



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.346 OF 2013

BETWEEN

JOSEPHAT MWISA.....1st PETITIONER
JULIAN AKINYI.....2nd PETITIONER
ANTONY KOMU.....3rd PETITIONER
FIDELIS MUSA.....4th PETITIONER
HANNAH MUNGAI.....5th PETITIONER
MOSES WEKESA.....6th PETITIONER
NANCY NJUKI.....7th PETITIONER
DOROTHY NGEMU.....8th PETITIONER
FLORENCE MUTHEU.....9th PETITIONER
JOHN GAKURU.....10th PETITIONER
AUGUSTINE MWANGI.....11th PETITIONER
JUDY KIBE.....12th PETITIONER
BENARD OTIENO.....13th PETITIONER
ENOCK OBWOCHA.....14th PETITIONER
TIMOTHY MWANGI.....15th PETITIONER
COLENCESON MAKANA.....16th PETITIONER

DELILAH AKAI.....	17 th PETITIONER
VINCIENT NJAGI.....	18 th PETITIONER
JANE MAKENA KIREA.....	19 th PETITIONER
GIDEON MUSYOKA.....	20 th PETITIONER
AGNES KITHEKA.....	21 st PETITIONER
ELIZABETH OWUOR ACHIENG.....	22 nd PETITIONER
MARY GATHONI KINGORI.....	23 rd PETITIONER
EDWARD OKETCH ODHIAMBO.....	24 th PETITIONER
PHILIP OSEWE.....	25 th PETITIONER

AND

PHARMACY AND POISONS BOARD.....	1 st RESPONDENT
THE REGISTRAR, PHARMACY AND POISONS BOARD.....	2 nd RESPONDENT

RULING

Background

[1] The Affidavit dated 9th April 2015 arises from the judgment and order of this Court dated 18th December 2013. The terms of the said order required the Pharmacy and Poisons Board (the Board) to permit the Petitioners to make applications in prescribed forms to be allowed to practise as Pharmaceutical Technologists. To date, none of the Petitioners have been admitted to practise as such. It is on this basis that I am now required to determine whether the Respondents have wilfully disobeyed the aforesaid orders and whether therefore they are in contempt of Court.

The Petitioners' case

[2] The Petitioners' case as set out in the Affidavit dated 9th April 2015 is as follows: that after the judgment aforesaid, the 1st Applicant was informed by his advocate on the 21st of January 2014 that the Board had advised that he and the other Petitioners could download the prescribed application forms at the Board's website or, alternatively visit its offices to collect the forms. The Petitioners opted to visit the Board's offices to collect the forms and upon doing so, the Board's receptionist informed them that the institution from which their qualifications were obtained was not in the list of those approved by the Board and as such they could not be given the prescribed forms. The Petitioners then resorted to downloading the forms from the Board's website and on 25th January 2014, he, with another Petitioner, took 23 completed forms to the Board's offices for submission as was ordered by the Court.

[3] They also requested to see the Registrar of the Board but they were not allowed to do so. After being instructed by his Advocate to submit the application forms to the Board, the 1st Petitioner did so on the 28th of January 2014 but the Board personnel declined to acknowledge receipt of the forms. On 17th February 2014, his Advocate informed him that they had used incorrect forms and that they had to restart

the process on a different form which was obtainable from the offices of the Board. He was further informed that they should obtain a guideline on how to make the application correctly.

[4] Based on the above narration, the Petitioners' complaint is that they have been aggrieved by the Board's conduct in introducing a new form for the application process. They now seek the assistance of this Court to ensure that the Board complies with the Court orders and they also complain that the Board's instructions that the Petitioners ought to apply for evaluation was "**a ploy hatched by the Registrar to avoid compliance with the court order and thwart the Petitioners' attempts to register**" per the Court order. They also argue that the Registrar had made it a mission not to comply with the orders of this Court and they deny that, at any time, they ever refused to comply with the said Court orders hence the present application.

The Respondents' case

[5] The Respondents in answer to the Application stated that in a letter dated 1st April 2015, the Board complained that despite the invitation for the Petitioners to come and make the applications as ordered, they had failed and or refused to comply with the said orders of this Court. Subsequently, in a letter dated 11th February 2015, the Registrar indicated that only three of the Petitioners had completed their applications for evaluation and were provided a website in which the Petitioners could download the application forms.

[6] Further, that on 11th March 2015, this Court made an order for the Registrar to appear in Court on 3rd July 2015 to proffer an explanation for the alleged non-compliance with the Court order of this Court dated 18th December 2013 and the Registrar complied and was directed to finalise the process as earlier ordered. In a letter dated 10th August 2015, the Registrar then advised that, except for the 8th Petitioner, all Petitioners had filed their application forms to the Registrar as per the judgment and order of this Court. However, that only the 13th, 14th and 25th Petitioners properly completed the application process and the three Petitioners were evaluated and invited for pre-enrolment examinations. That of the three, only the 25th Petitioner honoured the invitation while the other two Petitioners wrote letters to the Board to cancel the invitation and requested to be allowed to sit for the next series of examinations. The request was contained in two identical letters from the two Petitioners, dated 22nd June 2015 advising that they could not honour the invitation to write the pre-enrolment examination because they had received the invitation late and could not prepare themselves and had also not paid the examination fee as required.

[7] From the above facts, the Respondents denied disobeying this Court's orders and instead shifted blame on the Petitioners for not acting in accordance with the Court orders. That therefore their Application was misguided and should be dismissed.

