Republic v Kenya School of Law & another; Abdi (Exparte)
(Judicial Review Miscellaneous Application E088 of 2022)
[2023] KEHC 23026 (KLR) (Judicial Review) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23026 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E088 OF 2022

JM CHIGITI, J

SEPTEMBER 26, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA SCHOOL OF LAW ..... 1ST RESPONDENT

KENYA NATIONAL QUALIFICATIONS AUTHORITY ..... 2ND RESPONDENT

AND

SAMIRA ALLY ABDI ..... EXPARTE

JUDGMENT

1. The application before this court is the Notice of Motion application dated 13th July, 2022 where in the Applicant seeks the following orders

    1. An order of Mandamus to issue compelling the 2nd Respondent to forthwith equate the Applicants IGCSE qualification as per the prevailing law as at the time the Applicant joined Riara University.

    2. An order of Certiorari to remove into this Honourable Court and quash the 2nd Respondent's decision of 3rd June 2020 of refusing to equate the Applicants qualifications.

    3. An order of Mandamus to issue compelling the 1st Respondent to forthwith admit the Applicant into the Advocates Training Programme offered at the Respondent's institution.

4. An order of Certiorari to remove into this Honourable Court and quash the 1st Respondent's decision of 16th March 2022 barring the Applicant from enrolment and admission into the Programme for reason of lack of an equation letter.

5. An order of prohibition restraining the 1st Respondent from barring the Applicant from applying, being admitted and participating including undertaking her exams in the Advocates Training Programme at the Kenya School of Law.

6. A declaration that the Applicant's rights under Articles 27, 33, 34., 43, and 47 of *the Constitution* have been infringed and threatened with violation by the Respondents and that in the discharge of its statutory mandate the Respondents cannot act in a manner that infringes, violates or denies the petitioner her right to freedom from discrimination, right to Education and fair Administrative Action.

7. This Honourable Court should find and deem it fit to award exemplary damages, special damages and the costs of this Application and other costs incidental to this Suit.

8. Any further reliefs that this Honourable Court deems fit in the interests of a justice to grant.

2. The application is supported by the Affidavit of Samira Ally Abdi sworn on 4th July,2022 and a statement of even date.

3. The Ex parte Applicant's case is that the Applicant joined Riara University after her Application to the School was allowed upon thorough scrutiny of her Secondary School IGCSE Certificate. The Her Application for admission to the University is said to have been pegged on the Commission for Higher Education Standards and Guidelines for the Academic Degree Programmes,2011 which requires for a minimum of C+ for KCSE holders or 5 credits for IGCSE holders.

4. The Applicant is said to have surpassed the said requirement as she obtained 9 credits. It is also the Ex parte Applicant's case that the Applicable law at the time she joined Riara University was Regulation 5 (b) of the Council for Legal Education (Kenya School of Law) Regulations, 2009 and paragraph 1 (a) and (b) of the second schedule of *Kenya School of Law Act*, 2012 which did not make it a requirement for an equation letter to be availed subject to admission to the University.

5. The Applicant's legitimate expectation is said to have been that upon completion of her undergraduate studies and conferment of the LLB degree, she was entitled to admission with the 1st Respondent.

6. The Respondents having acted arbitrarily in frustrating the Applicant's attempt to join the Advocates Training Programme, the Applicant, among other Petitioners, instituted Constitutional Petition 182 of 2019; Kihara Mercy Wairimu 8 Others vs Kenya School of Law & Others.

7. In a judgment delivered on 28th November 2019, the Court found that the acts of the Respondents of rejecting and/or non—admitting the Applicant to the Training Programme, despite having obtained the requisite qualifications, to have contravened the Applicant's fundamental rights and freedoms guaranteed under *the Constitution*.

8. The Applicant sought for equation of her O-level Certificate from the 2nd Respondent as directed by the Court. However, the 2nd Respondent vide a letter dated 3rd June 2020, informed the Applicant that

they were not in a position to equate her O-level Certificate and as their mandate was only limited to equation of A-level Certificates.

9. The Applicant is said to have submitted the said letter from the 2nd Respondent alongside her Application for admission to the 1st Respondent's training programme in compliance with the Court's Judgment upon which on 26th February 2022 the 1st Respondent issued the Applicant with a letter of admission to the School whereas registration was to commence on 7th March 2022 and run till 25th March 2022.

