



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**JR. MISC CIVIL CAUSE NO. 6 OF 2015**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF**

**CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF: KISII UNIVERSITY**

**IN THE MATTER OF: AN APPLICATION BY MR. MUTHAMIA SAMUEL MWITI FOR**

**JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI, MANDAMUS AND PROHIBITION.**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**VICE CHANCELLOR KISII UNIVERSITY.....RESPONDENT**

**AND**

**MUTHAMIA SAMUEL MWITI.....EX- PARTE APPLICANT**

**RULING**

1. The application dated 26<sup>th</sup> May 2015 sought an order of **Certiorari** for purposes of quashing the decision of the university to downgrade the applicant's grades and unlawfully withhold the **ex parte** applicant's degree certificate, **Mandamus** to compel the University Council to issue the applicant with his degree certificate and an order of **Prohibition** to prohibit the university council from downgrading the grades of the applicant.
2. He also sought that the leave operates as a stay of the implementation of the Registrar's direction to downgrade his grades from a 1<sup>st</sup> class Honours to a second class Honours (Upper Division) and that costs of the application be in the cause.
3. A verifying affidavit was filed by the applicant to support his claim. Counsel for the applicant also filed a statement where he outlined similar grounds on which the reliefs are sought. He states that on 17<sup>th</sup> January, 2012 the ex-parte applicant was admitted to **Kisii University Eldoret** campus for a **Bachelor of Arts Criminology and Security Studies in the Faculty of Law**.
4. The ex-parte applicant embarked on his studies, attended classes and sat for the examinations as prescribed by the university. **On 19<sup>th</sup> December 2014** the ex-parte applicant with other students went for graduation and on 16<sup>th</sup> February 2015, he went to the university's main campus to collect original transcripts. He paid the requisite fee and was issued with a receipt.
5. Upon payment he was issued with the original transcript by the office of the Registrar at Kisii Campus. He stated that he submitted this original transcript on **19<sup>th</sup> March 2015**, to the Police Service Commission who is his employer, where he was vetted and advised to submit his degree certificate.
6. The certificate had not been released and when he went to collect it on **13<sup>th</sup> April 2015**, he was issued with new transcripts with different grades. He was then referred to the dean of students to whom he explained that the new transcripts lowered his marks and was full of errors.
7. The applicant then contacted the Registrar's office on 24<sup>th</sup> April 2015 via a telephone call and he indicated to him that a decision had been

made to lower his grades, a decision that he terms as unlawful, unfair, discriminative and without unjustifiable cause.

8. In a replying affidavit sworn by **PROFESSOR JOHN AKAMA** (the Vice Chancellor of the University) stated that he ought not to have been sued as his office has no legal personality and additionally, there is no reasonable cause of action against him.

9. The respondent stated that the applicant's results from his degree in **Criminology and Security Studies** were forwarded for approval to the **University Senate** (who are empowered under **Section 21(4) of the Charter for Kisii University**). They held a meeting on **27/11/2014** and resolved that the examination results be referred to the University's faculty Board for correction and further moderation.

10. The Senate is empowered under the above cited section to;

- **Approve examination results**
- **Determine the procedure to be followed in the conferment of the degrees and other awards**
- **Approve the award of degrees including honorary degrees and other academic distinctions subject to the provisions of the Universities Act.**
- **Receive proposals from various boards and faculties, institutes schools and centers and to consider their recommendations thereof and make appropriate decisions.**

11. The respondent states that the decision to have the applicant graduate with a second class honours upper division was not a one man decision but was arrived at after the entire Senate meeting. He added that the moderation of the results affected over 70 students and was done way before the graduation ceremony and the graduation booklet which confirmed this operation was circulated to all grandaunts before the graduation ceremony.

12. The ex- parte applicant attended the graduation and was conferred with the degree meaning that he was well aware of what degree he was conferred with. The contention that the ex-parte applicant was issued with different transcripts was the result of an error where a wrong set of transcripts was generated from the University's data collection system and presented to the ex-parte applicant instead of the correct transcripts that had been approved by the Senate. The respondent states that by this time, the ex-parte applicant already knew that he was graduating with a Second Class Upper division. According to the respondent, the ex-parte applicant was asked to surrender the transcripts to be issued with the correct set but knowingly left with the wrong ones and later refused to take the right ones.

13. He states that in view of the above, the writ of mandamus is not available to the ex-parte applicant who refused to comply with the mandatory requirements to enable the Registrar Academic Affairs who is tasked with issuance of transcripts and degree certificates issue him with a degree certificate.

14. If the ex-parte applicant presented the said transcripts before the vetting panel of the Police Service Commission as alleged knowing that he had not graduated with first class honours he has no one to blame but himself. The respondents state that the orders sought are not tenable because the university cannot be compelled to issue the ex-parte applicant with an award he did not graduate with.

15. The respondent further states that he is not in a position to issue the orders sought because by doing so he would be usurping the powers of the Senate. He states also that orders of certiorari and mandamus cannot issue against lawful acts of a statutory body. He prayed that the court dismisses the application with costs to the respondent.

16. The ex-parte applicant submits that according to **Article 48** of the Constitution, he has a right to justice. He cites several other articles of the Constitution citing his rights to reasonable and procedurally fair administrative action, the right to institute court proceedings.

He states that there was a **legitimate expectation** on his end based on the transcripts he was first issued with, which even had a recital at the end with the statement; "This transcript is issued without any alteration whatsoever."

**He cited the case of R V A.G and Anor exparte Waswa & others IKLR 280 in support of the principal legitimate expectation saying it extended to a future benefit yet to be enjoyed.**

17. He further submits that having presented the transcripts he refers to as his original transcripts to his employer, they were accepted and he was recommended for a further training in **Kigali, Rwanda** and awarded as an equivalent by the **Higher Education of Rwanda – Kigali**. He states that the respondent filed their affidavit 1 year after he had graduated with his master's degree program in Rwanda and it is contrary to the rules of natural justice to try and explain away the actions after the event.

18. In addition, that the respondent should not rely on false/desperate measures to justify the institution's unjust actions.

19. The ex-parte applicant outlined the parameters for the judicial review orders of mandamus, certiorari and prohibition and concluded that there is nothing that would bar the court from granting the orders sought.

20. The gist of the respondent's submissions has largely been captured in their replying affidavit. He stated that only Kisii University as an entity has the capacity to sue and be sued and not its offices thus rendering the present claim unsustainable.

21. Additionally, the respondent avers that the court's mandate in upholding Article 47 of the Constitution only extends to deciding whether

the process leading to the issuance of the second class upper division was proper and not to adjudicate on the merit of the same.

22. The respondent states that they had a right to effect the moderation and it did not affect only the ex-parte applicant but also other students in the university, across various faculties. All the parties including the ex-parte applicant got to see the graduation booklet before it was printed and got to confirm that the details were correct.

23. In examining whether the ex-parte applicant was entitled to the orders he sought, as regards the order of certiorari, the university contends that it reserves the right to moderate examination results and it has not been demonstrated that the results by the Senate were erroneous in any way. He states that the court should be slow in quashing a lawful decision by the Senate when no illegality had been proved.

24. On the order of mandamus, the respondent states that the court cannot compel the university to issue the ex-parte applicant with a certain degree because this is conditional upon satisfying a number of conditions from the time he sat for his exams up until the approval of his results by the university senate. They claim that this specific prayer is vague and that the Vice Chancellor who is the chairman of Senate cannot be personally sued or made liable in personal capacity for any decisions of the Senate. They say that the university has not refused to issue the ex-parte applicant with a degree certificate, rather he simply has refused to collect the certificate that reads Second class honours upper division.

25. The respondents submits that the court is being drawn into extraneous issues to decide aspects of the case that belong in the ambit of the university and therefore seeks that the ex-parte applicant's application be dismissed.

26. The ex-parte applicant claims that the actions by the respondent and the university amount to an illegality and this occasioned his seeking of the judicial review orders.

27. As a general proposition judicial review proceedings are not concerned with the *merits* but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety*. Those terms were explained well by Odunga (J) in **REPUBLIC V INSPECTOR GENERAL OF POLICE EX-PARTE PATRICK NDERITU NAIROBI, HIGH COURT JUDICIAL REVIEW 130 OF 2013 [2015] EKLK-**

***“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act 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 a 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 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 legislative instrument by which such authority exercises jurisdiction to make a decision.”***

12. Where the ex-parte applicant claims an infringement on the principle of natural justice the case of **ONYANGO OLOO V ATTORNEY GENERAL [1986-1989] EA 456**, the Court of Appeal said that :

