



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 316 OF 2010

**IN THE MATTER OF APPLICATION FOR LEAVE TO INSTITUTE CONTEMPT
PROCEEDINGS AGAINST THE INTERESTED PARTY**

AND

**IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND
TECHNOLOGISTS BOARD ACT NO. 10 OF 1999**

AND

**IN THE MATTER OF KENYA GAZETTE NOTICE SPECIAL ISSUE DATED 24TH
SEPTEMBER 2010 (VOL. CXII-94) NO. 11519 AND 11520**

**REPUBLIC.....
....APPLICANT**

VERSUS

**THE MINISTER, MINISTRY OF MEDICAL
SERVICES.....RESPONDENT**

**THE KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS
BOARD.....INTERESTED PARTY**

MOSES COLLINS ONONO LORRE, LABAN ONONO AND

RAPHAEL GACONDE GIKERA ON BEHALF OF THE ASSOCIATION

OF

**MEDICAL LABORATORY SCIENTIFIC
OFFICERS.....SUBJECTS/APPLICANTS**

RULING

The ex parte applicant's application dated 8th February, 2011 seeks the following orders:

“1. That this honorable court be pleased to find and hold that the following persons are in contempt of this courts orders granted on 27th October, 2010;

**i) Michael Abala Wanga
Executive Officer, KMLTTB
P.O. Box 20889 00202
NAIROBI**

**ii) Abel Odhiambo Onyango
Board Chairman, KMLTTB
P.O. box 20889 00202
NAIROBI**

**iii) Peter N. Lokamar
Registrar, KMLTTB
P.O. Box 20889 00202
NAIROBI**

**iv) Patrick Kisabei
Examination Officer, KMLTTB
P.O. Box 20889 00202
NAIROBI.**

2. That this honorable court be pleased to hold that as a consequence of their acts of contempt, they shall be detained in prison for a period of six months or such period that the court may please.

3. That this honorable court may be pleased to nullify all transactions and businesses conducted by the interested party while in contempt and particularly the Board Examination conducted between 6th December 2010 to 15th December 2010.

4. That this honorable court may be pleased to grant such orders and directions as may be appropriate in the circumstances.

5. That the interested party should be condemned to pay the costs of this application.”

The application was supported by an affidavit sworn by **Moses Collins Onono Lorre**, the Chairman of the Association of Kenya Medical Laboratory Scientific Officers. The petitioner deposed that on 27th October, 2010 the ex parte applicants, hereinafter referred to as **“the applicants”** were granted leave to apply for orders of certiorari, prohibition and mandamus in respect of the decision by the respondent and the interested party. The court ordered that leave shall operate as a stay to prohibit the interested party from **“operating or transacting any business for a period of 30 days or until further orders of this court”**. The orders were issued on 27th October, 2010 and were served upon the interested party and the respondent respectively. The orders were extended up to 9th January, 2011.

The applicants further stated that the interested party was served with a penal notice on 11th November and 2nd December, 2010. On 3rd December, 2010 **Michael Abala Wanga**, the Acting Executive Officer of the Kenya Medical Laboratory Technicians and Technologists Board, wrote to the applicants' advocate and acknowledged service of the penal notice. The applicants averred in paragraphs 7 and 8 of the supporting affidavit that:

"7.despite the fact that the interested party together with their agents and servants were well informed of the existence of the said court orders, they proceeded with impunity to disobey the said court orders by advertising in the newspapers, Sunday Standard of 14th November, 2010 for the recruitment of Examiners and Lab Auditors. Attached and marked "MCOL4" is a copy of the said newspaper advertisement.

8. That despite the fact that the interested party had knowledge of the existence of the said court order, they proceeded willfully and intentionally to disobey this court's order by advertising in the Daily Newspapers urging the examiners and students to prepare to sit for the Board exams between 6th December, 2010 to 15th December 2010 knowing there was a court order restraining the interested party from conducting any such exams until the substantive motion is heard and determined. Attached and marked "MCOL5" is a copy of the newspaper advertisement together with a bundle of the actual timetables."

