



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. JR.316 OF 2010

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS BY MOSES ONONO LORRE, LABAN ONONO AND RAPHAEL GACONDE GIKERA ON BEHALF OF THE ASSOCIATION OF MEDICAL LABORATORY SCIENTIFIC OFFICERS

AND

IN THE MATTER OF: THE MEDICAL LABORATORY TECHNICIANS & 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

BETWEEN

REPUBLICAPPLICANT

AND

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

THE KENYA MEDICAL LABORATORY TECHNICIANS & TECHNOLOGISTS BOARD.....INTERESTED PARTY

EX-PARTE

MOSES ONONO LORRE, LABAN ONONO AND RAPHAEL GACONDE GIKERA ON BEHALF OF THE ASSOCIATION OF MEDICAL LABORATORY SCIENTIFIC OFFICERS.....SUBJECTS/APPLICANTS

RULING

This is a ruling in respect of an application by way of Notice of Motion dated 8th February, 2011 and filed on the same day seeking the following orders:

- 1) **THAT** this Honourable Court be pleased to find and hold that the following persons are in contempt of this court’s 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. 20889 – 00202,
NAIROBI.

(vi) Patrick Kisabei
Examination Officer, KMLTTB
P.O. Box 20889 – 00202
NAIROBI

(2) **THAT** this Honourable 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 Honourable 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 Honourable Court may be pleased to grant such other 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 grounds stated on the face of the application and by an affidavit sworn by Moses Collins Onono Lorre, the National Executive Chairman of the Association of the Medical Laboratory Scientific Officers (AKMLSO).

It is the applicant's case that the four cited contemnors should be found guilty of contempt of court and be punished accordingly for having allegedly disobeyed the court orders issued on 27th October, 2010 directed at the interested party herein, the Kenya Medical Laboratory Technicians and Technologists Board (hereinafter referred to as the Board).

It is important to set out the background against which the application is made so that issues raised in this application can be better understood.

On 27th October, 2010 the ex-parte applicants moved the court through a Chamber Summons filed on the same date under certificate of urgency in which the following orders were sought:

1) **THAT** this application be certified urgent in the first instance.

2) **THAT** the Honourable Court be pleased to grant leave to the subject/applicants to institute Judicial review proceedings for Orders of Certiorari, Prohibition and Mandamus against the decision by the Minister for Medical Services to constitute by Gazettement members of the Medical Laboratories Technicians and Technologists Board contained in the Gazette Notice No.11519 and Gazette Notice No.11520 dated 28th September, 2010.

3) **THAT** the leave above to operate as a stay of further proceedings or dealings of respondent and the interested party pending the hearing and determination of the substantive motion.

4) **THAT** the costs of this instant application do abide the outcome of the substantive motion.

The application was premised on the following grounds:

- a) **THAT** the Respondent contravened the provisions of the Act, the Medical Laboratory Technicians and Technologists Act, 1999 by appointing the Board members through powers conferred on him under Section 26(1) instead of appointing them under Section 6(1). The Special issue of the Kenya Gazette No.11519 and 11520 dated 24th September, 2010 are therefore defective.
- b) **THAT** the respondent exceeded his powers conferred on him under the Act by contravening Section 6(1)(i) of the Act the Medical Laboratory Technicians and Technologist Act and contravening Section 6(1)(i) of the Act by appointing six Laboratory Technicians and Technologists whereas he is only permitted to appoint three but not more than five.
- c) **THAT** the respondent contravened the provisions of Section 6(1)(a) of the Act the Medical Laboratory Technicians and Technologists Act, Act No.10 of 1999 by the Gazettement of the Director of Medical Services in his personal capacity whereas the Act provides that the Director is a member by virtue of his office. The Act does not also provide for an alternate member whatsoever.
- d) The Respondent also contravened Section 6(1)(c) of the Act by failing to gazette the Name of the Registrar to the Board who should be the Chief Medical Laboratory Technologist.
- e) The Respondent further erred in law by contravening the provisions of Section 6(1)(e) where he omitted the names of Medical Laboratory Technologist in charge of the Division of Vector – borne diseases.
- f) The Respondent also contravened the provisions of Section 6(1)(h) by omitting from the list of the gazetted members the name of the National Executive Chairman of the Association of Medical Laboratory Technicians and Technologists Officers who **MUST** chair the disciplinary Committee within the Board.
- g) The Respondent also contravened the provisions of the Act Section 6(2) where he is required to appoint the Chairman from among the members of the Board but instead he appointed a person who was not an elected member of the Board as Chairman and worst still under Section 6(1).
- h) The Respondent under Section 6(1)(f) and (g) intentionally ignored the list of the names of elected members of the association to the Board and instead maliciously chose to pick on some of the names leaving out others without any justifiable reason.