Determination

[8] Having considered the rival submissions, I will determine the Application by firstly setting out the applicable law and conclude by determining whether on the facts and the law, the Respondents are guilty of contempt of Court.

Applicable law

[9] Contempt of court at the time of hearing this Application was governed by the **Judicature Act 16 of 1967**. **Section 5** of the **Act** confers on the High Court and the Court of Appeal, the powers to punish those who disregard their orders. This position was well expressed in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. The provision does not however set out the standard or test applicable in cases of contempt and consequently, the courts have, over time, developed the test and principles applicable in such cases. That fact will become clear when I proceed to consider the following questions which, I think, call for determination in the specific circumstances before me:

(a) Whether there was a clear and unambiguous Court order.

- (b) Whether the alleged contemnor was aware of the Court order.
- (c) Whether the alleged contemnor is guilty of contempt of Court.
 - a. **Whether there was a clear and unambiguous Court order.**

[10] This fact cannot be disputed because it is clear that there was a judgment and Court order dated 18th December 2013. Were the orders clear and unambiguous? This is also not questionable. Had it not been the case, one would have expected either of the Parties to approach the Court to seek clarity. Moreover, the fact that the Board took certain steps in compliance with the Court order points to the fact that it understood the terms of the order. That is all I should say on that question.

b. **Whether the alleged contemnor was aware of the Court order**

[11] On this aspect, recent jurisprudence of the Kenyan courts favour the knowledge requirement approach. The position therefore is that a party must have knowledge of the Court order for which he is being held in contempt. It is no longer required of a party to prove that the alleged contemnor was personally served with the Court order and that is why the Court of Appeal in **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR** had this to say on that issue:

“[T]his court has slowly and gradually moved from the position that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved.”

[12] On the same point, this Court in **Basil Criticos vs Attorney General & 8 Others & 4 Others [2012] eKLR** (at paragraph 20) expressed itself as follows:

“[T]he law has changed and as it stands today knowledge supersedes personal service and for good reason.”

Applying the above principle to the present case, it is clear that it suffices for the alleged contemnor to be aware of the judgment and orders of the Court without any need to prove personal service. In fact, nowadays judgments are generally handed down in open court in the presence of counsel or parties. It is highly unlikely therefore that in such circumstances that a party may successfully claim that he/she was not aware of a judgment and court orders. In the present case, it is not in dispute that the Respondents were aware of the Court order and for that reason, I need not take this point further.

c. **Whether the alleged contemnor is guilty of contempt of Court**

[13] To determine this aspect of the Application, it is important to highlight the applicable test. The standard for contempt is higher than the balance of probabilities test. In fact, it is closer to that in criminal proceedings i.e beyond reasonable doubt and this is a higher standard than is sometimes fathomed. In **Kenya Tea Growers Association v Francis Atwoli & 5 Others [2012] eKLR** (paragraph 22), this Court had this to say about the test applicable in cases of contempt:

“In *Mutika vs Baharini Farm Ltd [1985] KLR 227*, it was held that the standard of proof in contempt matters is higher than a balance of probability but not exactly beyond reasonable doubt. In some cases, however the “beyond reasonable doubt” standard has been invoked.”

[14] Further, in South Africa, it is now settled law that the applicable standard is that of proof beyond reasonable doubt and in the Free State High Court of South Africa in **Wilson vs Wilson [2009] ZAFSHC 2** at paragraph 10, Rampai J pointed out that **“[t]he standard of proof required to sustain committal for civil contempt is to prove all the elements thereof beyond reasonable doubt”**. In **Fakie NO vs CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA)**, the Supreme Court of South

Africa per Cameron JA (as he then was), found that the burden of proof in contempt proceedings should be established beyond reasonable doubt and not on the preponderance of probabilities. The reason for this conclusion was that contempt proceedings may result in committal to prison and to have a contemnor committed to prison on a balance of probabilities standard does not accord with the right to fair trial. This decision was approved by the Constitutional Court of South Africa in **Pheko and Others vs Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC)** and I adopt the same reasoning.

[15] From the facts provided can one conclude that the Board is guilty of contempt? I have stated above that both sides blame each other for non-compliance with the orders of this Court. However, from the narration of facts, it is clear that the Petitioners do not single out a particular incident or conduct on the basis of which they submit that the Board is in contempt. The Board on the other hand led uncontroverted evidence on what happened with the Petitioners until the last two of them. It stated that only three Petitioners completed the application process. To this end, one may pause to emphasise that it is not open for those Petitioners to claim that the Board did not comply with the Court order. They were given an opportunity to comply but they did not. Of the remaining three, only one completed the process. The other two withdrew from the whole process. Two letters dated 22nd June 2015 confirm this fact. The Petitioners did not seek to controvert all these averments and I accept the Board's position as the truth. Does the conduct of the Board then amount to disregard of the Court order? Put differently, did the Petitioners establish beyond reasonable doubt that the Board disregarded the court order? I am not convinced that the Petitioners satisfied that standard and their Application must fail.

Conclusion

[16] I have shown that the Petitioners failed to prove, beyond reasonable doubt, that the Board disregarded the Court orders in issue and that such conduct constitutes contempt of Court.

Disposition

[17] The Application dated 10th April 2015 is lacking in merit and is dismissed. Let each party bear its own costs.

[18] Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Mwangi for Petitioners

No appearance for Respondents

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

19/2/2016