demonstrated that they had the knowledge of the order as they had replied to the court's order by issuing the letters dated 19<sup>th</sup> February 2020 and 21<sup>st</sup> February 2020.

13. It is further urged by virtue of paragraph 8 of the 4<sup>th</sup> Respondent's affidavit he had demonstrated he was aware of the court's order as he had read both the court's judgment and the ruling. It is urged by the petitioners that the law has changed and as it stands knowledge supersedes personal service. It is further averred the 4<sup>th</sup> Respondent counsel was made aware of the court's order through service and the advocate was under duty equally to advise his client of the court's order for compliance.

14. The petitioners' further submits that personal service is neither requisite nor mandatory where knowledge of the order and notification is sufficient. It is further urged the 4<sup>th</sup> Respondent with intention to defeat the order proceed and issued a "defective" certificate of Equation, which petitioners aver amounts to disobedience of this court order for failure to comply.

15. The petitioners further contend that Notice of an appeal is an intention to appeal and it is not an appeal and at any rate it is not a stay.

#### **The 2<sup>nd</sup> Respondent Response**

16. The 2<sup>nd</sup> Respondent filed 2<sup>nd</sup> Respondents statement of grounds of opposition being as follows:-

- a) The 4<sup>th</sup> Respondent has fully complied with the Order of the Honourable court and cannot be compelled to do more than that;
- b) Without prejudice to the foregoing, the present application grossly offends the procedures relating to contempt of court contrary to the provisions of *section 5 of the Judicature Act and part 81 of the English Civil Procedure (Amendment No.2) Rules, 2012* as set out in the Court of Appeal case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR**.
- c) The continued representation of the Petitioners/Applicants by advocate Sharon Jerotich Keter who has deponed to an Affidavit of service in this matter, is an affront to Rule 8 of the Advocates Practice Rules which are rules made pursuant to the Advocate Act.

#### **Analysis and Determination**

17. I have very carefully considered the parties rival pleadings as well as rival submissions and the issues arising for consideration are as follows:-

- a) **Whether the petitioners' application is defective?**

**b) Whether the 4<sup>th</sup> Respondent had been served with the court's order and/or had knowledge of the court's order issued on 13<sup>th</sup> February 2020?**

**c) Whether the 4<sup>th</sup> Respondent complied with the court's order?**

**A. Whether the petitioners' application is defective?**

18. The 2<sup>nd</sup> Respondent in its grounds of opposition contend that the petitioners' application dated 25<sup>th</sup> February 2020 grossly offends procedures relating to contempt of the court contrary to the provisions of *section 5 of the Judicature Act and part 81 of the English Civil Procedure (Amendment No. 2) Rules, 2012*, as set out in the court of Appeal Case of **Christine Wangari Gachege, Elizabeth Wanjiru Evans & 11 others (2014) eKLR**. It is further urged by the 2<sup>nd</sup> Respondent that the outlined representation of the Petitioners/Applicants by advocate Sharon Jerotich Keter who has deponed to an affidavit of service in this matter, is an affront to Rule 8 of the Advocates Practice Rules, which are rules made pursuant to the Advocates Act.

19. The Respondents urged that following the declaration of the contempt of court Act unconstitutional in *Hc Petition No. 87 of 2018* there is no local contempt of court Act save to rely on **section 5 of the Judicature Act** and that the courts have to follow the law in England. It is urged as such the application Notice should have been filed and not Notice of Motion application. It is urged the grounds should be set at separately and numerically.

20. Section 4 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) *Practice and Procedure Rules, 2013* provides:-

**"(4) For the purpose of furthering the overriding objective, the court shall handle all matters presented before it to achieve the just determination of the proceeding, the efficient use of the available and administrative resources, the timely disposal of proceedings before the court at a cost affordable by the respective parties and the use of suitable technology."**

21. Further **Article 159(2) (d) of the constitution** provides that justice shall be administered without undue regard to procedural technicalities.

