IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED JJ.A.)

CIVIL APPEAL NO. 172 OF 2016

BETWEEN

JOSEPHAT MWISA & 24 OTHERS.....APPELLANTS

AND

PHARMACY AND POISONS BOARD.....1st RESPONDENT

THE REGISTRAR,

PHARMACY AND POISONS BOARD.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (LENAOLA, J.), dated 19th February, 2016

in

HIGH COURT PETITION NO. 346 OF 2013)

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JUDGMENT OF THE COURT

[1] This appeal arises from a petition that was lodged in the High Court by Josephat Mwisa and 24 others persons. The petitioners who are now the appellants before us had moved the High Court by way of a petition under **Articles 22, 23** and **258** of the **Constitution,** seeking declarations that their rights under **Articles 27, 43, 47** and **73** of the **Constitution** had been violated, and an order directing the respondents who were the Pharmacy and Poisons Board and the Registrar, Pharmacy and Poisons Board *(1st and 2nd respondent respectively)* to admit and license the Petitioners to practice as pharmaceutical technologists.

[2] The appellants all claim to be holders of a diploma in Pharmacy having sat and passed an examination set by the Kenya National Examination Council (KNEC); that KNEC is a statutory body charged with setting, maintaining examination standards, and conducting public examinations within Kenya; that having acquired the diploma in Pharmacy the appellants were qualified under **section 8(2)** of the **Pharmacy** and **Poisons Act (PP Act)** to be enrolled into the Register as Pharmaceutical Technologists; that the appellants sought the prescribed forms from the respondents to enable them apply for registration and a licence to practice as pharmaceutical technologists but the respondents declined to give the respondents the prescribed forms; and that the respondents have thereby denied the appellants their right to practice as pharmaceutical technologists.

[3] In addition, the appellants maintained that the respondents' action against them was discriminatory and a violation of Article 27 of the Constitution as other persons holding similar qualifications had been registered and issued with practicing certificates; that the respondents' action was ultra vires the respondents' mandate and also a violation of the appellants' legitimate expectation that the college where they studied which was approved by the Commission for Higher Education, and the examinations conducted by KNEC, were actions of statutory bodies that should be upheld by all public agencies; and that their right to fair administrative action as provided under **Article 47** of the **Constitution** was violated.

[4] In reply to the petition, Dr. Kipkerich Koskei who is the Chief Pharmacist and also Secretary cum Registrar of the Pharmacy and Poisons Board, swore a replying affidavit in which he maintained that the appellants were acting in bad faith and had no proper cause of action against the respondents. Dr Koskei swore that the Pharmacy and Poisons Board has the mandate to control the trade and practice of

pharmacists including the training; that the petition was based on misrepresentation and misleading facts; that the correct position was that the appellants were denied the requisite forms because they did not satisfy the Board that they were eligible for consideration for enrolment as pharmaceutical technologists as they did not hold a Diploma in Pharmacy from a college approved by the Board as required under **section 8(2)** of the **PP Act.**

[5] Dr. Koskei further explained that an inspection carried out jointly by the Ministry of Education and the Ministry of Health had revealed that the *"The Kenya College of Medicine & Related Studies"* where most of the appellants claimed to have undertaken their studies was not one of the institutions qualified and approved to offer diploma in Pharmaceutical studies in Kenya; that on 13th December 2006, the said college had been warned by the Board to desist from misleading the public; that sometime in April, 2013 the Board carried out an advertisement in the Daily Nation Newspaper providing a list of the institutions approved to offer Diploma Course in Pharmaceutical Technology; that the Kenya College of Medicine & Related Studies was not on that list; that the Diploma course purported to have been offered to the appellants was illegally offered; and that KNEC only had authority to administer the examination to students from colleges approved by the Pharmacy and Poisons Board.

