



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent) (Civil Appeal E144 of 2021) [2021] KECA 97 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 97 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPEAL E144 OF 2021**  
**W KARANJA, MSA MAKHANDIA & KI LAIBUTA, JJA**  
**OCTOBER 22, 2021**

**IN THE MATTER OF**

**PHARMACY AND POISONS BOARD ..... 1<sup>ST</sup> APPLICANT**

**REGISTRAR, PHARMACY AND POISONS BOARD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NICHOLAS MWITI ..... RESPONDENT**

**NJERU NYAGA KIVUTI ..... RESPONDENT**

**JOSEPHAT MATOKE ..... RESPONDENT**

**ALEX MWANGANGI ..... RESPONDENT**

**BEATRICE ADHIAMBO ..... RESPONDENT**

**SHARF MBANI ..... RESPONDENT**

**JOSHUA MBINDYO ..... RESPONDENT**

**EVERLYN WAIRIMU ..... RESPONDENT**

**KENNEDY MIRITI ..... RESPONDENT**

**WALTER NYAMACHE ..... RESPONDENT**

**GIDRAPH KARUNGE ..... RESPONDENT**

**KHADIIJA GALGALO ..... RESPONDENT**

**IRENE KATUNGE ..... RESPONDENT**

**LYDIAH KARIMI ..... RESPONDENT**

**MORGAN MUKTHAR ..... RESPONDENT**

**CATHERINE NJAGI ..... RESPONDENT**

**MICHAEL KIMEU ..... RESPONDENT**



BRENDA OKUTO ..... RESPONDENT  
CONSOLATA OLUKHO MAKOKHA ..... RESPONDENT  
GEZIAH ANDANJE ..... RESPONDENT  
STEPHEN ASWANI ..... RESPONDENT  
JUDITH ONGERI ..... RESPONDENT

*(Being an application for stay of execution from the Ruling and Order of the High Court of Kenya at Nairobi delivered by the Hon. Justice W. Korir dated 24th of March, 2021 in High Court Constitutional Petition No. 140 of 2015)*

## RULING

- 1 The Applicants, the Pharmacy and Poisons Board and the Registrar Pharmacy and Poisons Board, were aggrieved by the Ruling and Order of the High Court of Kenya at Nairobi (Hon. Justice W. Korir) dated and delivered on 24<sup>th</sup> March 2021 in High Court Constitutional Petition No. 140 of 2015. In his Ruling, the learned Judge dismissed the applicants’ application dated 3<sup>rd</sup> November 2020 seeking to purge the contempt prior to the date scheduled for sentencing on the grounds that they were in contempt of court in failing to obey the orders of the High Court issued by Hon. Justice E. C. Mwita on 9<sup>th</sup> March 2018. We find nothing on the record before us to show the nature of the orders made by Justice Mwita of which the applicants were in contempt. Suffice it to observe that, by the Motion before us, the applicants seek:
  - (1) spent ...;
  - (2) “that there be stay of execution of the Ruling, resultant order and any other consequential orders by Hon. Justice W. Korir delivered on 24th March 2021 pending the hearing and determination of the intended appeal to be filed by the applicants herein”; and
  - (3) that costs be in the cause.
- 2 The applicants’ Notice of Motion dated 4<sup>th</sup> May 2021 is curiously made under Rule 15(2) of the [Court of Appeal Rules](#) (“Signature of documents in relation to criminal appeals”), which is not relevant to the application before us. It is also noteworthy that the application is accompanied by an unsigned affidavit purported to be sworn by Frederick Siyioi (counsel for the applicants), the effect of which we will shortly address. Neither are the annexures thereto marked or sealed by the Commissioner for Oaths, weighty discrepancies to which we will shortly return.
- 3 Annexed to the applicants’ Motion is a Notice of Appeal dated 9<sup>th</sup> April 2021, 16 days from the date on which the impugned Ruling and Order were made. Yet there is nothing on the record before us to suggest that the applicants had sought leave to file the Notice out of time. Neither is there anything to show that the Notice of Appeal has been lodged in the High Court.
- 4 The applicants’ Motion is opposed in terms of the 1<sup>st</sup> respondent’s replying affidavit sworn on 15<sup>th</sup> May 2021. In his replying affidavit, Nicholas Mwiti contends *inter alia* that –
  - (a) Frederick Siyioi is a medical doctor, and not an advocate as alleged in paragraph 1 of his supporting affidavit; and



(b) the application dated 3rd November 2020 was for stay of execution and review of an earlier Ruling and Order, and did not seek to purge the contempt as alleged.

5. The mandatory provision of Rule 75(2) of the Court of Appeal Rules requires that a Notice of Appeal be lodged within 14 days of the date of the decision against which it is desired to appeal. Failing compliance, the appellant is obligated to seek extension of time pursuant to Rule 4 to lodge the Notice out of time. The applicants have neither complied with Rule 75(2) nor sought extension of time pursuant to Rule 4. Consequently, there is no appeal properly before this Court in respect of which the orders sought would be granted.
5. Notwithstanding the foregoing, it would be remiss of us not to comment on, albeit obiter, to set the law straight on this and other issues that emerge from the application before us. With regard to the unsigned supporting affidavit, the unmarked and unsealed annexures, it would suffice to observe that such an affidavit is fatally defective and of no value to the applicants' Motion.
6. Addressing itself to the effect of an unsigned affidavit, the Supreme Court in Civil Application No. 26 of 2018 *Gideon Sitelu Konchellah v. Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR observed that such an affidavit is of no legal value to the matter before the court and that, in so far as it is defective, it is deemed that there is no affidavit on record.
7. The same fate befalls unmarked and unsealed annexures. They are of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the *Oaths and Statutory Declarations Rules*.
8. Turning to the principles that govern stay of execution of an order or decree pending appeal or intended appeal, it is noteworthy at the onset that the order sought to be stayed is the order dismissing the applicants' application dated 3<sup>rd</sup> November 2020. A negative order dismissing an application cannot be stayed, and we need not say more. Suffice it to observe that the Ruling and Order of Hon. Justice W. Korir made on 24<sup>th</sup> March 2021 dismissing the applicants' application aforesaid did not restrain or require anything to be done by the parties. Accordingly, there is nothing to be stayed.
7. As to whether the applicants have an arguable appeal with the possibility of success, or whether the intended appeal if successful would be rendered nugatory should stay not be granted, we need not go beyond our finding that there is no appeal properly before us to merit a grant of the orders sought. Having considered the Applicants' Notice of Motion dated 4<sup>th</sup> May 2021, the 1<sup>st</sup> Respondent's replying affidavit, the respective submissions of counsel for the applicants and counsel for the respondents, we find that the applicants Motion fails. Accordingly, the same is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**



**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true  
copy of the original.*

**DEPUTY REGISTRAR**