22. The 2<sup>nd</sup> Respondent has stated that the set procedure must be followed in seeking to have the application herein declared defective. The 2<sup>nd</sup> Respondent did not specifically stated what is the Law of England as of now and that which should be strictly followed. The 2<sup>nd</sup> Respondent's submissions are purely on procedural technicalities which our constitution do not uphold in determination of matters placed before courts. The law applicable in the instant application is set out under section 5 of the Judicature Act; section 3A of the Civil Procedure Act and all enabling provisions of the law. I have considered the provisions of the said law and I have no doubt that the Petitioners/Applicants' application is proper and not defective as alluded to by the 2<sup>nd</sup> Respondent.

23. On the issue of continued representation of the Petitioners/Applicants' by advocate Sharon Jerotich, who has deponed to an affidavit of service in this matter, the 2<sup>nd</sup> Respondent other than relying on ground No.2 of the 2<sup>nd</sup> Respondent's grounds of opposition, the 2<sup>nd</sup> Respondent has not attempted to make any submission in support of those ground. The law do not bar an advocate from deponing an affidavit on service. Further in this matter other than Sharon Jerotich Keter representing the Petitioners/Applicants there are two more Advocates on record namely Mr. Arusei Advocate and M/s Kiget Advocate. The 2<sup>nd</sup> Respondent has failed to demonstrate why the said counsel cannot continue to represent the Petitioners/Applicants. He has not submitted how, deponing to an affidavit of service in this matter is an affront to Rule 8 of the Advocate Practice Rules and how such service violates the counsel right to represent her clients. I find no merit in the 3<sup>rd</sup> ground of opposition by the 2<sup>nd</sup> Respondent.

24. From my findings, I am satisfied that the Petitioners/Applicants application dated 25<sup>th</sup> February 2020 is properly drawn and before the proper court.

**B. Whether the 4<sup>th</sup> Respondent had been served with the court's order and/or had knowledge of the court's order issued on 13<sup>th</sup> February 2020?**

25. The Petitioners/Applicants contention is that the court's order of 13<sup>th</sup> February 2020 was extracted and service thereto affected upon Dr. Juma Mukhwana, the Director General/Chief Executive officer of the Kenya National Qualification Authority, the 4<sup>th</sup> Respondent as per annexed affidavit of service ("**MKM-2**").

26. The intended contemnor through his Relying affidavit dated 28<sup>th</sup> February 2020 denies ever having personally been served with the contempt application but admits having been informed of the Motion Application dated 25<sup>th</sup> February 2020 by his advocate.

27. The 4<sup>th</sup> Respondents advocate through an affidavit dated 28<sup>th</sup> February 2020 similarly contends that he was never served with any court's order.

28. The affidavit of service by Sharon Jerotich Keter dated 25/2/2020 under states as follows:-

**"On the 13<sup>th</sup> day of February, 2020 the Honourable Court issued an order dated the 13<sup>th</sup> February, 2010. That on the 17<sup>th</sup> day of February, 2020 in the morning I proceeded to the 4<sup>th</sup> respondent offices at Uchumi House, Nairobi and effected service upon the Director General/ CEO Kenya Qualification Authority. The order was received by the 4<sup>th</sup> Respondent Director General/CEO office whereby his Personal assistant with authority to accept service of documents addressed to the**

**CEO/Director General which authority she demonstrated by affixing their stamp on the copy of the order. Returned herewith as duly served (copy attached)."**

29. I have very carefully perused the affidavit and the order purportedly served and contrary to the counsel averment that the copy of the order was affixed with the 4<sup>th</sup> Respondent stamp, the copy of the order annexure ("MKM-1"), the same has no stamp of the 4<sup>th</sup> Respondent at all to demonstrate service upon the 4<sup>th</sup> Respondent or its counsel.

30. The petitioners urge that even in absence of service the law has changed and as it stands today knowledge supersedes personal service. It is contended that the 4<sup>th</sup> Respondent clearly through his acts had knowledge of the court's order as he acted by issuing letters purportedly in compliance with the court's order through its letter dated 19<sup>th</sup> February 2020 and 21/2/2020 a few days from the date of purported service.

