



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 175 OF 2016

**IN THE MATTER OF ARTICLES 2 (1), 3(1), 10, 19, 20 (1), (2), & (4), 21 (3), 23, 24 & 25 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 35 (1), (B), 43 (1), (F), 47 & 50 OF THE CONSTITUTION**

AND

**IN THE MATTER OF KENYA NATIONAL EXAMINATIONS COUNCIL ACT, 2012 AND THE
RULES THERE UNDER**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

**IN THE MATTER OF THE CANCELLATION OF THE RESULTS OF 131 CANDIDATES OF
THE KENYA CERTIFICATE OF SECONDARY EDUCATION EXAMINATIONS HELD AT
KABOSON GIRLS SECONDARY SCHOOL**

BETWEEN

**C R (SUING THROUGH FATHER AND NEXT FRIEND) & 130
OTHERS.....PETITIONERS/APPLICANTS**

VERSUS

**KENYA NATIONAL EXAMINATIONS
COUNCIL.....RESPONDENT**

JUDGEMENT

1. All the petitioners sat for the Kenya Certificate of Secondary Examination in the year 2015 at Kaboson Girls Secondary School. The examination involved eight subjects which included English 101/1 (Functional Skills) and English 101/2 (Comprehensive, Literary Appreciation & Grammar) and English 101/3 (Creative Composition and Essays based on set Texts).

2. The petitioners avers that during or at the end of the said examinations, the Respondents officers did not notify the school management of any irregularities. However, on 2nd March 2016 the Respondent wrote to the Head teacher of the petitioners' school communicating cancellation of their English 101 results citing an irregularity, namely collusion, contrary to the Kenya National Examination Council Act. [\[1\]](#) A request for the review of the said decision was unsuccessful, hence this petition seeking several declaration/orders against the Respondent.

3. The petition is premised on alleged contravention of Fundamental Rights and Freedoms of the petitioners, namely, cancelling results without notice, failure to give opportunity to be heard, failure to give reasons or afford right or review or furnish materials relied upon.

4. The Respondents Response is that Section **10 (2) (e)** of the Kenya National Examinations Council Act[\[2\]](#) (herein after referred to as the act) empowers the Respondent to withhold or cancel results of candidates involved in examination irregularities/malpractices; while section **45 (2)** of the act provides for nullification of results if the Respondent is satisfied that the examination results of such a candidate have been obtained by irregular means. A similar provision is contained in paragraph 9, Rule 27 (2) of the Kenya National Examination (Kenya Certificate of Secondary Education Examinations) Rules, 2009 which provides that the Respondent, if satisfied after investigation that candidates or examination centres have been involved in any examination irregularity or misconduct, shall cancel the results of such candidates or examination centres.

5. The Respondent also states that the Respondent circulated to every candidate instructions on how the candidates should conduct themselves during examinations and even warned of grave consequences to those caught engaging in irregularities. Further, a circular was issued to each candidate warning them against engaging in misconduct and that the examination was marked in conformity with the regulations.

6. The Respondent maintains that cheating in the form of collusion in the papers in question was detected and shown in annexure JS4; that the papers were subjected to scrutiny by the language teams which on 10th February 2016 made a report on its findings to the Research and Quality Assurance Processing Team which resolved to set up a validation team. The teams findings were presented to a special management meeting of the Respondent held on 18th February 2016 who after evaluating the reports and evidence recommended the cancellation of 5,101 results which included the petitioners results and withholding of results for centres suspected of having engaged in irregularities.

7. The petitioners school was one of the centres detected to have candidates whose scripts evidenced examination malpractices; that the papers in question were carefully scrutinized and they disclosed collusion. All the petitioners totalling to 131 presented identical responses for English paper 101/1 for spaces 1-10 including one identical incorrect response for space 10. The Respondent observed that even though there were other possible responses, all the petitioners provided an identical response, and argued that such a similarity of thought and choice of words is not possible, hence the candidates must have been exposed to the linguistic items before or during the examination.