[6] In response to Dr Koskei's affidavit, Josephat Mwisa swore a further affidavit in which he reiterated that the respondents dismissed their application for registration summarily; that the respondents breached the law and acted ultra vires by denying the appellants the requisite forms; that the appellants obtained their diplomas 5 years before the respondents' advertisement regarding the approved institutions; and that the appellants ought not to be punished because of the failure and mistakes of public institutions and statutory bodies in carrying out their duties effectively.

[7] The petition was heard by way of the affidavits and written submissions. The appellants were represented in the High Court by Mwadumbo, Amol, Ngome & Co Advocates, who filed written submissions and authorities urging the court to find that the respondents had violated the constitutional rights of the appellants by acting in a discriminatory manner and contrary to the rules of natural justice; and further that the respondent had acted in excess of its jurisdiction by purporting to accredit colleges and administer examinations before issuing licences.

[8] Naikuni, Ngaah & Miencha Advocates who represented the respondents similarly also filed written submissions in which they urged the court to weigh the public interest of ensuring proper training in all institutions against the appellant's private interest; that taking into account that pharmacy is a sensitive profession that has a bearing on the well being of the populace, the respondents properly exercised their mandate under the PP Act in refusing to license the appellants; and that the respondents acted reasonably, in good faith, and in public interest.

[9] On 18th December 2013, the trial court (Lenaola J - as he then was), delivered a judgment in which he addressed the issue whether the respondents had acted in excess of their statutory mandate in purporting to accredit colleges offering training in pharmacy. The trial court made a finding that the respondents did not act ultra vires as the mandate of the 1strespondent under the PP Act as indicated in the preamble and section **8(2)** of the **PP Act,** was sufficiently wide as to include training, assessment, recognition, registration and practice of the profession of pharmacy and trade in drugs and poisons, and this would include accreditation of colleges offering training in pharmacy.

[10] On the right to fair administrative action as provided under **Article** 47 of the **Constitution,** the trial court made a finding that under **section 7(2)** of the **PP Act,** the appellants were entitled to have their application to be entered in the roll of Pharmaceutical Technologists made in the prescribed form; that by refusing to give the appellants the prescribed form the respondents rejected the applications even before they were made; that by denying the appellant the opportunity to make their applications, and maintaining the position that the appellants were not qualified even before considering their applications, the respondents denied the appellants the right to fair administrative action.

[11] With regard to the appellants' contention that they were discriminated against, the trial court found no discrimination, as KNEC had no mandate to develop any syllabus in pharmaceutical courses. The court relied on ***John Kabui Mwai & Others v Kenya National Examination Council (2011) e KLR*** in which Nyamu J stated that:

> ***"In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality, but also the larger social, political and legal context. It is only by determining the larger context that a court can determine whether differential treatment results in equality."***

[12] On violation of **Article 43** on the right to social security and right to dignity under **Article 28,** the trial court found that after undergoing the long period of studies and spending huge resources in education, the appellants had the legitimate expectation that they would be licensed to trade as pharmaceutical technologists in order to achieve social and economic security and to sustain themselves.

[13] The trial court concluded its judgment by issuing 3 prayers as follows:

> ***a) Let the Respondents within 30 days grants each of the Petitioner the right to apply in the prescribed form addressed to the Registrar to be licensed to practice as pharmaceutical technologists***
>
> ***b) Let the Pharmacy and Poisons Board consider each application, the qualifications of the applicants and consider whether they are qualified to practice as pharmaceutical technologist irrespective of their college of training.***
>
> ***c) Thereafter, a report to be filled in this Court within 60 days for final orders to be made.***

[14] On 9th April, 2015, Josephat swore an affidavit that was filed in the trial court the following day. In the affidavit, the appellants sought the intervention of the court with a view to ensuring that the respondents complied with the orders made by the trial court in the judgment of 18th December, 2013. Josephat averred to unsuccessful attempts made by the appellants and their counsel after the judgment to have the respondents issue the appellants with the prescribed application forms for registration, and explained that after a lot of frustrations the

respondents finally demanded that the appellants make the application through newly designed forms that were for evaluation.