31. In the case of **Wilson K. Kwambai & another vs Director of Survey & 2 others and Joseph Koroney & another (2017) eKLR** citing the decision of Lenaola J. in **Basil Critics vs Attorney General & 8 others [2012] eKLR** where the court had stated:-

**"...The law has changed and as it stands today knowledge supersedes personal service....where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary."**

32. In the case of **Eliphas Ondiwuor Omondi vs Orange Democratic Party Movement & others (2017) eKLR** the court citing from the case of **Gatharia K. Mutikika vs Baharini Farm Limited [1985] KLR**, the court stated as follows:-

**"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily...it must be higher than proof on a balance of probability, almost but not exactly beyond reasonable doubt...the guilty has to be proved with such strictness of proof as is consistent with the gravity of the charge...."**

The court proceed to state it is because of the consequences that follow the contemnor that makes it a requirement that it be proved at a higher degree, and in some jurisdictions it is said to be beyond reasonable doubt, that the alleged contemnor was aware of the court order and had an opportunity to obey it.

33. In the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR** the Court of Appeal stated:-

**"...The question in each case and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which has been made. And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such notice ought to prove it beyond reasonable doubt."**  
**(underlining mine.**

The court went on to state that knowledge of existence of a court order is much more important than anything else.

34. In the instant petition Ruling was delivered on 13<sup>th</sup> February 2020 in absence of the advocates for the Respondents. The Respondents were absent. As regards service of the court's order, the alleged copy of the order duly stamped by the 4<sup>th</sup> Respondent is not attached, the counsel who allegedly effected service clearly states that she did not serve Dr. Juma Mukhwana but effected service on his personal assistant. Clearly there was no personal service upon Dr. Juma Mukhwana. It has further not been demonstrated that he had knowledge of the court's order or that he had notice nor are there facts from which it can be inferred that he had notice in fact of the order which had been made on 13<sup>th</sup> February 2020. I am not satisfied beyond any shadow of a doubt the person herein alleged to be in contempt committed the acts complained of with full knowledge or notice of the existence of the order of the court. This is so as the letter issued to the petitioners are contrary to the court's order and going beyond to contradict the court's judgment. Furthermore the threshold in contempt proceedings is quite high as it involves possible deprivation of a person's liberty.

### **C. Whether the 4<sup>th</sup> Respondent complied with the court's order?**

35. The court's judgment dated 28<sup>th</sup> November 2019 and the Ruling of 13<sup>th</sup> February 2020 are clear and still stands as no appeal has been filed, and allowed nor is there stay of the court's orders.

36. The orders issued on 13<sup>th</sup> February 2020 for clarity required the Petitioners/Applicants to submit their international General certificate of Secondary Education (**IGCSE, GSCE & GCE**) certificates to the Kenya National Qualification Authority for issuance of equation letters. The order as issued only required the 4<sup>th</sup> Respondent to equate their certificates with **KCSE**. The 4<sup>th</sup> Respondent was to indicate the equivalent grade either indicating as usually done in **KCSE** either the petitioner scored equivalent to A or B or C or D or E. It was only required to grade the petitioners' certificates and no more.

37. The 4<sup>th</sup> Respondent must have misapprehended what was required of it and assumed a role that it did not have nor that was not required of it when it wrote letters contrary to the court's order. It was not required in equation of the international certificates of Education in respect of the petitioners to indicate which between the two certificates was higher or lower than the other as it did; nor to decide whether the petitioners were qualified to be admitted at the 1<sup>st</sup> Respondent institution or not. This act went beyond the court's order and as such Dr. Juma Mukhwana acted beyond what was expected of the 4<sup>th</sup> Respondent.

38. In view of the foregoing I direct the 4<sup>th</sup> Respondent to withdraw or retract the letters already issued and in compliance with the court's order do what the order demands of it within the next 7 days from the date of this Ruling in default the court shall be at liberty to cite the 4<sup>th</sup> Respondent herein.

39. The upshot is that application dated 25<sup>th</sup> February 2020 is declined. Each party to bear its own costs.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of April, 2020.**

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**J .A. MAKAU**

**JUDGE**