It was further alleged that the interested party further breached the aforesaid court orders by proceeding to withdraw funds and issuing various cheques from the account of the Kenya Medical Laboratory Technicians and Technologies Board. Copies of four cheques issued between 3rd and 15th November, 2010 were annexed to the affidavit. The interested party has further continued to advertise in the local newspapers asking applicants to pay colossal amounts of money for renewal of their licences without due regard to the existence of the said court orders. It is for those reasons that the applicants want to have the interested party and its four above named officers punished for contempt of court.

On 23rd February, 2011 the court directed that this application be heard on 5th May, 2011. The interested party was ordered to file and serve their replying affidavits by 17th March, 2011. The applicants would then file their submissions by 31st March, 2011 and the interested party to put in their submissions by 13th April, 2011. On 5th May, 2011 the court did not sit. The application was therefore mentioned on the following day when the court directed that the application be heard on 27th May, 2011. The applicants had filed their submissions as directed but the interested party did not file their replying affidavit until 5th May, 2011, although the same was served on 11th May, 2011. As at 27th May, 2011 the interested party had not filed their submissions.

On 26th May, 2011 the interested party filed a notice of preliminary objection. The same reads as follows:

"TAKE NOTICE that the 1st interested party shall raise a preliminary objection to the applicant's notice of motion application dated 8th February 2011 (together with the supporting affidavit of Moses Collins Onono Lorre sworn on 8th February 2011 with its various annexures) *in limine* on the following grounds:

1. The Penal Notice (pursuant to the order issued by this Honorable Court on the 27th of October 2011) was not personally served upon Abel Odhiambo Onyango, Peter N. Lokamar and Patrick Kisabei, whom the subject/applicant now seeks to cite for contempt."

At the instance of the applicant, the interested party's replying affidavit was ordered struck out as it was

filed out of time and without leave of the court. No reason was given for the late filing of the same. The aforesaid preliminary objection was argued on 31st May, 2011 and it is the subject of the ruling.

Mr. Ligunya for the interested party submitted that the order alleged to have been disobeyed was not personally served upon **Abel Onyango Odhiambo, Peter Lokamar** and **Patrick Kisabei**. The penal notice was also not served upon the said persons. Service was only effected upon Michael Wabala Wanga. Further, the order that was served upon Mr. Wanga was not accompanied by a penal notice, the latter was served on 11th November, 2010 whereas the order was served on 27th October, 2010. In any event, Mr. Ligunya added, what was purported to be a penal notice is a letter from the applicant's advocate and the same does not suffice as a penal notice.

Counsel further submitted that for a party to be tried for contempt of court the order that is alleged to have been breached must be served with a penal notice indorsed on the face of the order. He cited the case of **KARIUKI & 2 OTHERS v MINISTER FOR GENDER, SPORTS, CULTURE AND SOCIAL SERVICES & 2 OTHERS [2004] 1 KLR 588**. In that case, Lenaola J. referred to the law of contempt in England from where the Kenyan law on the subject is borrowed and stated that in England, as a general rule, no order of court requiring a person to do or restrain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. He further held that the copy of the order must be endorsed with a notice informing the person to whom the order is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

Mrs. Manyarkiy for the applicants opposed the preliminary objection. She contended that the preliminary objection raises issues of fact and not matters of law. She said that service of the said order can only be disputed by way of an affidavit and since the interested party's affidavit had been struck out there were no factual depositions to challenge the affidavit of service on record.

Counsel further submitted that there was proper service upon all the persons sought to be cited for contempt. Apart from serving the order upon Mr. Wanga and the entire Board, a penal notice was also served in form of a letter done by her office. Mr. Wanga acknowledged service of the penal notice by a letter dated 3rd December, 2010. In her view, the format of a penal notice is not important.