The application was heard ex-parte by Hon. Maraga, J who in the exercise of his discretion granted leave as sought and directed that the leave so granted 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 the court. The substantive motion was to be filed and served within the following ten (10) days.

On 18th November, 2010 the interested party filed an application seeking to vacate the leave granted to the Ex-parte Applicants as well orders of stay. The application was scheduled for hearing on 29th November, 2010 but on 25th November, 2010 Mrs. Manyarkiy, Counsel for the Applicants attended the court and successfully applied for extension of the interim orders to 29th November, 2010 since the same ought to have lapsed on 27th November, 2011. On 29th November, 2011 hearing of the application did not take place and it was adjourned to 20th January, 2011. The interim orders were also extended till then.

It is the applicant's contention that when the orders were first issued on 27th October, 2010 they were extracted and served on the Board through its Chief Executive Officer, Mr. Michael Abala Wanga together with a penal notice and that the board was well aware of the extension of the said orders since it was represented by an advocate in the proceedings in which the orders were severally extended.

In paragraph 7 and 8 of the applicant's supporting affidavit Moses Collins Onono Lorre depones that despite the fact that the board together with its agents and servants were well informed of the existence of the court orders, they proceeded with impunity to willfully and intentionally disobey the courts orders by advertising in the Sunday Standard of 14th November, 2010 for the recruitment of Examiners and Lab Auditors and urging the lab technicians and technologist students to prepare to sit for the Board examinations between 6th -15th December, 2010. Copies of the Newspaper advertisements and timetables for the said examinations were annexed to the supporting affidavits and **marked MCOL4** and **MCOL5**.

In paragraph 10 and 11 of the supporting affidavit, the applicants detail other activities of the interested party which they claim was further evidence of the board's contempt of the court's aforesaid orders. They relate to issuance of four cheques dated 3rd November, 2010 and 15th November, 2010 to different beneficiaries. **Copies of the said cheques are exhibited as annexures marked MCOL7**. In paragraph 11, it is deponed that the board in disobedience of the courts orders advertised through the daily newspapers of 20th January, 2011 that members of the applicants association should pay colossal amounts of monies for renewal of their licences. **The said advert was annexed to the affidavit and marked MCOL8**.

The interested party (Respondent for purposes of the application) opposed the application through a replying affidavit sworn by Michael Abala Wanga the Chief Executive Officer of the board on 3rd May, 2011. The Replying affidavit was however expunged from the record on 11th May, 2011 by Musinga, J for having been filed out of time and without leave of the court. After the Replying affidavit was expunged from the record, the Respondent's only option was to oppose the application on points of law only.

The application was argued before me by counsels for both parties on 17th October, 2011. In her submissions, Mrs. Manyarkiy counsel for the applicants maintained that the Board was served with the court orders and a penal notice through its Chief Executive Officer and that all the board members and its officers had knowledge of the said orders whether or not they were personally served with the said orders. She submitted that knowledge of court orders is superior to personal service and relied on the case of **Gatimu Farmers Company –versus- Geoffrey Kagiri Kimari and Others – Civil Suit No.302 of 2004**. She stated that since the board was served with the court orders of 27th October, 2010 and its officers including the four cited for contempt of court had knowledge of the same and they proceeded to carry out activities that were in flagrant breach of the orders, they should be punished for contempt of court in order to uphold the dignity of the court.