8. The Respondent also argued that answers to question 3 (a) (i) and (ii), 90 and 60 respectively discussed character traits (similar) instead of skills in similar words (similar wrong answers) and that answers to question 3 (b) (i), 67 and 60, the petitioners respectively had strikingly similar expressions in their responses to the question and in question 3 (b) (iii) groups of 61, 94, 30 and 81, the petitioners respectively presented similar incorrect responses to the question, while in answers to question 3 (d) groups of 86 and 62 the petitioners respectively gave similar incorrect responses.

9. The Respondent contented that in view of the above, and relying on its officers expertise and skills in testing candidates, it concluded that it was not possible, if the petitioners had worked independently, to present the answers found in their scripts which left no doubt that there was collusion.

10. The Respondent also stated that comparisons of answering patterns for candidates from non-cheating centres were made and they showed different features such as absence of identical phraseology among other trends, hence, the Research and Quality Assurance Processing Team in a meeting held on 18th

February 2016 examined the findings and after scrutiny was satisfied that there was collusion, hence the team recommended cancellation of the results, which decision is permitted by the law and in its letter dated 2nd March 2016, the Respondent gave reasons for the cancellation.

11. Further, the Respondent states that it is in public interest that each candidate gets a grade that has been fairly obtained considering that the examination results are the major determination of access to institutions of higher learning and the job market and emphasised on the need to ensure integrity of national examinations and denied that the Respondent acted in bad faith and also stated that a Bill has been passed in Parliament to provide for a National Examinations Appeals Tribunal.

12. The petitioners, in a supplementary affidavit sworn by Joel Kibet Towett, avers that Section 10 (2) (e) of the act[3] and Rule 27 (2) of the Kenya National Examinations (Kenya Certificate of Secondary Education) Rules, 2009 offend article 47 of the constitution.

Petitioner's Advocates submissions

13. The petitioners counsel argued that the procedure employed by the Respondent in cancelling the results is unlawful in that it offends article 47 of the constitution and section 4 of the Fair Administrative Actions Act[4] which provisions obligate the Respondent to act in a manner that is expeditious, efficient, lawful, reasonable and procedurally fair.[5] Counsel also cited *Kenya Revenue Authority vs Menginya Salim Murgani*[6] where it was held 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 the task it is for them to decide how they will proceed.

14. Counsel insisted that failure to observe the rules of natural justice and failure to afford the petitioners an opportunity to be heard is a procedural irregularity and offends the rules of natural justice[7] and article 35 of the constitution and urged the court to quash the decision.

Respondents Counsel's Submissions

15. The crux of the Respondents counsel's submissions is that section 10 (1) (a) and (b) of the Act sets out its core functions, while section 45 provides for nullification of examinations and section 42 provides for limitation of the right to access information.

16. To buttress its argument, counsel cited two leading court decisions on cancellation of examination results, namely *Kenya National Examinations Council vs R Ex parte Geoffrey Gathenji Njoroge & 9 Others*[8] and *Kenya National Examinations Council vs R ex parte Kemunto Regina Ouru*[9] and quoted extensively from the said decisions. Also cited is the decision in *R vs Kenya National Examinations Council ex parte Afrah Farid Maree & 48 others*[10] where addressing a similar argument, the court *inter alia* observed that academic integrity of secondary school examination is crucial, as a basis for access to the entire learning process in the tertiary institutions as well as to the finite job opportunities which facilitate the running of the society's private and public governance institutions and that the respondent should be allowed a certain measure of discretion to discharge its functions.

17. Also cited is *R vs Kenya National Examinations Council & Others Ex parte Kipkurui Michele & 34 Others*[11] in which the court agreed that the criteria adopted by the Respondent did not entirely comply with the constitutional dictates but held that to grant orders as sought in the petition, would be to invite chaos and bring the very process of examination into disrepute.

18. Counsel argued that that section 42 of the act allows for limitation on the right to access to information and reiterated that section 10 (2) (e) of the act empowers the Respondent to cancel results.