In support of the above submissions, counsel cited the case of **GATIMU FARMERS COMPANY v GEOFFREY KAGIRI KIMARI & 3 OTHERS [2005] eKLR**. She added that knowledge of an order supersedes service of the same. She urged the court to dismiss the preliminary objection.

I have considered the rival arguments as summarized hereinabove. There is an affidavit of service sworn by **Boniface Mutua Nzau**, a process server, on 10th December, 2010. He deposed that on 27th October, 2010 he proceeded to Kenyatta National Hospital where the offices of the Kenya Medical Laboratory Technicians and Technologists Board are located. A lady by the name Mary pointed out to him the office of Michael Abala Wanga and he served upon him the orders issued by this court on 27th October, 2010. Mr. Wanga accepted service by stamping the reverse side with the Board's official stamp and signing the same.

On the same day the process server went to Afya House, 6th Floor where the Minister's office is located and served the order as well. The service was effected upon one Mrs. Onyango.

The process server further stated that on 11th November, 2010 he proceeded to the offices of the interested party and served the penal notice upon Mr. Wanga but he directed him to serve the same upon the Board's advocates, Messrs Rachier and Amollo, which he did. On 2nd December, 2010 the process server was instructed to return to the offices of the interested party and serve the penal notice upon Mr.

Wanga, which he did.

On 3rd December, 2010 the interested party through Mr. Wanga wrote to the applicants' advocate and acknowledged receipt of the penal notice. The letter was written on the official letter head of the Kenya Medical Laboratory Technicians and Technologists Board. It was copied to the Chairman of the Board and Mr. Peter Lokamar, the Registrar, among others.

From the contents of the affidavit of service, it would appear that the order in issue was not personally served upon Abel Onyango Odhiambo, Peter N. Lokamar and Patrick Kisabei. It is only Mr. Wanga who was personally served. However, there can be no denial that the order was served upon the Board since service of the same was effected upon the Board's Chief Executive Officer, Mr. Wanga. That is not denied. To the extent that service was effected upon the Board, all the Board members are in law presumed to be aware of the said orders.

Section 5(1) of the **Judicature Act** which grants power to the High Court and the Court of Appeal to punish for contempt of court states as follows:

“The High Court and Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

Whereas I agree with the legal position re-stated by Lenaola J. in **KARIUKI & 2 OTHERS v MINISTER FOR GENDER, SPORTS, CULTURE AND SOCIAL SERVICES & 2 OTHERS** (Supra), there are exceptions to that strict construction of the law. **Halsbury's Laws of England, 4th Edition Volume 5 paragraph 65** states as follows:

“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise.”

I agree with the holding of Kimaru J. in **GATIMU FARMERS COMPANY v GEOFFREY KAGIRI KIMARI & OTHERS** (Supra) that the most important aspect for consideration in an application for contempt is knowledge of a court order. In my view, knowledge is higher than service.

There can be no denial that all the members of the Board and other persons who may have acted on instructions of the Board in respect of the acts complained about were fully aware of the existence of this court's orders. The argument that personal service of the orders was not effected upon all the persons sought to be punished or that the order was not indorsed with a penal notice is, in my view, no more than a subterfuge – a seemingly clever explanation or trick intended to justify the contemptuous acts complained of.

Article 159(2) (d) of the **Constitution** requires the court to administer justice without undue regard to procedural technicalities. **Article 10** of the **Constitution** stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he

was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court.

In **HADKINSON v HADKINSON** [1952] All ER 567 at page 569, Romer, LJ held as follows:

“It is the plain and qualified obligation of every person against, or in respect of whom an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

For me, that is the position I take in this matter. I believe that the court will be failing in its constitutional mandate if it failed to maintain the dignity and respect for the rule of law on account of procedural technicalities such as the preliminary objection taken by the interested party herein. I dismiss the preliminary objection with costs to the applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY, 2011.

**D. MUSINGA
JUDGE**

In the presence of:

Jane – court clerk

Mr. Muchiri for Mr. Amolo for the Interested Party

Mrs. Manyarkiy for the Applicants