***“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard.....There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellants and others guessing about what matters could have persuaded him to decide in the manner he decided.”***

28. Kimondo J. avers persuasively in the case of **REPUBLIC V MOI UNIVERSITY [2015] EKLK** that;

***“There are no hard and fast rules on the procedure to be adapted by various bodies; however, the administrative tribunals must achieve a reasonable degree of fairness throughout their investigations, proceedings and final decision. If that threshold is not met, then the High Court will be entitled to call for the proceedings, quash them and grant appropriate reliefs. The onus to prove the violation of rights rests squarely with the ex parte applicant.”***

29. The principle of legitimate expectation was elaborated upon in the case of **KEROCHE INDUSTRIES LIMITED VS. KENYA REVENUE AUTHORITY & 5 OTHERS NAIROBI [2007] EKLK** where the Court held that:

***“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to***

*their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”*

30. Two issues arise for determination:

**i. Should the applicant have sued the Vice Chancellor in his personal capacity**

**ii. Should the court compel the university to issue the applicant with a Bachelors degree 1<sup>st</sup> class honours based on the principle of legitimate expectation**

31. The ex parte applicant was a student at Kisii University which is not a party to this suit. The decision he contests was made by the University's Senate.

The charter for the said University empowers the Senate under **Section 21 (4)** to inter alia

**(i) approve the examination results,**

**(j) subject to the provisions of the Act, to approve the award of degrees including the award of honorary degrees and other academic distinctions,**

**(i) to determine the procedure to be followed in the conferment of degrees and awards, approve examination results.**

32. The decision was not made by the Vice Chancellor in his personal capacity to warrant suing him. Indeed under the Universities Act 2012 and the Charter for Kisii University, the entity which was legal capacity to sue or be sued for acts done by it or against it.

33. It is not disputed that in exercise of its mandate, the University's Senate resolved that the examination results were to be reported back to the University's Faculty Board for correction and further moderation on the number of first class honours to be awarded.

34. The Faculty Board forwarded the moderated results to the University's Main Campus for approval. Subsequently the University's Senate held a meeting on 27.12.2014 and approved the pass list and graduation list for all the students.

Obviously the decision was not a one man move and it is thus misplaced for the applicant to sue the Vice Chancellor in his personal capacity.

35. Should this court compel the University to award the applicant a 1<sup>st</sup> class honours degree?

There is nothing to suggest that in making its decision, the Senate acted ultra vires its mandate. Was the decision erroneous or unreasonable? Again no evidence has been led to demonstrate that in moderating the applicant's results, the Senate acted in error.

36. For the ex parte applicant to be issued with a 1<sup>st</sup> class honours degree, he was required not only to pass the examination, but have the results approved by Senate, which also had the mandate to approve the degree to be awarded. That is an exercise conferred upon the Senate and this court cannot deign to cloth itself with such mandate.

37. I concur with the Respondent's counsel that in an application such as this one, the concern is whether the legal procedure was followed in regard to the impugned decision, and not whether the applicant was qualified to be awarded a 1<sup>st</sup> class honors degree. I can do no better than to echo the words in MAGIT VS UNIVERSITY OF AGRIC, MARKUDI [2005 – SUPREME COURT] that

***“the courts have no business to flirt into the arena of a University deciding whether a thesis had met the standard of which it has set, has been met. Any attempt, in any court, .... to dabble or encroach into the purely administrative and domestic affairs of a University...may lead to undue interference, nay the weakening inadvertently so to speak, of the powers and authority conferred on the Universities by statutes and that .... Will not be justifiable....truly academic decisions are to be distinguished from the administration decisions of the academic boards ....administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the court's reach though, on facts in several cases, the courts can interfere...”***

38. It is clear that the university made an error in issuing the initial transcripts which afforded the ex-parte applicant a different set of grades amounting to a first class honors.

In my opinion and in view of the foregoing, the judicial review orders sought for are not applicable in this case.

The university's error was corrected and the ex-parte applicant followed through to graduation with the award of a second class honors-upper division. There was no proof of malice on the university's part and orders to compel the university to change the grades at this point without solid evidence would be inordinate. The ex-parte applicant's application is therefore dismissed with costs to the respondent.

**DELIVERED AND DATED THIS 26<sup>TH</sup> DAY OF FEBRUARY 2019 AT ELDORET**

**H. A. OMONDI**

JUDGE