Analysis of the law, issues and authorities

19. Regarding the authorities cited by the petitioners counsel, it is important to point out that a case is only an authority for what it decides. This position was well elucidated in *State of Orissa v. Sudhansu*

Sekhar Misra in the following words:-[12]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn v. Leatham, [13]that "Now before discussing the case of Allen vs. Flood[14] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...." (Emphasis added)

20. The ratio of any decision must be understood in the background of the facts of that case.[15] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[16] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[17]

21. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[18] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[19] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[20] My plea is to keep the path of justice clear of obstructions which could impede it.

22. I find that the following issues distil themselves for consideration, namely, **(a)** whether the petitioners right to access to information was violated, **(b)** whether the petitioners are entitled to judicial review reliefs in the nature of *certiorari* and *mandamus* or any of the reliefs sought in the in the petition and **(c)** whether actions complained of violated the petitioners rights under article 47 of the constitution.

23. It is well known that the Examination is always considered as one of the major means to assess and evaluate candidate's skills and knowledge be it a school test, university examination, professional examination.

24. Schools can function properly only if its members adhere to clearly established goals and values. Essential to the fundamental purpose of the learning institutions is the commitment to the principles of truth and academic honesty. The provisions of the governing law are designed to ensure that the principle of academic honesty is upheld. While all members in learning institutions share this responsibility, such strict regulations are designed so that special responsibility for upholding the principle of academic honesty lies with the students and teachers so as to avoid academic dishonesty and safe guard integrity of academic programs.

25. Academic dishonesty is a corrosive force in the academic life of learning institutions and is an evil that must be fought zealously. It jeopardizes the quality of education and depreciates the genuine achievements of others. It is, without reservation, a responsibility of all members of the learning institutions to actively deter it.

26. Where there are allegations that students resorted to "unfair means on a large scale" at an examination, this court takes the view that any reliable information suggesting the occurrence of such malpractice in the examination is sufficient to authorize the examining body to take action because examining bodies are "responsible for their standards and the conduct of examinations" and "the essence of the examination is that the worth of every person is appraised without any assistance from an outside source."

27. A was observed by the Supreme Court of India, the public policy of the country and the larger public

interests, would be more appropriate guides than the considerations of equity to decide the questions in the absence of any statutory prescription applicable to the controversy on hand than the consideration of equity.[\[21\]](#)

28. Discussing public policy, the following passage from the decision of the Supreme Court of India in *Central Inland Water Transport Corporation Limited & Another v. Brojo Nath Ganguly & Another*,[\[22\]](#) in which the court explained the concept of public policy and its role in the judicial decision making process in the following words is highly beneficial:-

“92. From the very nature of things, the expressions “public policy”, “opposed to public policy”, or “contrary to public policy” are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought— “the narrow view” school and “the broad view” school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.* [(1902) AC 484, 500] : “Public policy is always an unsafe and treacherous ground for legal decision”. That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* [(1824) 2 Bing 229, 252 : 130 ER 294, 303 and (1824-34) All ER 258, 266] described public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you”. The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Assn. Ltd.* [(1971) Ch 591, 606] : “With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.” Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of Equity would never have evolved. Sir William Holdsworth in his *History of English Law Vol. III*, p. 55, has said:-

“In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.”

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.”

29. It is my considered opinion that public policy and public interest must be construed strictly to uphold the sanctity and integrity of national examinations. Lord Shaw of Dunfermline in *Local Government Board vs Airlidge*,[\[23\]](#) summed up the position when he held that authorities:-

“... must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means”

30. Section 45 of the Act[24] provides for nullification of examination and investigations where the Council is satisfied that there has been an irregularity in the course of any examination. The challenged decision has not been shown to be unlawful or malicious. The court cannot stop a lawful process. It can only intervene if it is shown to be an abuse of the process, illegal or baseless or if it is prompted by ulterior motives or any such other motives other than furtherance of the law, relevant regulations and public interest.

31. The Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law or regulations. An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent.