[15] Josephat denied the respondents allegations that it is the appellants who declined or refused to comply with the orders of the trial court, and swore that the respondents direction to apply for evaluation was a ploy by the respondents to avoid complying with the orders made by the trial court on 18th December, 2013, hence the appellants plea for the court's intervention in ensuring compliance. Josephat's affidavit was accompanied by annextures that included a copy of the order made on 18th December, 2013, that was served on the respondent, a copy of a letter dated 1st April, 2015 from the respondents' advocates blaming the appellants for not complying with the order of the court, a copy of an advertisement in the Sunday Nation of 29th March, 2015 in which the respondents advised eligible candidates to download evaluation and assessment forms from their website by Friday 24th April, 2015 and apply for pre enrollment Examinations that were due to be conducted on 15Th June, 2015, and a letter dated 10th October, 2014 in which the respondents through their Registrar rejected the application of one of the appellants who had applied for evaluation.

[16] Be that as it may, on the 19th February, 2016 the trial court (Lenaola J - as he then was), delivered a ruling in which *"the application dated 10th April, 2015"* was dismissed due to lack of merit.

[17] The appellants who are aggrieved by the ruling of 19th February, 2016 have appealed to this Court against the ruling raising 4 grounds. In brief, the appellants contend that the trial court erred in law and fact: in considering and dismissing a non existent application allegedly dated 10th April, 2015 for contempt of court; in failing to enforce its orders made on 18th December, 2013 giving the appellants the right to apply to be licensed; in violating the appellants' legitimate expectation that the respondents would license them to practice as pharmaceutical technologists; failing to consider that the appellants had made their respective applications to be licensed as pharmaceutical technologists using the prescribed form addressed to the registrar as ordered by the court; in failing to consider the fact that the respondents had blatantly failed to license the appellants in violation of the court orders.

[18]Following directions given by the Court in consultation with the parties' counsel, hearing of the appeal proceeded by way of written submissions that were orally highlighted before the Court. For the appellants, it was submitted that the respondents had adamantly refused to comply with the orders made by the trial court on the 18th December, 2013; that in the ruling of 19th February, 2016, the trial court erred by dismissing a non-existent application for contempt of court; that the affidavit sworn by Josephat and filed on 9th April, 2015, was to explain the efforts made by the appellants to obtain the application forms and to seek the court's assistance in summoning the 2nd respondent to clarify and report to the court the progress made in complying with the orders issued by the court.

[19] It was posited by the appellants that by dismissing a non-existent application the trial court failed to deal with the issue of enforcement of its order requiring the respondents to issue the appellants with the prescribed forms for enrolment as pharmaceutical technologists; that the requirement by th**e** respondents for the appellants to undergo evaluation was a departure from both the provisions of the PP Act and the orders made by the trial court as it required them to undergo further examination and attachment for 6 months; that the requirement was aimed at avoiding compliance with the court orders that required the respondent to enroll the appellants upon application regardless of the college that they had attended; that the effect of the ruling of the trial court was to seal the appellants' fate by emboldening the respondents' refusal to comply with the orders of 18th December, 2013.

[20] The appellants faulted the trial court for finding that the respondents had complied with the order, as it was the appellants who had not complied with the order. The appellants maintained that the orders made by the trial court did not provide for evaluation but required each application to be considered. The Court was therefore urged to allow the appeal, set aside the ruling of 19th February 2016, and substitute a judgment ordering the respondent to immediately enroll and license the appellants as pharmaceutical technologists.

[21] For the respondents it was submitted that in dismissing the affidavit dated 9th April, 2015, the trial court correctly arrived at findings of fact based on evidence and legal principles; that although there was no application filed by the appellants for contempt of court orders, the affidavit sworn by Josephat raised the issue of contempt of court; that an affidavit is an instrument used to adduce evidence, and therefore the court can make a finding based on the evidence adduced through the affidavit; that the appellants failed to prove through their affidavit that the respondents disregarded the court orders; and that the appellants sat on their rights by failing to comply with the court orders as only 3 of the respondents made the necessary application for evaluation.

