



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO 140 OF 2015**

**NICHOLAS MWITI .....1<sup>ST</sup> PETITIONER**  
**NJERU NYAGA KIVUTI.....2<sup>ND</sup> PETITIONER**  
**JOSPHAT MATOKE.....3<sup>RD</sup> PETITIONER**  
**ALEX MWANGANGI.....4<sup>TH</sup> PETITIONER**  
**BEATRICE ADHIAMBO.....5<sup>TH</sup> PETITIONER**  
**SHARF MBANI.....6<sup>TH</sup> PETITIONER**  
**JOSHUA MBIDYO.....7<sup>TH</sup> PETITIONER**  
**EVERLYN WAIRIMU.....8<sup>TH</sup> PETITIONER**  
**KENNEDY MIRITI.....9<sup>TH</sup> PETITIONER**  
**WALTER NYAMACHE.....10<sup>TH</sup> PETITIONER**  
**GIDRAPH KARUNGE.....11<sup>TH</sup> PETITIONER**  
**KHADIJA GALDALO.....12<sup>TH</sup> PETITIONER**  
**IRENE KATUNGE.....13<sup>TH</sup> PETITIONER**  
**LYDIAH KARIMI.....14<sup>TH</sup> PETITIONER**  
**MORGAN MUKTHAR.....15<sup>TH</sup> PETITIONER**  
**CATHRINE NJAGI.....16<sup>TH</sup> PETITIONER**  
**MICHAEL KIMEU.....17<sup>TH</sup> PETITIONER**

BRENDA OKUTO.....18<sup>TH</sup> PETITIONER

VERSUS

PHARMACY AND POSIONS BOARD .....1<sup>ST</sup> RESPONDENT

REGISTRAR, PHARMACY & POISONS BOARD....2<sup>ND</sup> RESPONDENT

RULING

**Introduction**

1. By their application dated 8<sup>th</sup> April 2015, the petitioners sought orders to stop the respondents from offering examinations in June 2015 and from closing the registration for the examinations on the basis that they had been unfairly prevented from sitting for the said examinations. The date scheduled for the closing of registration was the 24<sup>th</sup> of April 2015. They contended that they had submitted their forms to the respondent, but that the forms had been rejected, hence their application under certificate of urgency in which they sought an extension of the date of 24<sup>th</sup> April 2015 so that the Board could reconsider their applications.
2. The notice giving rise to the petition and application was as follows:

**PROFESSIONAL EXAMINATIONS**

The Pharmacy and Poisson Board will conduct **Pre-enrolment Examinations (Level I and II)** for **Pharmaceutical Technologists** on 15<sup>th</sup> June 2015 at KICC – Nairobi.

Eligible candidates are advised to download the Guidelines for Evaluation and Assessment of Pharmaceutical Technologists at [www.pharmacyboardkenya.org](http://www.pharmacyboardkenya.org) and apply to the Registrar, Pharmacy and Poisons Board.

**NOTE: This is the Final Professional Examination that the Board is offering for candidates who sat for the KNEC 2421 series of Diploma in Pharmaceutical Technology examinations from PPB approved institutions.**

The deadline for submissions of application forms will be on Friday 24<sup>th</sup> April 2015.

....NB: *Certificate Course in Pharmacy is NOT recognized.*

**For more information, visit our website: [www.pharmacyboardkenya.org](http://www.pharmacyboardkenya.org)**

DR KIPKERICH C KOSKEI, OGW

**REGISTRAR, PHARMACY AND POSIONS BOARD**

3. The respondents opposed the application, noting that the notice was issued by a statutory body and could not be extended, but that the Court could direct the respondent to re-issue the registration forms. In its view, the main issue in contention were the examinations which were scheduled to take place in June 2015.
4. Though the Court proposed to the parties that they should attempt an amicable resolution of the application and proceed with the petition, the parties were unable to agree on the hearing of the substantive petition, and I therefore directed the respondent to file its reply to the application. The application was argued before me on 23<sup>rd</sup> April 2015, the day before the deadline allegedly set by

the respondent.

5. Upon hearing the parties, I delivered an *ex tempore* ruling in which I declined to issue the conservatory orders, but reserved the full reasons for a later date. This ruling therefore relates to the said application and contains the arguments of the parties as well as the reasons for the decision delivered on 23<sup>rd</sup> April 2015.

### **The Submissions**

6. In their submissions which were made by their Counsel, Mr. Amol, the petitioners stated that they were pursuing only prayer no. 3 in their application. In the said prayer, the petitioners were seeking:

***3. “An interim order does issue restraining the respondents from implementing the decision notified to the Petitioners and the general public to the effect that the respondents will abolish a series of examinations which entitles the petitioners to practice as pharmaceutical technologists.”***

7. Mr. Amol submitted that they were seeking orders to restrain the respondent from abolishing examination series No 2421 as it had indicated it would do in the notice with respect to the examinations set for 15<sup>th</sup> June 2015. The said series was allegedly set for abolition the next day, 24<sup>th</sup> April 2015.
8. The petitioners submitted that the Court has the jurisdiction to grant the orders they were seeking, while they had a right to approach the Court when rights were threatened. According to the petitioners, their case was based on Article 27 which provides that everyone has equal benefit of the law and the right not to be subjected to discrimination. They submitted that the respondent has allowed others to sit for the examinations, but has denied them the same right.
9. The petitioners also alleged violation of Article 47 on the right to fair administrative action. They contended that after much pressure, the respondent allowed the petitioners to submit their applications, collected money from them, but dismissed their applications. Their contention was that the respondent did not consider their applications on their merits, and relied on the decision of Lenaola J in **High Court Petition No 346 of 2013 Joseph Mwisu & Others –vs-The Pharmacy and Poisons Board** to submit that the Court directed the respondent to consider the qualifications of the petitioners beyond their colleges. It was also their contention that the decision of the respondent violated their right under Article 43, and that they had a legitimate expectation that they would earn a living.
10. The petitioners also argued that under section 8 of the Pharmacy and Poisons Act, having been allowed to sit examinations administered by the **Kenya National Examination Council (KNEC)** which the respondent, according to the petitioners, had admitted that it recognized, they were also entitled to sit the examination to practice as pharmaceutical technologists.
11. It was the petitioners’ case that if the notice for 24<sup>th</sup> April 2015 was not suspended, the 2421 series of examinations would be completely abolished, and the petitioners will have to go back for training under the new series. They submitted that they had established a prima facie case, and that the balance of convenience lay in their favour.

### **Submissions in Response**

12. In his reply to the petitioners’ submissions, Mr. Naikuni, learned Counsel for the respondents, observed that while the petitioners had argued the petition, they had not addressed their application for conservatory orders.

13. The respondents observed that while the petitioners were asking the Court to stop examinations scheduled for 15<sup>th</sup> June 2015 on the basis that the 1<sup>st</sup> respondent intended to abolish examination series 2421, which was allegedly set for abolition on 24<sup>th</sup> April 2015, nowhere in the notice relied on was the intention to abolish the examination series indicated. Its contention was that the impugned notice talks of a deadline for submission of applications being 24<sup>th</sup> April 2015, and there was no intention to abolish the examinations indicated. What was required was for eligible candidates to download and submit application forms by the 24<sup>th</sup> of April 2015.
14. The respondents also opposed the application on the basis of the 1<sup>st</sup> respondent's legal mandate. Their position is that the 1<sup>st</sup> respondent is a statutory body created under the **Pharmacy and Poisons Act**. Under section 3 of the Act, it is given a wide legal mandate with respect to the control and management of the industry, including regulation and vetting of persons offering pharmacy services in Kenya, akin to the Council of Legal Education. Its case was that the petitioners have submitted their applications to the 1<sup>st</sup> respondent as required by section 7(2) and 8(2) of the Act pursuant to the notice published on 29<sup>th</sup> March 2014, and their applications had been assessed and a response given by way of letters dated 10<sup>th</sup> October 2014. The petitioners had not challenged the decision contained in the said letters.
15. It was also the 1<sup>st</sup> respondent's case that its actions with respect to the examinations was within its statutory right in managing the diploma in pharmaceutical technology in accordance with the syllabus. It urged the Court to rely on the decision of Lenaola J in **Joseph Mwisa & Others vs The Pharmacy and Poisons Board (supra)** and to decline to grant the prayers that the petitioners were seeking.
16. In his submissions in reply, Mr. Amol stated that the petitioners were relying on the letters dated 10<sup>th</sup> October 2014 addressed to some of the petitioners which indicated that their applications had been rejected because the colleges they attended are not recognized by the respondent.
17. He conceded that the petitioners had not challenged the said letters, which had been received in December, 2014. He further submitted that the petitioners were not seeking to stop the examination. Their problem was that the notice states that the examinations scheduled for 15<sup>th</sup> June 2015 were the final professional examination that the Board was offering for candidates who sat for the KNEC 2421 series, and therefore the date of 24<sup>th</sup> April 2015 was tied to the abolition of the 2421 series.
18. Mr. Amol contended that what the petitioners wanted was that the final examinations for that series should not be held as scheduled on the 15<sup>th</sup> of June 2015 unless the Court can order that, should the petitioners finally succeed in their petition, they will be entitled to sit an examination under the series; and further, that they wanted the Board to keep the old syllabus for purposes of this petition even if they introduce a new series.

### **Determination**

19. After considering the petitioners' application and submissions as well as the pleadings and submissions in response, the view of the Court is as set out hereunder.
20. First, did the petitioners establish a case for granting the conservatory orders that they were seeking? The principles for the grant of conservatory orders are fairly well settled, and were captured succinctly in the decision of the High Court in **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014** as follows:

*[59]"In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: "... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory*

***order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”***

***[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.***

***[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory”.***

21. A critical principle was also enunciated by the Supreme Court in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013**. This principle requires a party to satisfy the Court that the public interest tilts in favour of granting the conservatory orders that he seeks, and requires that the Court considers the public interest in determining whether or not to grant conservatory orders, particularly in cases where orders are sought to stop a public agency from carrying out its mandate. In enunciating this principle, the Supreme Court (Ojwang and Wanjala, JJSC) stated as follows:

***[86]”...Conservancy Orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”***

***[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”***

22. In the present case, the petitioners had been informed in October 2014 that they were not eligible to sit for the examinations because the colleges they had attended were not approved by the Pharmacy and Poisons Board to offer Diploma in Pharmaceutical Technology. They then approached the Court with a view to stopping the deadline for registration scheduled for 24<sup>th</sup> April 2015, and to stop the examinations then scheduled for 15<sup>th</sup> of June 2015. They allege violation of Article 27, 43 and 47 of the Constitution.

23. As observed by Musinga J in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General Petition No. 16 of 2011**, I am not at this stage required to analyze the facts and law underlying the petition, which shall be done after the full hearing:

***“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”***

24. As noted earlier, the petitioners had been informed by the letters dated 10<sup>th</sup> October 2014, that they were not eligible to sit for the examinations due to the status of their colleges. They had been

given the reasons why they could not be permitted to sit for the examinations more than six months prior to the presentation of their petition, and so on the face of it, they were not able to present a prima facie case that their right to fair administrative action had been violated.

25. The letters to the petitioners, which are annexed to the affidavit in support of the petition, are in the following terms, save for the name of the addressee and the institution in question:

**PPB/T & A/DIP/VOL.1V/014/(080)**

**10<sup>TH</sup> OCTOBER 2014**

**Nyaga Kivuti Njeru**

**P. O. Box 2412-60100**

**EMBU.**

**APPLICATION FOR PHARMACY AND POISONS BOARD PRE-ENROLMENT EXAMINATION**

***We acknowledge the receipt of your application for Evaluation and Assessment for enrolment as a Pharmaceutical Technologist.***

***We regret to inform you that upon evaluation, your application was not approved as you did not meet Pharmacy and Poisons Board eligibility criteria for Evaluation and Assessment for enrolment as a Pharmaceutical Technologists i.e:***

- ***Regional Institute of Business management is not recognized by Pharmacy and Poisons Board to offer Diploma in Pharmaceutical Technology.***

**Dr. W. Ochieng**

**For: REGISTRAR**

26. The other institutions which the petitioners had attended, according to the letters that they received from the 1<sup>st</sup> respondent annexed to their affidavit, are Kenya Institute of Applied Sciences and Step-Up Training Institute. These institutions were not listed among the institutions approved by the 1<sup>st</sup> respondent to give diplomas in pharmaceutical technology in the notice published by the 1<sup>st</sup> respondent.

27. As the petitioners had notice of these facts long before the notice, (which is undated but appears to have been published sometime in March or early April 2015) was issued by the Board, they cannot allege that they were denied the right to fair administrative action.

28. Further, the balance of convenience did not lie in their favour: the Board, as a public entity, was exercising its mandate in accordance with the law in scheduling the examinations for the 15<sup>th</sup> of June 2015 and issuing a public notice with respect thereto to those who were qualified to sit for the examinations. For the same reasons, the public interest would not have been served by issuing the orders that the petitioners were seeking, which would have interfered with the mandate of the 1<sup>st</sup> respondent, and adversely affect the rights of persons who were not parties to the application or the petition.

29. In addition, the Court (Lenaola J) had considered the substance of the issues raised in the petitioners' application in **High Court Petition No 346 of 2013 Joseph Mwisu & Others vs The Pharmacy and Poisons Board**, whose facts were similar to the present petition, which the

respondent relied on in opposing the application the subject of this ruling. Like in the present petition, the petitioners in that case were aggrieved that the Board had refused to register them to practice as pharmacists on the basis that it had not recognized the institutions from which they obtained their diplomas.

30. Without pre-judging the respective arguments and submissions that may be made at the hearing of this petition, it was difficult to find a basis for the contention that the 1<sup>st</sup> respondent has violated any of the petitioners' rights that would justify the issuance of conservatory orders directed at the respondent.

31. It is for the above reasons that I declined to issue the conservatory orders sought by the petitioners, and directed the parties to proceed with the hearing of the substantive petition.

**Dated, and Signed at Nairobi this 17<sup>th</sup> day of September 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Amol and Ms. Fozah instructed by the firm of Amol & Co. Advocates for the petitioners.**

**Mr. Naikuni instructed by the firm of Naikuni, Ngaah & Miencha & Co. Advocates for 1<sup>st</sup> and 2<sup>nd</sup> respondent.**