32. The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

33. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicant has not satisfied the threshold for this court to grant the orders of *mandamus* and *certiorari*.

34. On the issue of denial of the right to access to information, for a better understanding of the petitioners claim for access to information, it is necessary at the outset to outline the legal basis for the claim. The right of access to information held by the state or any other person is guaranteed by Article 35 of the Constitution. It provides:-

35. (1) *Every citizen has the right of access to—*

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

35. The importance of this right has been explained by the constitutional Court of South Africa in *Brümmer vs Minister for Social Development and Others*[25] where the Court said:- ".....access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights....."

36. Access to Information Act[26] was enacted to give effect to Article 35 of the Constitution. It provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.

37. Section 4 provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6 of the act.

38. Section 42 of the Act[27] provides for limitation on right to access information. It provides that:-

1. The right to access to information guaranteed under Article 35 of the Constitution is hereby limited under Article 24 of the Constitution to the nature and extent contemplated under subsection (2)

2. The Council, being a public entity shall be under no obligation contemplated under Article 35 of the Constitution to give such information as would, in the opinion of the Council—

- a. *compromise the integrity of any examination administered by the Council*
- b. *compromise the examination process; or*
- c. *compromise the right to privacy of an individual*

39. It is clear from section 6 of the Access to Information Act, and section 42 of the Act that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 of Access to Information Act and section 42 cited above is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

40. The burden of establishing that the refusal of access to information is justified rests on the party refusing access. This position was clearly expressed by the Constitutional Court of South African in *President of the Republic of South Africa & Others vs M & G Media Limited* [28] where it was held that:-

"The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of..... the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions Hencethe evidentiary burden rests with the holder of information and not with the requester."

41. Thus, the Respondents have a burden and a duty to demonstrate that the information sought falls within the exceptions under sections 6 and 42 of the acts cited above. In my view, the Respondent have demonstrated that the refusal falls within the exceptions.

42. It is also important to point out that the limitation claimed must satisfy the provisions of article 24 of the constitution and must be reasonable and justifiable.

43. Although the right of access to information is not absolute, to satisfy the requirements set out under article 24 of the Constitution, the respondents must demonstrate that the limitation imposed on the constitutional right is "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and that it falls within the exceptions provided in section 6 of the act." In my view, the Respondents have demonstrated that that the refusal falls within the exceptions in section 6 of the Access to Information Act and Section 42 of the Kenya National Examinations Act.

44. On the right to be heard, Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[29]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[30]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

45. The issue that inevitably follows is whether or not the Respondent's conduct amounted to breach of the rules of natural justice. In *Local Government Board v. Arlidge*,[31] Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."*

46. I am not unconscious or oblivious of grave injustice which might be done to the students, because of refusal by this Court to interfere but I cannot ignore the importance of maintaining the dignity and sanctity of examinations. The regulation, management or control or examinations should best be left to the discretion of those who are entrusted with the responsibility. If this Court starts substituting its own opinion in place of opinion expressed by a body mandated by the law to manage examinations, it shall result in chaos.

47. In *University of Ceylon vs. Fernando*[\[32\]](#) at pg 637 para. E the Court citing **Tucker L.J.** in *Russel v Duke of Norfolk (1)* held that:-

“Their Lordships do not propose to review these authorities but would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point...There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth”.

48. The Supreme Court of India in *Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others*[\[33\]](#) at pg 104 was however of the view that:-

“Viewed against this background, we do not find it possible to agree with the views expressed by the High Court that the denial of the right to demand a revaluation constitutes a denial of fairplay and is unreasonable. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against revaluation”.

49. The petitioners sat for the examination in question fully aware of the instructions, rules and regulations and even consequences. The decision to cancel the results has not been shown to be unreasonable or unjustified in the circumstances.

50. In the above cited case at page 1105, the Court stated *inter alia* that *“the test of reasonableness is not applied in a vacuum but in the context of life’s realities..... As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice.”*

51. Also relevant is the decision in *R vs. Council of Legal Education*[\[34\]](#) where the court Judge stated thus:-

“The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable...”