Mr. Ligunya, counsel for the Respondents on his part in opposing the application submitted that the court orders of 27th October, 2010 only prohibited the nineteen people appointed to sit as board members of the interested party from sitting as a board and transacting any business and that the orders did not extend to prohibit members of its secretariat from continuing with the daily operations of the board. Mr. Ligunya maintained that within the board there was an organ known as the secretariat which operates independently from the board and that it is this secretariat that administered the examinations which the applicant contends were done in contempt of the court orders. He went further to submit that the applicant had failed to demonstrate that the board ever sat and deliberated on any business including the taking of examinations by students between 6th – 15th December, 2010. It was his view that the orders so generally crafted were not meant to interfere with the studies of thousands of students who had been duly registered to sit for the examinations in December 2010 and who had nothing to do with contests of how the board should be constituted.

Having considered the application, the supporting affidavit together with its annexures alongside the rival submissions advanced by the respective parties and having also perused the entire court record, I find that service of the court orders issued on 27th October, 2010 and penal notice on members of the Respondent board is not in dispute in this application the same having been settled by Musinga, J in his ruling delivered on 1st July, 2011. The ruling was in respect of a preliminary objection filed by the interested party on 26th May, 2011 to the hearing of the applicant's instant application on grounds that

three of the cited contemnors namely Abel Odhiambo Onyango, Peter N. Lokamar and Patrick Kisabei had not been personally served with the court orders and the penal notice.

In finding that the members of the board were properly served with the court orders and penal notice, Musinga, J adopted the holding by Kimaru, J in **Gatimu Farmers Company –versus-Geoffrey Kagiri Kimari & Others (Supra)** that knowledge of court orders supercedes personal service and delivered himself thus

“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”

I cannot agree more.

Having established that the board members were properly served with the court orders of 27th October, 2011 which as stated earlier were extended from time to time upto 20th January 2011, the only task left for this court to determine is whether the board operated or transacted any business for the time the orders were in force in disobedience of the said orders.

The Board is established under Section 3 of the Medical Laboratory Technicians and Technologists Act, Act No.10 of 1999 (hereinafter referred to as the Act) as a body corporate with perpetual succession and a common seal. Being a body corporate, it is common knowledge that the Board can only execute its mandate and functions as provided for in Section 5 of the Act through either members appointed to sit in the board or through officers appointed for that purpose under Section 11.

It is the applicant’s case that the four cited contemnors were officers/members of the board being the Chief Executive Officer of the board, the Board Chairman, the Registrar and Examinations Officer respectively and that they were the officers who were directly involved in the advertisements complained about and the administration of examinations to student in flagrant disobedience of the court orders.

Though it is not disputed by the Respondent that the acts attributed to the four contemnors amounted to disobedience of the court orders, Mr. Ligunya in his submissions apparently contested the claim that the four contemnors are indeed officers of the board with the designations described in the application and noted that no evidence was availed to the court by the applicant to prove that claim. I concur with Mr. Ligunya that with the exception of Michael Abala Wanga, no evidence was availed to the court to confirm that the other three persons cited for contempt were indeed officers of the board.

With due respect, I find no substance in Mr. Ligunya’s submission that the board is not guilty of contempt of court since it did not sit to transact any business during the period of validity of the court orders and that the acts complained about that amounted to disobedience of the court orders were executed by the board’s secretariat which according to him was separate from the board and operated independently from the board.

I have painstakingly gone through the Medical Laboratory Technicians and Technologists Act and I have not come across any provision that provides for the establishment of an independent secretariat within the main board. It is very clear from the constituting statute read as a whole that the daily operations and transactions of the board were meant to be carried out by officers appointed by the board and in carrying out those functions, those officers would be acting as agents of the board. It is my finding then that no independent secretariat was contemplated under the Act and there is no evidence that any existed. If any existed, then it must have existed as an internal arrangement within the board in order to assist it execute its mandate and functions under Section 5 of the Act.

Now that it is not disputed that the acts complained about by the applicant actually constituted

disobedience of the aforementioned court order, the only other issue for this court to determine is whether the four persons cited for contempt of court were the ones responsible for publishing the said advertisements and administering of examinations to students. From a reading of annexures marked MCOL4, MCOL5, MAW6 and MAW9, it is clear that the officer who caused the Newspaper adverts to be published calling for recruitment of Lab Auditors and professional examiners and confirming the taking of examinations by students in December 2010 and even publishing the examinations timetable was Michael Abala Wanga the board's Chief Executive Officer. This is the same officer who was personally served with the court order first issued on 27th October, 2010 and the penal notice on behalf of the board. Having been fully aware of the contents of the aforesaid court order, Mr. Michael Abala Wanga deliberately transacted part of the board's business that of preparing for and administering examinations to students in laboratory technology in flagrant disobedience of the said court orders. This was in satisfaction of the board's mandate of training and regulating the registration and practice of laboratory technicians and technologists in Kenya as required of it by Section 5 of the Act. I find that the actions by this officer were in total contempt of the court orders and I am convinced and I so find that he is guilty of contempt of court.

As for the other three cited contemnors, as observed earlier, there is no proof that they were indeed officers of the board in the capacities described in the application and even if they were, no evidence was availed to the court to demonstrate that they participated in the violation of the court orders or what role they played in the alleged disobedience if any. As held by **L. Denning in Re Bramblevale Ltd (1970) CH. 128 at page 137** – ***“A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.....”***. I respectfully agree with that exposition of the law.

In view of the foregoing I do not find Abel Odhiambo Onyango, Peter N.Lokamar and Patrick Kisabei guilty of contempt of the court orders issued on 27th October, 2011 and extended upto 20th January, 2011.

As for the other acts said to have been done by the contemnors in disobedience of the aforesaid court orders as deponed in the applicants supporting affidavit paragraphs 10 and 11 namely issuing of several cheques and requiring payment of monies by the applicant's members for renewal of licences, I find that parties did not address these complaints in their submissions and they seem to have been abandoned. Be that as it may, the advertisement attached to the supporting affidavit as evidence of the claim that the contemnors were demanding money for renewal of licences though appearing in the letter heads of the board is not signed by any of the persons cited for contempt and is merely a 30 day's notice notifying public and private medical laboratories and their clients that they needed to formalize their registrations, licences and their renewal within that period. No sums of money were demanded in that notice. The signatories of the relevant cheques were also not disclosed. In the premises I find that the applicants have not proved that the four contemnors were responsible for the issuance of the said cheques or publication of the said advert.

Lastly, there is one more aspect of this matter that caught my attention and I think it would not be proper for me to conclude this ruling without making my observations on the same. This concerns Mr. Ligunya's submission that the orders of 27th October, 2010 were drafted in general terms and that could not have been intended to injure the rights of innocent third parties who had nothing to do with board wars.

While I agree with Mr. Ligunya that the said orders were issued in general terms and that they unfortunately had the effect of paralyzing the operations of a state corporation and had potential to adversely affect the rights of thousands of students who had gone through paid tuition and registered to take examinations administered by the board in December 2010, they were nevertheless court orders which had to be obeyed at all costs.

In **KALYASOI FARMERS CO-OPERATIVE SOCIETY & 6 OTHERS –versus- COUNTY COUNCIL OF NAROK [2005]** eKLR the court cited **HADKINSON V HADKINSON [1952] All ER 567 at 569** where Romer L, J 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”.

If the interested party was so aggrieved by the generality of the said orders, it ought to have sought their variation or discharge at the earliest opportunity. For as long as the orders remained in force the interested party and its officer's were duty bound to obey the orders in the form in which they were issued without fail.

The courts are enjoined by Art.10(2) of the Constitution of Kenya 2010 to apply or interpret the Constitution and any other law in a manner that promotes the national values and principles of governance that binds all state organs, state officers and public officers. Those values and principles of governance include respecting the rule of law among others. In order to preserve the dignity and authority of the court and to advance the rule of law as well as encourage the public's confidence in the administration of justice, those who disobey court orders cannot be allowed to do so with impunity. They must be held to account by being found guilty of contempt of court and be punished accordingly.

In conclusion, I hold that Abel Odhiambo Onyango, Peter N. Lokamar and Patrick Kisabei are not guilty of contempt of court but Michael Abala Wanga is guilty of contempt of court having knowingly and deliberately violated the court orders issued on 26th October, 2010 and extended thereafter. In the circumstances, the said Michael Abala Wanga is ordered to appear before this court on 17th November, 2011 for mitigation and sentencing. The interested party (the board) shall bear the costs of this application.

DATED and DELIVERED at Nairobi this 10th day of November, 2011

C. W. GITHUA
JUDGE

Ruling read in Open Court in the presence of:

Mrs. Mari for Applicant

Mr. Ligunya for Respondent

Court Clerk - Florence

C. W. GITHUA
JUDGE