



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 6 OF 2017

IN THE MATTER OF AN APPLICATION FOR

AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

AND

KISII UNIVERSITY.....RESPONDENT

EX PARTE: MARY JEBET MUTAI

JUDGMENT

[1] The Notice of Motion dated **18 August 2018** was filed herein on even date by the *Ex Parte* Applicant, **Mary Jebet Mutai**, pursuant to **Sections 8 and 9** of the **Law Reform Act** and **Order 54** of the **Civil Procedure Rules, 2010**, for an Order of Mandamus directing the Respondent, **Kisii University**, to issue to her an academic certificate for a certificate course in Library and Information Science that she had undertaken at the University; and that the costs of the application be provided for. The application is expressed to be brought under **Order 54** of the **Civil Procedure Rules**. That must be a mistake because **Order 54** has only two provisions, which are in connection with revocation of the old **Civil Procedure Rules** and transitional provisions. Obviously then, that must have been a typographical error, the correct provision being **Order 53** of the **Civil Procedure Rules**.

[2] The application was predicated on the grounds that the Applicant was registered upon admission by the Respondent to pursue a certificate course in Library and Information Science which she successfully completed; that the Applicant thereafter registered and was admitted by the Respondent to pursue a Diploma in Library and Information Science, which she also completed successfully in **2013**; but that, while the Respondent dutifully issued her with her Diploma in Library and Information Science, it had refused to release the Certificate for the certificate course. It was the contention of the Applicant that she was unable to use the Diploma Certificate in the absence of the Certificate, on account of the fact that it was foundational to the Diploma Course.

[3] It was further the contention of the Applicant that, in spite of several requests, the Respondent had declined to issue the Certificate to her in unjust and unwarranted violation of her right to employment; and that unless compelled to release the Certificate, the Respondent would persist in its unreasonable and unjustified posturing. The application was supported by the Applicant's affidavit sworn on **18 August 2017**, to which she annexed her Official Academic Transcript, a copy of her Diploma as well as her correspondence with the Respondent.

[4] The Respondent opposed the application and filed a Replying Affidavit herein sworn on **14 November 2017** contending that the application is devoid of merit, frivolous, vexatious and bad in law and therefore ought to be dismissed with costs on the grounds that, at no

time did it deny the Applicant her Certificate; and that it was the responsibility of the Applicant to go to its main campus in **Kisii** to collect the Certificate. However, the said Certificate has since been released to the Applicant; and therefore it is not necessary to go into the merits of the application. Hence, the only question for determination is whether, in the circumstances, the Applicant is entitled to costs. To that end, Learned Counsel filed their written submissions herein on **26 June 2018** and **9 July 2018**, respectively.

[5] Counsel for the Applicant, **Mr. Momanyi**, was of the posturing that the filing of this application would have been obviated had the Respondent promptly released the Certificate to the Applicant; and that in the circumstances, the Applicant had no option but to seek the intervention of the Court. He urged the Court to take into account the correspondence annexed to the Supporting Affidavit; which in his submission show that the Applicant made several personal attempts to secure the release of her Certificate to no avail. Counsel further pointed out that since the Applicant did not qualify to pursue a Diploma course before the completion of a bridging Certificate course, the Diploma was of no use to her without the Certificate; and that she could not have refused to go and pick the Certificate as alleged; or opted to spend money to hire the services of two advocates and finally filing this application if it was not absolutely necessary.

[6] The Respondent's Counsel, **Mr. Isiji**, on his part, was of the contention that the application was unnecessary. He argued that the Respondent is guided by the **Kisii University Charter, 2013**, and the **Universities Act, 2012** while carrying out its mandate; and that, in accordance therewith, it was mandatory for the Applicant to personally go to its main campus in **Kisii** to collect the Certificate. He blamed the Applicant for the delay and argued that the Certificate had always been available for collection. **Mr. Isiji** further submitted that since the Certificate has since been released, there is no successful party in this matter to warrant an order for costs. He relied on **Republic vs. Ihururu Dairy Farmers Co-operative Society Ltd, Ex Parte Rosemary Wairimu Munene** for the proposition that the issue of costs is in the discretion of the Court and that the well recognized principle that costs follow the event is not to be used to penalize the losing party, but for compensating a party for the trouble taken in prosecuting or defending the case.

[7] Having given due consideration to the documents annexed to the two affidavits filed herein by the Applicant, it is manifest that before the Applicant moved to court, she did make efforts to have the Certificate released to her by the Respondent, to no avail. It is therefore disingenuous for the Respondent to aver that it received none of those letters, yet some of them were delivered by courier to the Respondent. The Applicant annexed to the Supplementary Affidavit an EMS shipment Waybill as **Annexure MJM8** and Nation Media Group Courier Service Waybill as **Annexure MJM9**. The said documents confirm that the letters in question were delivered to the Respondent's main campus. Moreover, the Respondent's contention that the Applicant failed to collect the Certificate cannot be true, given that she had no similar issues in connection with her Diploma.

[8] I would accordingly agree with the Applicant that had the Respondent heeded her pleas, the filing of this Judicial Review application would have been obviated. Accordingly, I am satisfied that the Applicant is entitled to costs of this Judicial Review Application, including the costs of the application for leave, being **High Court Judicial Review Application No. 87 of 2017**. Hence, Judgment is hereby entered in the Applicant's favour for costs of the application herein as well as **Judicial Review Application No. 87 of 2017**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST 2018

OLGA SEWE

JUDGE