52. I am persuaded that the respondent did not entirely comply with the constitutional dictates prescribed under article 47 of the constitution, but in my view, taking into account the facts of this case and the need to uphold the integrity of examinations in this country, to grant the orders sought herein would bring the very process of examination into disrepute. It would breed despondency and dent public confidence in the conduct of examinations in this country.

53. I find comfort in the decision in *Kenya National Examinations Council vs. Republic Ex-parte Kemunto Regina Ouru*^[35] where the Court of Appeal stated that: -

“Considering the foregoing we come to the conclusion that balancing one thing against the other the balance tilts in favour of subordinating the right to be heard directly, in favour of the public interest of ensuring that national examinations results enjoy public confidence and integrity by letting the experts handle them as they deem best provided what they do is applied equally to all candidates with similar complaints against them. In view of the conclusion we have come to, it is our judgment that Ibrahim, J. was in error to issue an order of certiorari, more so because, other than the alleged denial of a hearing as we strictly know it, there was no proper basis for him to interfere.”

54. Also relevant is the decision in *Baseline Architects Limited & 2 Others vs. National Hospital Insurance Fund Board Management*^[36] where the High Court stated that :-

“It is, I think, a principle which commands general acceptance that there are circumstances in which the public interest must be dominant over the interest of a private individual. To the safety or the well-being of the general public, the claims of a private litigant motivated by profit may have to be subservient. It is therefore vital to protect the public from private interest peril – i.e. interests of a litigant must give way to that of the general public...”

As stated the court has ultimate power in the interest of justice to fulfill the mandate given to it, to safeguard the interests of the public and in doing so, where there is reasonable grounds to protect and preserve the interests of the public. Such duty must be performed in order to do justice between the parties. It is also instructive to note that the court has a duty to safeguard genuine interest of a litigant but also ensure that the scope of privilege is not extended in matters which have strategic importance to members of the public.”

55. I take the view that this is a case where public interest must be dominant over the rights of individuals.

56. In view of my conclusions herein above, I decline to grant the reliefs sought in this petition. Accordingly, I dismiss the petition with no orders as to costs.

Orders accordingly

Signed, Dated, Delivered at Nairobi this 21st day of September 2017

John M. Mativo

Judge

[1] Act No 29 of 2012

[2] Cap 225A, Laws of Kenya

[3] Ibid

[4] Act No. 4 of 2015

[5] Counsel cited Republic vs National Police Service, Commissioner of Police ex parte Francis Omondi Okonya {2014}eKLR

[6] Civil Appeal No. 108 of 2009

[7] Republic vs The Hon. the Chief Justice of Kenya & Others ex parte Moiwo Ole Keiwua, Nairobi HCMCA No. 1298 of 2004 cited

[8] {1997}eKLR

[9] {2010}eKLR

[10] HC Misc Civil App No J.R. N. 44 of 2010- Mombasa, Ojwang J

[11] NBI JR Civil App No 7 of 2015

[12] MANU/SC/0047/1967

[13] {1901} AC 495

[14] {1898} AC 1

[15] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[16] Ibid

[17] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[18] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[19] Ibid

[20] Ibid

[21] In the Supreme Court of India Civil Appeal No. 1727 OF 2016 Nidhi Kaim Vs State of Madhya Pradesh & Others Etc.

[22] {1986} 3 SCC 156

[23] {1915} AC 120

[24] Supra

[25]{2009} ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[26] Act No. 31 of 2016

[27] Supra

[28] CCT 03/11 {2011} ZACC 32 Heard on : 17th May 2011 Decided on : 29th November 2011

[29] Article 47(1) of the Constitution of Kenya, 2010

[30] Article 47(2) of the Constitution of Kenya, 201

[31] {1915} AC 120 (138) HL

[32] {1960} 1 ALL ER 631

[33] {1985} CLR 1083

[34] {2007} eKLR

[35] {2010} eKLR

[36] {2008} eKLR