[22] In addition, it was submitted that the prayers sought by the appellants are an abuse of the process of the court, as the appellants have not appealed against the judgment of 18th December, 2013, and the court cannot therefore interfere with or deal with that judgment; that the judgment cannot be substituted with other orders without any application for review or revision of the judgment. The Court was therefore urged to uphold the ruling of the trial court and dismiss the appeal with costs.

[23] We have carefully considered the record of appeal, memorandum of appeal, the contending submissions made by the parties and the authorities cited. Although this appeal is against the ruling of the trial court delivered on the 19th February, 2016, that ruling cannot be looked at in isolation. That ruling has its roots in the judgment delivered by the trial court on 18th December, 2013 and the orders made in that judgment. The orders made in the judgment show that it resulted only in a preliminary decree to the extent that the judgment declared the respective rights of the parties. The final decree was to result from compliance with the orders of the trial court and the final orders to be made by the court thereafter. Thus, although neither party has appealed against or challenged the judgment, the background to that judgment shows that no prejudice has arisen. It is the question of compliance with the final orders made in that judgment that is the subject of the rival contestations resulting in the ruling of 19th February, 2016.

[24] In the ruling, the trial court made conclusive findings that the appellants had failed to establish that the respondents disregarded the court orders, and consequently *"purported"* to dismiss the application dated 10th April 2015. Under section 66 of the Civil Procedure Act, an appeal lies from the decree or part of a decree of the High Court to the Court of Appeal where the Act or the civil Procedure Rules has expressly provided for it. In reference to the dismissal, we have used the word *"purported,"* as it was common ground that there was no application that was before the trial court dated 10th April 2015, or for that matter any other application for contempt of court.

[25] What was before the learned judge was the affidavit sworn by Josephat on 9th April 2015 and filed in court on 10th April 2015, in

which he had sought the court's intervention as the respondent had allegedly failed to comply with the orders of the court. While we accept the respondents' argument that the court could base a ruling on the affidavit evidence, we find that the affidavit is not an application that could be subject of an order of dismissal. Be that as it may, the dismissal falls under Order 19 of the Civil Procedure Rules, and an appeal is provided for under Section 75(1)(h) of the Civil Procedure Act as read with Order 43 Rule 1(1) (j) of the Civil Procedure Rules.

[26] In our view, the orders made by the court in the judgment of 18th December 2013, provided three steps for compliance. The first step was for the respondent to facilitate each of the appellants by availing the prescribed form so as to give them the opportunity to exercise their right of making their application to be licensed. This first step was crucial in light of the holding of the learned judge that the respondent had breached the appellants' right to fair administrative action by declining to issue them with the prescribed application form.

[27] The second step was for the respondents to consider each application and the qualifications of the applicants in order to make a decision as to whether they were qualified to practice as pharmaceutical technicians. The final stage was for a report to be filed in court within 60 days from 18th December, 2013 to enable the court give final orders in the judgment. The final order was necessary because the learned judge had neither allowed nor dismissed the petition, nor did he render himself on the issue of costs. It is evident that the parties did not go beyond the first step and therefore the final step that would have brought these matters to conclusion was not arrived at.

[28] Looked at in light of the judgment and orders of the trial court, the affidavit sworn by Josephat on 9th April, 2015, was not an application for contempt proceedings, but simply an attempt to bring to the attention of the court the position regarding compliance of its orders so that the court may finalize its judgment or give directions on the next move.

