



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPL. NO. 324 OF 2009

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS TO**

**COMPEL THE RESPONDENTS TO READMIT THE APPLICANTS TO COMPLETE THEIR
STUDIES**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION TO PROHIBIT THE**

**RESPONDENTS FROM EXPELLING AND/OR DISCONTINUING THE APPLICANTS FROM
K.M.T.C.**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI TO QUASH THE**

RESPONDENTS ACTION OF REFUSING TO RE-ADMIT THE APPLICANTS TO K.M.T.C.

**IN THE MATTER OF: SECTION 6 OF THE KENYA MEDICAL TRAINING ACT CAP 261
LAWS OF KENYA**

PENINAH WANJIRU MIRUGI.....1ST APPLICANT

SAMSON KIPCHOGE KANDIE.....2ND APPLICANT

VERSUS

BOARD OF MANAGEMETN K.M.T.C.....1ST RESPONDENT

ACADEMIC BOARD K.M.T.C.....2ND RESPONDENT

RULING

1. There were two applications which were argued before me. The first is a chamber summons dated 10th October, 2009. It is an application brought by the Board of Management K.M.T.C. and Academic Board K.M.T.C. The two were the original respondents to this suit. The respondents' main prayer is an order to stay, set aside or reverse the orders made on the 15th June, 2009 to the effect that the grant of leave to apply for judicial review orders do operate as a stay of the respondents' actions so that the applicants be admitted and be given registration numbers to enable them complete their studies.
2. The second application is a notice of motion dated 17th March, 2011. It is an application brought by Peninah Wanjiru Mirugi and Samson Kipchoge Kandie who are the original applicants in this suit. They seek to have Dr. Olang'o Onudi, the Director K.M.T.C. and Mr. Bernard Wambua Kamuti, Principal K.M.T.C. Port Reitz committed to prison for a maximum period of 6 months for contempt of court orders made on 23rd September, 2009 and issued on 5th October, 2009. The applicants further seek to have the personal property of the two persons attached and sequestered for contempt of court.
3. It is necessary to put the two applications into right perspective by giving a little background.

The two applicants were admitted in the Module II Program for Diploma in Clinical Medicine at the K.M.T.C. Port Reitz College. They had each separately applied for admission in response to an advertisement in the local daily. They reported to the college on 6th October, 2008 and finished the first semester on 5th February, 2009. When they went back for the second semester they were not allowed to register nor were they given any explanation. After following up the matter unsuccessfully they moved to this court and filed an application for leave to apply for orders of judicial review to compel the respondents to readmit the applicants to the college to enable them complete their studies.

4. The application was heard inter-partes before Hon. Ibrahim J. who delivered his ruling on 23rd September, 2009. The application was allowed and orders granted for leave to the applicants to apply for orders of mandamus, prohibition and certiorari and that the grant of leave to operate as a stay of the respondents actions so that the applicants may be admitted to K.M.T.C. and given registration numbers to enable them complete their second semester.

5. The applicants filed the substantive motion for judicial review order on 15th October, 2009. The substantive motion has not been heard to date. In the meantime on the 12th October, 2009, the respondents filed their Chamber Summons dated 10th October, 2009. The application came before Hon. (Prof.) Justice Ojwang who directed that it be mentioned before Hon. Mr. Justice Ibrahim. On the 4th November, 2009 the application came up before Hon. Mr. Justice Ibrahim. The advocate for the applicants indicated that he had a preliminary objection to the application where upon the court delivered a ruling in which it noted that the respondent's application was premature and pre-emptory as no contempt proceedings or execution proceeding in regard to the stay order had commenced. The judge then stated as follows:

“Exercising the court’s inherent jurisdiction and *suo motto*, I hold that on the basis of section 8 (3) of the Law Reform Act, no return shall be made to my order of leave and the order is final subject to the right of appeal conferred by sub-section 5 of the section. The respondent is prohibited from making the application herein. There is a possibility perhaps of revisiting the order of leave or stay if there is fraud or serious non disclosure of material facts. I do not know. In this case the application was heard inter-partes. I therefore do hereby reject to hear the application. I do order

that the substantive notice of motion be heard on priority basis. Costs in the cause.”

6. My understanding of the above is that Hon. Mr. Justice Ibrahim rejected the Chamber Summons dated 10th October, 2009 on two main grounds. Firstly because the application was premature and preemptory, secondly because section 8 (3) of the Law reform Act provides that no return shall be made on an order of leave and therefore the order granting leave was final and only subject to appeal. In effect therefore the Hon. Mr. Justice Ibrahim upheld the preliminary objection which was raised by the applicants’ counsel. The attempt by the respondents counsel to re-argue the application before me is thus misconceived.

7. Moreover given that the order for leave to operate as a stay was issued after an inter-parte hearing even if I were to re-hear the application dated 10th October, 2009, there would be no justification for me to reverse the orders. The respondent is not relying on any new facts, but facts which were in existence at the time the application was argued. The allegation that the applicants fraudulently and irregularly obtained admission to the college is one which can only be ventilated at the hearing of the main application for Judicial Review.

8. In granting leave to the applicants to apply for orders of judicial review Hon. Ibrahim J. did make a finding that the pleadings are regular, proper and competent, and that the applicants have disclosed a *prima facie* case which should be heard on merit . It is not open to this court to revisit that issue again.

9. As to the contention that the order made on 23rd September, 2009 for re-admission is unenforceable because the second semester had actually passed, that contention cannot hold as the order did not specify that the applicants must be admitted in the second semester of any particular year. The logical understanding of the order was that the respondents were to re-admit the applicants in the second semester available. The order was made on 23rd September, 2009, the second semester to which the applicants were denied admission started on 6th March, 2009. It was not practical for the applicants to be admitted to that semester 6 months down the road. Indeed the second semester for the year 2009 had already ended when the order of 24th September, 2009 was made. Therefore the logical understanding of the order is that the respondents were to re-admit the applicants in the next second semester available which would enable the applicants to undertake their studies from the beginning of the semester to the end and this presumably would have been the second semester in the next year i.e. March, 2010. The court has not been told that there was no second semester available in that year for the course being undertaken by the applicants. Thus the alleged impossibility of performance has not been established.

10. I believe I have said enough to lead to the conclusion that the attempt to re-argue the application dated 10th October, 2009 before me is ill advised and doomed to failure.

11. As regards the notice of motion dated 17th March, 2011, the application was filed pursuant to leave granted to the applicants on 10th March, 2011 to institute contempt proceedings against Dr. Olang’o Onudi and Bernard Wambua Kamuti (hereinafter referred to as the alleged contemnors). It is not disputed that the alleged contemnors were served with the order of 24th September together with a notice of penal consequences. It is also evident that the court order has not been complied with to date. The alleged contemnors have merely tried to hide under the excuse that the court order is not enforceable. They have however explained that the second semester in all the K.M.T.C. colleges is from March upto the end of July. Annexure “005” – shows that in the year 2010 the 2nd semester started on 1st March and ended on 9th July, 2010, while for the year 2011 the 2nd semester was from 7th March, 2011 to 15th July, 2011. No explanation has been given as to why the respondents could not have the applicants admitted to any of

these semesters.

12. It is evident that the alleged contemnors have deliberately refused to obey the court orders possibly because they believe the applicants should not be re-admitted as they allegedly secured admission to the college fraudulently. As I have already stated, the respondents will have the opportunity to establish that fact during the hearing of the substantive application for Judicial Review. If the respondents do succeed, it will be to the applicants' detriment as their re-admission will be nullified.

13. Court orders are made to be obeyed and the integrity of the court must be protected. The alleged contemnors both hold public offices. They are not ignorant people who do not understand the implications of disobeying a court order. The applicants counsel did write to the Principal of Kenya Medical Training College as early as 7th October, 2009 warning of the dire consequences in failing to comply with the court order. Notwithstanding this warning and also service of the court order and notice of penal consequences, the court order made on 23rd September, 2009 had been deliberately ignored and disobeyed. The court therefore grants this application and issue orders for warrants of arrest to issue against the alleged contemnors to be produced before this court for committal for contempt of the court order made on 23rd September, 2009 and issued on 5th October, 2009. Those shall be the orders of this court.

Dated and delivered this 29th day of July, 2011.

H. M. OKWENGU

JUDGE

In the presence of:-

..... for the plaintiff
..... for the defendant
..... Court Clerk