



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Suit 37 of 2006

1. DR. MOSES NJUE GACHOKI

**2. KING'S MEDICAL SCHOOL.....
.....PLAINTIFFS**

VERSUS

1. THE REGISTRAR

2. THE CHAIRMAN

3. KENYA MEDICAL LABORATORY TECHNICIANS AND

**TECHNOLOGISTS BOARD.....
.....DEFENDANTS**

RULING

By a notice of motion brought under **order L rule 1, 2 & 3** of the Civil Procedure Rules and **sections 3 & 3A** of the Civil Procedure Act (erroneously stated as Rules) Dr, Moses Njue Gachoki and Kings Medical School (*hereinafter referred to as 1st and 2nd Applicants respectively*) seek orders against The Registrar, The Chairman, and Kenya Medical Laboratory Technicians and Technologist Board, (*hereinafter referred to as 1st, 2nd and 3rd Respondents respectively*) seeking orders: -

- 1) That the Defendants herein be ordered by this court to re-evaluate end of first year results 2006 to include the 24th March 2006 to include the continuous assessment mark. (sic)**
- 2) That the first year results be set aside, the Defendants be restrained to supplementary examinations until such Re-evaluation and inclusion of continuous assessment marks is done. (sic)**

The application is supported by the affidavit of Dr. Moses Gachoki in which He explains that the Applicant Plaintiff's institution which is duly registered by the Ministry of Health to train Diploma and certificate students in Medical Laboratory Technology trained and offered students for examination but that the Defendants had declared end of year examination which excludes the continuous assessment marks resulting in some students being discontinued and others being referred when they have actually passed the examination.

It is contended that the results released by the Respondents are in total disregard of the syllabus as

provided under section 5 (2) of the Medical Laboratory Technician and Technologists Act 1999. The Respondents raised a preliminary objection to the hearing of the Applicants motion on the grounds that there was misjoinder of the Registrar and the chairman to the suit and that the Plaintiffs had no *locus standi* to file the suit or the application. It was also contended that the Plaintiffs had not complied with the Civil Procedure Rules with regard to representative actions and that the Applicant's suit was frivolous and an abuse of the process of the court. Given the urgency of the application before the court, I overruled the preliminary objection as it was my considered opinion that the preliminary issues could be raised in response to the application and considered within the main application.

Relying on the case of *Milimani Commercial Courts H.C.C.C. 851 of 2002 Nairobi City Council v/s Cris Evarard & Others*. It was submitted on behalf of the Respondent that the Plaintiffs' suit was fatally defective having been instituted in the name of a person not recognized by law. It was also submitted that the Plaintiffs had no cause of action as the cause of action envisaged could only be canvassed by the students in an approved registered institution and that the names of the students should be disclosed. It was further submitted that the weighting in respect of the continuous assessment results referred to by the Applicants related only to the final results.

Although the application is brought under **sections 3 & 3A** of the Civil Procedure Act, it is evident from the prayers sought that the application is in actual fact seeking orders in the nature of a mandatory injunction. From the way the prayers are framed, there is no indication that the prayers sought are interlocutory orders. Indeed the plaint also seeks the very same orders. In effect therefore were the court to grant the prayers sought, that would be the end of the suit as there would be no need for the applicants to pursue the matter further.

As was held by Onyango Otieno J. in the case of *Boyani v Mwaghoti [2002] 2 K L R 774* a mandatory injunction at an interlocutory stage is granted "only when the Plaintiffs' case is clear and incontrovertible." Assuming that the motion is one for an interlocutory mandatory injunction, the question then is whether the Applicants have established a clear and incontrovertible case.

The cause of action as seen from the plaint paragraphs 8, 9 and 10 is the deprivation of marks allegedly scored, a denial of right to pursue further education and the discontinuation and referral of some students. Obviously these are complaints that cannot be raised by the Applicants alone, but can only be raised in conjunction with the students. Although it was submitted that the suit was a representative suit, there is nothing on the face of the plaint to show that the suit is a representative suit nor were the provisions of order I rule 8 of the Civil Procedure Rules complied with.

Further the Medical Laboratory Technicians and Technologists Act 1999 section 3 (1) & (2) establishes the Kenya Medical Laboratory Technicians and Technologists Board as a corporate body capable of suing and being sued; The Registrar and Chairman of the Board are merely members of Kenya Medical Laboratory Technicians and Technologists Board and cannot be sued in their individual capacity in relation to matters of the Board. It is evident that there was misjoinder of the Defendants. In the light of these flaws, the Applicant's suit against the Respondent is fatally defective and cannot form the basis for any interlocutory mandatory injunction.

Finally, the application was poorly drawn and brought under the wrong provisions of the law. An application for an interlocutory injunction, can only be maintained under the provisions of **Order XXXIX** of the Civil Procedure Rules.

For all the aforesaid reasons I find that the notice of motion dated 19th June 2006 must fail. It is accordingly dismissed.

Dated, signed and delivered this 12th day of July 2006.

H. M. OKWENGU

JUDGE