10. The Applicant further states that on 16th March 2022, she paid the requisite tuition fees and on the same day, presented herself for registration when to her utter disbelief, the 1st Respondent's Legal Counsel, Pauline Kanyaa Mbuthu, refused to enrol her on grounds that she had no letter of equation from the 2nd Respondent.

11. It is the Applicant's case that the issue the equation letter was conclusively determined following the determination in Constitutional Petition 182 of 2019; Kihara Mercy Wairimu & Others where the court found that the Applicant had duly qualified to join the Respondent's programme.

12. The Court is said to that the 1st Respondent herein had infringed upon the Petitioner's fundamental rights and freedoms guaranteed under *the Constitution*. The court according to the Applicant directed the Respondent to admit the Petitioner without any conditions whatsoever.

13. It is the Ex parte Applicant's case that the 1st Respondent continues to frustrate her by demanding for an equation from the 2nd Respondent. The Applicant contends that the impugned decision contravenes Article 47 of *the Constitution* and section 4 and 5 of the Fair Administrative Actions Act.

14. The Applicant contends that she has spent a fortune spent a fortune to acquire her LLB Degree having been in the Private Sponsored Programme at Riara University and having undertaken IGCSE at the University of Cambridge International Examinations, UK.

15. The Respondent it is contended being the only institution that offers the Advocates Programme and having failed to comply with the Court orders only means that Applicant has no other recourse and further that she will be barred from ever practising Law despite having qualified for the training. She also argues that she stands to suffer great prejudice should she not be admitted with the Respondent bearing in mind the more than six years expended and the amount of money spent thus far.

16. The 1st Respondent in response filed a Preliminary Objection dated 31st October, 2022 in which it raises 2 grounds as follows;

    1. The matter before the court is res judicata.
    2. The application is frivolous, vexatious and an abuse of the court.

17. The 2nd Respondent in response filed a Replying Affidavit dated sworn by Dr. Alice Kande on 17th May,2023. In the affidavit it is deponed that in Petition No.182 of 2019 where the Ex parte Applicant herein was the 3rd Petitioner the Court issued the following orders on 14th February,2020;

> "Issue the petitioner with equation certification. Further the petitioners (the ex parte applicant included) were required to submit their International General Certificate of Secondary Education (lGCSE), GSCE and GCE Certificate together with equation letters (Secondary School Qualification Clearance letter) to the 2nd respondent.

a. The 1st respondent to admit the petitioners the Ex parte applicant included upon meeting the qualifications of the Council of Legal Education and the 1st respondent herein."

18. The 2nd Respondent it is deponed in line with the above orders proceeded to equate the Ex parte applicant's IGCSE Certificate pursuant to the existing law that is the Kenya National Qualification Framework Regulations, 2018 and a decision was rendered on 3rd June, 2020 and communicated to the applicant the next day.

19. The 2nd Respondent's decision was that it could not equate the applicant's IGCSE Certificate. She was also required to present her "A" level certificate. It is the deponent's averment that the GCSE certificate was equated to KCSE whereas the Applicant only had her IGCSE Certificate.

20. The Applicant is said to have applied for admission to the 1st Respondent well knowing the decision that the 2nd Respondent had given. It is averred that the Applicant failed to disclose to the 1st Respondent the decision that the 2nd Respondent had made despite having been aware of the same as evidenced in her letter dated 17th December,2021 and therefore she cannot blame the 1st Respondent for revoking her admission.

21. The 2nd Respondent's case is also that proceedings of the nature and orders sought by the ex parte applicant ought to have been commence within 6 months however the ex parte applicant seeks to quash the 2nd Respondent's decision 2 years after it was rendered.

22. It is deponed that the Applicant's prayer the equation should be done afresh is a moot order as no action has been done since the 2nd Respondent undertook the equation and gave a fresh detailed response and reasoned decision.

23. The deponent deposes that the Ex parte Applicant's is acting in bad faith and is indolent, further that she seeks to relegate issues that have been adjudicated and determined with finality. It is also deponed that that she has approached this court for discretionary orders based on material non-disclosure. The Ex parte Applicant is also said to have misled the Court on what the Judgment of the Court was in Petition No.182 of 2019.

24. The 2nd Respondent is said to only play an advisory and support role to other government departments and agencies upon request. Further that it is unreasonable and misleading for the Applicant to demand payment of exemplary damages and special damages and costs of the proceedings.

25. It is reiterated that there is no cause of action to necessitate the issuance of damages sought since for special damages none has been pleaded with specifity and also no payment was made for the 2nd Respondent for the ex parte applicant to demand a refund.

26. The deponent deposes that the judgment in the Petition restated that the Ex parte applicant had to demonstrate that she had the requisite academic qualifications to pursue a degree in law. Also, that the issuance of a degree certificate did not mean that Ex parte applicant was qualified to study law.

27. Further that the Ex parte applicant cannot now claim that having been admitted to pursue a degree in law then she automatically qualifies to be admitted to the ATP Programme provided by the 1st respondent.

28. The application was canvassed by way of written submissions. The Applicant filed written submissions dated 2nd December,2022 in which 3 issues are identified for determination and these are Whether these

Judicial Review Proceedings are Res Judicata, Whether the Petitioner's right under Article 47 of *the Constitution* was violated, Whether the Ex Parte Applicant is entitled to the remedies sought.

29. On the 1st issue the Applicant submits that the 1st Respondent has not stated what exactly is res judicata in the instant judicial review proceedings. Section 7 of the *Civil Procedure Act* is refered to on the issue of res judicata. The Applicant also refers to the Supreme Court case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR where the Court dealt with the different facets making up the doctrine of res judicata.

30. The Ex parte applicant submits that the Supreme Court in the above case noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional Petition. The Court also noted that the issues raised in the constitutional Petition were more than those decided in the judicial review application.

31. It is the Ex parte Applicant's submission that she is challenging the procedure and fairness exercised by the 1st Respondent in denying her admission despite issuing her with an admission letter and making her pay tuition fees. The applicant also contends that her right to a fair administrative action under Article 47 was infringed as the 1st Respondent failed to give reasons, written or otherwise for its decision not admit her.

32. The case of Judicial Service Commission vs. Mbalu Mutava & Another [2015] is cited on public officers, state organs and other administrative bodies being subjected by Article 47(1) to the principle of constitutionality rather than the doctrine of ultra vires.

33. The Ex parte applicant's submission is that the decisions by the Respondents were decisions on a competent matter but were so unreasonable that no reasonable authority could ever have come to it, and as such this Court ought to therefore intervene.

34. The 1st and 2nd Respondents are faulted for failing to comply with the provisions of Section 4 of the *Fair Administrative Action Act*. The case of Onyango Oloo vs. Attorney General [1986-1989] EA 456 is also referred to where the court elucidated the need to incorporate rules of natural justice even in the interpretation of statutes.

35. The Ex parte Applicant also cites the case of Republic vs The Honourable Chief Justice of Kenya & Others Ex parte Moijo Mataiya Ole Keiwa, Nairobi HCMA No.1298 of 2004 where the court emphasised on the importance of natural justice.

36. On the concept of arbitrariness, the Applicant cites the Court of Appeal case of Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR, the High court case of Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR and the case of Shrilekha Vidyarthi vs. State of U.P. (1991)1 SCC 212 from the Supreme Court of China.

37. It is the Ex-Parte Applicant's submissions that it has satisfied this Court for the appropriate orders of Mandamus, Certiorari and Prohibition. Also, that damages ought to issue in this matter so as to vindicate her and to also convey a deterrent message regarding the sanctity of *the Constitution* and the need for protection of fundamental rights and freedoms.

38. The Applicant also prays that this court be guided by the various decisions which include Eunice Nganga vs. Higher Education Loans Board & 2 others [2020] eKLR where the Court awarded Kshs. 10 Million, M W K v Another -vs- Attorney General others [2017] eKLR where the Court awarded Kshs. 4 Million, Rachel Mutheu Ndambuki vs- Cabinet Secretary, Ministry of Lands and Physical Planning & 2 others [2020] eKLR where the Court made an award of Kshs. 3.5 Million and also in the case of

Lucas Omoto Wamari -vs- Attorney General 8 another [2017] eKLR where the Court awarded Kshs. 2 Million in making its determination on the award of damages.

39. The 2nd Respondent in its submissions dated 22nd May,2023 contends that two main issues crystallize for determination and these are Whether the Ex parte applicant's applications are merited and consequently whether the orders and or reliefs sought are available and who bears the costs.

40. On the first issue the cases of Republic v National Assembly & 5 others Ex-parte Greenbelt Movement & 2 others [2018] eKLR where the court quoted with approval the case of Pastoli vs Kabale District Local Government Council and Others [2008] 2EA 300 and the case of Republic v Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR are cited on the scope of judicial review and on the requirements for succeeding in an application for judicial review.

41. The Respondent's case is that the Applicant's application is not merited as she failed to file for leave to file the said application within 6 months as is required under Order 53 Rules 1and 2 and as provided under section 9(2) and (3) of the *Law Reform Act*.

42. The Respondent is buttressing the above argument cites the case of Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Exparte Magal Security Systems Ltd/ Firefox Kenya Limited (JV) [2019] eKLR where the court is said to have dismissed a similar application and declined to grant extension of time.

43. On non-disclosure and concealment of material facts on the part of the Applicant the Respondent also refers to the case of Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control supra.

44. The Respondent cites the case of Godfrey Julius Ndumba Mbogori & another V. Nairobi City County [2018] eKLR where the court pronounced itself on circumstances where exemplary damages can be issued. It is submitted that the Ex parte applicant has neither deponed nor led evidence as to what has led to or the 2nd respondent done to necessitate payment of exemplary damages or proved and pleaded with specifity the prayer for special damages.

45. The applicant has failed to depose with clarity when and what constitutional violations have been suffered as was held by the court in the cases of Michael Rubia v Attorney General [2020] eKLR and David Gathu Thuo v Attorney General & another [2021] eKLR where the court reiterates the importance of a party in constitutional litigation who allege violations of his or her rights to plead the same with reasonable precision.

46. The Respondent also submits that it is trite law that for special damages to be awarded it must not only be pleaded but proved as well. However, that in the instant application the particulars of special damages have not been pleaded nor proved hence the same ought not to be awarded as well. The case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR is cited to buttress this argument.

47. The Respondent in its submission urges the Court not to interfere with the decision of the 2nd respondent which was based on strict adherence to the law and regulations and in support of this argument refers to the case of Kihara Mercy Wairimu & 7 others v Kenya School of Law & 4 others [2019] eKLR where the court quoted with approval the case of Kenya Revenue Authority vs. Menginya Salim Margani Civil Appeal No. 108 of 2009 and stated as follows;

> " There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they

achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

48. It is submitted that it is important for the court to note that post qualifications of IGCSE is equivalent to form 2 of the 8-4-4 system meaning that a learner has to have an advance level to be admitted to pursue a degree in the university. The authority is said to equate both local and foreign qualifications and further that even in the United Kingdom you have to pursue advanced level qualification to proceed to university.

49. On the issue of res judicata the Respondent cites the Supreme Court case of Kenya Commercial Bank Ltd -vs- Muiri Coffee Estates Ltd & Another (2016) eKLR. The 2nd Respondent's submission is that it is trite law that costs follow the event.

Analysis And Determination

50. Having considered the respective cases by the parties and attendant submissions in support thereof, I have identified the following issues for determination:

    1. Whether the application before this court is res judicata
    2. Whether the court ought to grant the orders sought.

The issue of res judicata:

51. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, had the following to say on circumstances when a Preliminary Objection may be raised.

> " a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

52. The 1st Respondent herein in its Preliminary Objection dated 31st October,2022 challenges the Ex parte applicant's application dated 13th July,2022 on grounds that the same is res judicata.

53. In response the Ex parte Applicant contends that 1st Respondent has not stated what exactly is res judicata in the instant judicial review proceedings and she goes ahead to state that it is safe to assume that the 1st Respondent is referring to Constitutional Petition 182 of 2019.

54. The Ex parte applicant in response also states that the proceedings before this court have been brought under Article 47 of *the Constitution* and that the proceedings seek to challenge the 1st Respondent's decision to deny her admission to the Advocates Training Programme despite issuing her with a letter of admission.

55. It is also The Applicants" argument that the 2nd Respondent's decision of refusing to equate her O-Level Certificate was never in issue in the said Petition. Further that different from what was being sought in the Petition in the application before this court she is challenging the procedure and fairness exercised by the 1st Respondent in denying her admission despite issuing her an admission letter and making her pay tuition fees.

56. The Petition being referred to by the Ex parte Applicant herein is the one dated 14th May,2019 which was brought pursuant to Articles 2(1),3(1). 10(1), (2),19(2),20(2),21(2) 22,23, 24, 27(1), 28, 43, 47,

48, 55, 56, 165(3), 258, 259, and 260 of *the Constitution* of Kenya and Section 3(1) (A) and c;4(1)(2),3 and 11 of the Fair Administrative Actions Act. The Ex parte Applicant herein was the 3rd Petitioner in the Petition.

57. Upon hearing of the Petition, the court in its Judgement held as follows;

a. A declaration be and is hereby issued that the petitioners submit their A-Level certificates together with an equation a letter (Secondary School qualification clearance letter) from the Kenya National Qualification Authority together with LL. B degree certificate from Riara University within 21 days from the date of this judgment.

b. A declaration be and is hereby issued that the petitioners were discriminated by the Respondents by dint of the fact that the petitioners have been denied admission at Kenya School of Law unlike their predecessors who are from the same University with same qualifications and who were admitted to ATP Programme.

c. A declaration be and is hereby issued that the acts of 1st Respondent of rejecting and/or non-admitting the petitioners to ATP (advocates Training Programme) without a certificate of their A-Level results and despite having qualified in terms of the second Schedule of the *Kenya School of Law Act* 1(a) and despite having been conferred their Bachelors of Laws (LLB) degree by a local University, the Riara University, contravened the petitioners fundamental rights and freedoms under Articles 2(1), 3(1), 10(1) (2), 19(2), 20(2), 22, 23, 24, 27(1), 28, and Article 47 of *the Constitution* of Kenya, 2010, and therefore such violation and/or infringement was unconstitutional, unlawful, illegal, null and void, in consequence this Honourable court intervenes to quash, set aside and/or put a stop to the same forthwith.

d. A declaration be and is hereby issued to the effect that the application by the 1st respondent of the provisions of second Schedule 1 (b) of the *Kenya School of Law Act* No. 26 of 2012 to the extent that the same applies dissimilar treatment exclusively to the petitioners is discriminatory, irrational, unreasonable, arbitrary, abuse of discretion, exercise of discretion for improper purposes, unlawful, acting unfairly, unreasonable and amounted to exercising of discretion arbitrarily and had violated the rights and fundamental freedom of the petitioners.

e. A declaration be and is hereby issued that the 1st respondent conduct above amounted to acting unfairly, acting in violation of Article 47 of *the Constitution* of Kenya and Section 4 (3) of the Fair Administrative Actions Act, 2015 to the extent that the petitioners were not afforded the benefit of the rules of natural justice and were not heard before the decision to bar or reject the applications for admission and therefore the whole process leading to the non-admission to the Kenya School of Law ATP Programme was in expeditious, inefficient, unlawful, unreasonable, procedurally unfair unconstitutional, nullity, null and void ab initio and is accordingly quashed and/or set aside in its entirety.

f. An order be and is Hereby issued upon the petitioners complying with order (a) herein above, the 1st and 2nd do register and forthwith admit the petitioners herein to undertake Advocate Training Programme (ATP) at the Kenya School of Law without any other conditions.

g. In the alternative to (f) above an order be and is HEREBY issued directed upon the 3rd and 4th Respondents to issue the petitioners with equation certificate for respective academic papers upon the petitioners' application within the period of 15 days from the date of application.

h. Prayer (f) is declined.

i. As both parties have won and lost in someway I direct each party to bear its own costs.

58. The Ex parte Applicant herein seeks the following orders;

1. An order of Mandamus to issue compelling the 2nd Respondent to forthwith equate the Applicants IGCSE qualification as per the prevailing law as at the time the Applicant joined Riara University.

2. An order of Certiorari to remove into this Honourable Court and quash the 2nd Respondent's decision of 3rd June 2020 of refusing to equate the Applicants qualifications.

3. An order of Mandamus to issue compelling the 1st Respondent to forthwith admit the Applicant into the Advocates Training Programme offered at the Respondent's institution.

4. An order of Certiorari to remove into this Honourable Court and quash the 1st Respondent's decision of 16th March 2022 barring the Applicant from enrolment and admission into the Programme for reason of lack of an equation letter.

5. An order of prohibition restraining the 1st Respondent from barring the Applicant from applying, being admitted and participating including undertaking her exams in the Advocates Training Programme at the Kenya School of Law.

6. A declaration that the Applicant's rights under Articles 27, 33, 34., 43, and 47 of *the Constitution* have been infringed and threatened with violation by the Respondents and that in the discharge of its statutory mandate the Respondents cannot act in a manner that infringes, violates or denies the petitioner her right to freedom from discrimination, right to Education and fair Administrative Action.

7. This Honourable Court should find and deem it fit to award exemplary damages, special damages and the costs of this Application and other costs incidental to this Suit.

8. Any further reliefs that this Honourable Court deems fit in the interests of a justice to grant.

59. Section 7 of the *Civil Procedure Act* on res judicata, reads as follows:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

60. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

61. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

62. In that respect, the Court of Appeal held in The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR), that:

> [F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

63. The Court went on to state on the role of the doctrine:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and

brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

64. This court finds that the Respondent doesn't fulfil the requirements of Section 7 of the *Civil Procedure Act* since the issues that the Ex parte Applicant seeks recourse on arose after the decision of the court had been issued and they are not res judicata as the same were not litigated upon in Petition No. 182 of 2019; Kihara Mercy Wairimu & 7 Others v Kenya School of Law & 4 Others [2019] eKLR. The ground of Resjudicata fails.

Can the court an order of Certiorari, and Prohibition?

65. In the case of Pastoli v Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304 it was held that:

> "In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or acts done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision - it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision."

66. On the Order of Prohibition, the court states as follows;

> "What does an Order Of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law Of England, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

67. The Court also held as follows on the order of certiorari;

> " Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter."

68. The Applicant herein seeks an order of Certiorari to remove into this Honourable Court and quash the 2nd Respondent's decision of 3rd June,2020.

69. Order 53 Rule 2 of the Civil Procedure Rules provides that: -

> " Leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceedings or such shorter period as may be described by any act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time."

70. Section 9(3) of the *Law Reform Act* provides that: -

> " In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings, for purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such period as may be prescribed under any written law....."

71. Ex parte Applicant's application was filed out of the mandatory period of 6 months. On this ground prayer 2 fails.

72. An order of certiorari quashing the 1st Respondent's decision of 16th March, 2022 is also sought by the Applicant for the reason that she was not accorded a fair administrative action as no reasons were given for the impugned decision. This I note from the Applicant's prayer is far from the truth as therein she alludes to a decision dated 16th March 2022 where the 1st Respondent declined to admit her into the Programme for the reason that she lacks an equation letter.

73. On the question whether the court can issue an order of prohibition restraining the 1st Respondent from barring the Applicant from applying, being admitted and participating including undertaking her exams in the Advocates Training Programme at the Kenya School of Law.

74. The Court in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others supra emphasizes that an order of prohibition is powerless against a decision which has already been made and that such an order can only prevent the making of a decision.

75. In the case before this court, a decision on the Applicant's admission to the Advocate's Training Programme has already been made. In light of the above the order of prohibition can therefore not issue.

76. The Applicant also seeks an order of Mandamus compelling the 2nd Respondent to forthwith equate her IGCSE qualification per the prevailing law as at the time the Applicant joined Riara University

and compelling the 1st Respondent to forthwith admit the Applicant into the Advocates Training Programme offered at the Respondent's institution.

77. The Applicant seeks for this court to direct the Respondents to undertake their mandate in a certain manner which is not what an order of mandamus entails as the duty of the two bodies is imposed under the *Kenya School of Law Act*,2012 and the *Kenya National Qualifications Framework Act*, 2014 respectively.

78. Dr. Alice Kande in her replying affidavit deponed that in Petition No.182 of 2019 where the Ex parte Applicant herein was the 3rd Petitioner the Court issued the following orders on 14th February,2020;

> b. Issue the petitioner with equation certification. Further the petitioners (the ex parte applicant included) were required to submit their International General Certificate of Secondary Education (lGCSE), GSCE and GCE Certificate together with equation letters (Secondary School Qualification Clearance letter) to the 2nd respondent.
>
> c. The 1st respondent to admit the petitioners the Ex parte applicant included upon meeting the qualifications of the Council of Legal Education and the 1st respondent herein.

79. The Ex parte Applicant's case is that the Applicant joined Riara University after her Application to the School was allowed upon thorough scrutiny of her Secondary School IGCSE Certificate.

80. The Her Application for admission to the University was pegged on the Commission for Higher Education Standards and Guidelines for the Academic Degree Programmes,2011 which requires for a minimum of C+ for KCSE holders or 5 credits for IGCSE holders.

81. Instead, the 2nd Respondent proceeded to equate the Ex parte applicant's IGCSE Certificate pursuant to the existing law that is the Kenya National Qualification Framework Regulations,2018 and a decision was rendered on 3rd June,2020 and communicated to the applicant the next day.

82. This decision was materially influenced by an error of law in that the wrong regulations were invoked in equating her grade and it calls for the judicial review intervention as sought.

83. This decision offended Section 7(2)(D) of The *Fair Administrative Action Act* which provides that the action or decision was materially influenced by an error of law.

84. In the case of Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) it was held that *The Constitution* contains constitutional obligations such as those in Article 43 and 47 of *the Constitution*. The standards demanded by *the Constitution* for the exercise of public power are that it should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. Whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. In relation to the exercise of power by the Respondent, the rule of law requires that the exercise of public power should not be arbitrary, and that the decision taken must be rationally related to the purpose for which the power was given. The Respondent must carry out its constitutional obligations in line with the rule of law.

85. At its core, "discretion" means choice. To find an abuse of discretion, the reviewing court "must determine that the facts and circumstances presented 'extinguish any discretion [or choice] in the matter.'" Therefore, simply because a decision maker has exercised its discretion to decide a matter differently than a reviewing court under similar circumstances does not establish an abuse of discretion.

In other words, the reviewing court "may not substitute its own judgment for the decision maker. The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the decision maker's action." Rather, a decision maker abuses its discretion if its decision is "arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles" or is "'so arbitrary and unreasonable such that no reasonable person presented with the same set of facts and circumstances could arrive at the same decision.

86. A decision maker abuses its discretion if it exercises a power that it does not legally possess or declines to exercise a power of discretion vested to it by law when the circumstances require that the power be exercised. A decision maker may also abuses its discretion if it purports to exercise its discretion without sufficient information upon which a rational decision may be made or if it exercises its power of discretion by making an erroneous choice as a matter of law by making a choice that is "not within the range of choices permitted by law or by arriving at its choice in violation of an "applicable legal rule, principle, or criterion or by making a choice that is "legally unreasonable in the factual-legal context in which it is made.

87. The court is generally reluctant to interfere which a functionaries' exercise of discretion "unless it is satisfied that the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a reasonable person properly directing himself to all the relevant facts and principles. For the court to intervene, there must have been a material misdirection on the part of the decision maker.

88. The traditional grounds of abuse of discretion are: mala fides, ulterior purpose or motive, and failure to apply mind. Abuse of discretion could also fall within the description in section 7(2)(a) to (o) of the FAA for inter alia not being rationally connected to the purpose of the empowering provision; the information before the administrator; and, the reasons given for it. The relevant factors to be taken into account in determining whether a decision maker abused its power includes the source of the power; the nature of the power; the subject matter of the power; whether the power involves the exercise of a public duty; how closely the power is related, on the one hand, to policy matters which are not administrative, and on the other hand to the implementation of the enabling legislation or legislation.

89. The source of the power is specifically set out in the enabling. In the Applicants case the appropriate source of power that the Respondents should have invoked is the 2011 regulations. The respondent exercised its discretion using the 2018 regulations. This was a fundamental flaw.

90. In addition, the exercise of Respondent's power must fall within the powers lawfully conferred upon them in terms of *the Constitution* and the tax statutes and must not be arbitrary or irrational. The decision taken be it is an assessment or request for information as happened in this case, or to request documents must be rationally related to the purpose for which the power was given, namely, for the administration of the tax laws. This requirement must be satisfied so as not to fall short of the standards demanded by *the Constitution* and the enabling statute which would include compliance with the principle of legality generally, and various constitutional and statutory obligations.

91. By now it is clear that a party seeking review a decision citing the circumstances relied upon by the applicant must demonstrate that the act or omission constitutes a clear abuse of discretion. Closely tied to the issue at hand is the question whether the Respondent acted in an arbitrary manner. Arbitrary and Capricious means doing something according to one's will or caprice and therefore conveying a notion of a tendency to abuse the possession of power. This is one of the basic standards for reviewing administrative decisions. Under the arbitrary and capricious standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and

capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment. An action not based upon consideration of relevant factors is arbitrary, capricious, an abuse of discretion. So is an action not in accordance with the law or if undertaken without observance of procedure required by law - Natural Resources Defense Council, Inc. v. United States EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)].

92. In determining the case before me I am guided by the above principles in in finding that the 2nd respondent in acting as the decision maker abused its discretion since its decision was "arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles" and in particular in invoking the wrong regulations while equating the applicant's grades.

93. The Court of Appeal in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR the court held as follows;

> " The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again, we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says: - "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

> " The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

The issue of the violation of the Applicant's right to freedom from discrimination:

94. On the issue of the violation of the Applicant's right to freedom from discrimination and her right to Education and fair Administrative Action this court is convinced that the applicant's rights have been violated.

95. The Court of Appeal in the case of Kenya School of Law v Akomo & 41 others (Civil Appeal E472 of 2021) [2022] KECA 1132 (KLR) (21 October 2022) (Judgment) held as follows on the issue of discrimination;

> " On the question of discrimination of the respondents by the appellant, we wish to render ourselves as follows. In the case of Nyarangi & 3 others v Attorney General [2008] KLR 688, it was held:
>
> > The Black's Law Dictionary, 10th Edition defines discrimination as follows:
> >
> > > "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
> >
> > The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows: -
> >
> > "A particular form of differentiation on illegitimate ground." ...
> >
> > The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs v Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants."
> >
> > Further in the persuasive High Court case of Republic v The Council of Legal Education ex parte James Njuguna & 14 others Miscellaneous Civil Case No 137 of 2004 (Unreported): Mumbi, J (as she then was) whilst dealing with a similar situation stated:
> >
> > > "...it is clear that, rather than the respondents having acted in a manner that was discriminatory against the petitioner, it was the petitioner who was seeking what can only be viewed as preferential treatment from the respondents. The Admission Regulations applicable to all those seeking admission to the Kenya School of Law in 2006 when the petitioner made her application were the Council of Legal Education (Kenya School of Law) Regulations, 1997. There is nothing before this court to show that all other applicants were not required to meet these qualifications. What the petitioner was asking was for the 1st respondent to waive these requirements with regard to her; and what she is asking this court to do is to find that even if she was not qualified under those regulations, they were against the requirements of the *Advocates Act* anyway, and she should not have been required to meet them."

The Applicant has not tendered any evidence to show how she was treated differently from any other students within the framework of Article 27 of *the Constitution*. This court does is not satisfied with the Applicant's case that she was a victim of discrimination.

Damages:

The Applicant's rights under Articles 27, 33, 34., 43, and 47 of *the Constitution* have been infringed and threatened with violation by the Respondents and that in the discharge of its statutory mandate the Respondents. The Applicant is asking for exemplary damages.

96. This court has powers under Section 12 (1) (j) of The *fair administrative Action Act* to award pecuniary compensation in appropriate cases. I find this to be a case that is deserving of compensation.

Special damages

97. The Applicant did not nor prove special damages and the same cannot be granted.

99. Order

1. An of Certiorari is hereby issued to remove into this Honourable Court the 2nd Respondent's decision of 3rd June 2020 refusing to equate the Applicants qualifications is hereby quashed.
2. An order of Mandamus is hereby issued compelling the 2nd Respondent to equate the Applicants IGCSE qualification as per the prevailing law as at the time the Applicant joined Riara University within 30 days.
3. An order of Mandamus do issue compelling the 1st Respondent to admit the Applicant into the Advocates Training Programme offered at the institution based on the outcome of the equation in order 2.
4. A declaration is hereby issued that the Applicant's rights under Articles 27, 33, 34., 43, and 47 of *the Constitution* have been infringed and threatened with violation by the Respondents
5. The Applicant is granted compensation of Kshs. 300,000.
6. Costs to the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2023

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J. CHIGITI (SC)

JUDGE