[29] At paragraph 4 of the ruling, the trial court appears to have properly captured the spirit and purpose of Josephat's affidavit as follows:

> ***"[4] Based on the above narration, the Petitioners' complaint is that they have been aggrieved by the Board's conduct in introducing a new form for the application process. They now seek the assistance of this Court to ensure that the Board complies with the Court orders and they also complain that the Board's instructions that the Petitioners ought to apply for evaluation was "a ploy hatched by the Registrar to avoid compliance with the court order and thwart the Petitioners' attempts to register" per the Court order. They also argue that the Registrar had made it a mission not to comply with the orders of this Court and they deny that, at any time, they ever refused to comply with the said Court orders hence the present application."***

[30] However, in determining the matter, the trial court identified its task as determining whether on the facts and the law the respondents were guilty of contempt of court. The trial court then proceeded to consider the law relating to contempt of court, and thereafter identified the questions for consideration as follows:

> ***(a) Whether there was a clear and unambiguous Court order.***
>
> ***(b) Whether the alleged contemnor was aware of the Court order.***
>
> ***(c) Whether the alleged contemnor is guilty of contempt of Court.***

[31] With due respect, the trial court misdirected itself in addressing the issue of contempt. There was no application before the court seeking committal of the respondents for contempt of court. The issue was that of non-compliance of the orders of 18th December 2013. The record of appeal indicates that the matter was fixed for mention on 11th March, 2015, but there was no appearance for the respondent, upon which the court ordered the 2nd respondent to be summoned *"to appear in court on 10th April, 2015 to explain non-compliance with the orders of 18th December 2013"*.

[32] The parties' counsel appeared in court but apparently the Registrar did not appear. The summons were extended on two occasions and finally came up before the court on 14th August, 2015 when one Dr. Ochieng appeared on behalf of the Registrar and explained that they had complied with the orders of the court but that apart from three of the appellants, the appellants did not submit their examination forms. In response, the appellants' counsel referred the court to the affidavit of Josephat, which showed the appellants' efforts to comply with the court's order.

[33]However, in the ruling of 19th February 2016, the court addressing the case for the respondent stated as follows:

> ***"Further, that on 11th March 2015, this Court made an order for the Registrar to appear in Court on 3rd July 2015 to proffer an explanation for the alleged non-compliance with the Court order of this Court dated 18th December 2013 and the Registrar complied and was directed to finalise the process as earlier ordered. In a letter dated 10th August 2015, the Registrar then advised that, except for the 8th Petitioner, all Petitioners had filed their application forms to the Registrar as per the judgment and order of this Court. However, that only the 13th, 14th and 25th Petitioners properly completed the application process and the three Petitioners were evaluated and invited for pre-enrolment examinations. That of the three, only the 25th Petitioner honoured the invitation while the other two Petitioners wrote letters to the Board to cancel the invitation and requested to be allowed to sit for the next series of examinations."***

[34] It is evident from the above that the trial court issued the summons to the registrar, and that upon the registrar attending the court he was "directed to finalize the process as earlier ordered."

This was obviously in response to the plea made by the appellants for the court's intervention. Therefore the appellants' plea was not without substance as more than a year after the order of 18th December, 2013 the respondent was still being directed to finalize the process.

[35] Besides, even assuming that step one and two of the orders made on 18th December, 2013 had been complied with, there remained the

task of the trial court to finalize its judgment in accordance with the third part of its order. In the judgment as reflected above, the court had in effect partly allowed the appellant's petition. The order made by the court on 19th February 2016 dismissing a non-existent application for contempt of court provided no direction in so far as its final judgment was concerned.

[36] We believe we have said enough to come to the conclusion that the orders made by the High Court cannot stand. Accordingly, we set aside the orders made on 19th February, 2016, and direct that the matter be referred back to the High Court for the court to make a final determination in accordance with the orders of 18th December, 2013 or to issue any appropriate directions as it may deem fit. As the learned judge who made the orders of 18th December, 2013 and the ruling of 19th February, 2016 is no longer available to finalize the judgment we direct that the matter may be dealt with by any other judge.

Dated and delivered at Nairobi this 9th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR