REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

JUDICIAL REVIEW NO. 19 OF 2014.

REPUBLIC ::: APPLICANT

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY, KAKAMEGA :::::::::: RESPONDENT

EXPARTE: COSMAS RUTTO CHEPTOO

R U L I N G.

1. The exparte applicant filed an application for Judicial Review on 8th December, 2014 brought under order 53 rule 3 (of the Civil Procedure Rules) and sections 8 and 9 of the Law Reform Act. The exparte applicant sought the following orders:-

i. *That the prerogative order of certiorari do issue to remove into this court and quash the decision of the senate of the respondent to award the exparte applicant second class honours degree upper division, in purchasing and supplies management;*
ii. *That a prerogative order of mandamus do issue directed at (sic) the respondent directing it to release consolidated mark sheets for the 1st, 2nd, 3rd and 4 (sic) year of study and the marked answer sheets for the same period for all subjects studied by the applicant and be compelled to re tally (sic) the same to ascertain the correctness of the award or the award or the correct award and the related marks be the basis of award of degree to the applicant;*
iii. *That costs of this application be borne by the respondent.*

The application is anchored on the following grounds:-

i. *That the applicant is an under graduate at the respondent (sic) college, Kakamega campus;*
ii. *That the applicant is aggrieved by the award of 2nd class Honours upper division degree;*
iii. *That the applicant has information that his marks have been deliberately reduced to deny him the benefits that come with an award of 1st Class Honours degree;*
iv. *That the applicant has constitutional right to information and equality before the law;*
v. *That it is in the interest of justice that the orders sought be granted;*
vi. *That the applicant is entitled to a fair administrative action that is lawfully and procedurally fair;*
vii. *That the applicant's fundamental right has been adversely affected as he would lose the benefits that comes with an award of 1st Class Honours.*

2. The ex-parte applicant also filed a statement of facts as required under order 53 rule 4 (1)of the

Civil Procedure Rules. A copy of a verifying affidavit of the exparte applicant, Cosmas Rutto Cheptoo was attached to the application.

Ex-parte applicant's submissions

3. At the hearing of the application, Mr. Munyendo, learned counsel for the exparte applicant submitted that the exparte applicant is seeking orders of certiorari to quash the order of the respondent's senate to award the exparte applicant a 2nd class honours degree, upper division and that he be awarded a 1st class honours degree. It was submitted that the respondent is withholding the results and that the applicant wants a re-tallying of his results.

4. Mr. Munyendo submitted that article 10 of the Constitution is applicable in the instant case as the exparte applicant is seeking accountability and transparency. Inasmuch as the transcripts given to the exparte applicant show that he scored 68.5%, he seeks to see his results to ascertain that he did not score over 70%. The exparte applicant does not understand how the respondent's senate arrived at 68.5%. Mr. Munyendo submitted that if that is the practice of the respondent to withhold results, it should stop as by not releasing the exparte applicant's results, the respondent is not being accountable and transparent. Thus the integrity of the results released to the exparte applicant is in doubt.

5. Mr. Munyendo further submitted that article 35 of the Constitution of Kenya enjoins the University to release the exparte applicant's results and no reason has been given as to why the results cannot be disclosed.

Mr. Munyendo prayed that the application be allowed.

Respondent's submissions

7. Mr. Mukele, learned counsel for the respondent opposed the application and relied on the replying affidavit filed on 8th May, 2015 and his written submissions filed on 21st July, 2015 and list of authorities. He submitted that the application arises from a feeling of self entitlement by the exparte applicant that he is entitled to a 1st class honours degree other than a 2nd class honours degree, upper division. Mr. Mukele referred the court to paragraph 4 of the statement filed by the exparte applicant in support of the application. He submitted that with regard to paragraphs 5 and 6 of the exparte applicant's affidavit, the burden is not on the respondent to demonstrate that it contravened any law or that there was procedural impropriety. The exparte applicant should show that the law has been broken. He has failed to do so.

8. Mr. Mukele also submitted that in paragraph 5 of the said affidavit, the exparte applicant states that he has information that his aggregate score entitles him to a 1st class honours degree. Under Order 19 of the Civil Procedure Rules, the source of any information deposed to in the affidavit should have been disclosed for the court to make a decision on the same. Since the source of information is not disclosed, the respondent has been taken to court because of rumours and conjecture which has no basis. Mr. Mukele submitted that if the prayers herein are granted, hundreds of students would go to court making demands for awards of 1st class honours degree. It would lead to an absurdity.

9. Mr Mukele submitted that under article 35 of the Constitution, there is a right of access to information and the exparte applicant could have filed a petition under article 35 of the Constitution. This was not done. Mr. Mukele relied on the case of **Andrew Omtatah Okoiti vs. Attorney General & 2 others, Petition No.92 of 2011 (Nairobi)** where it was held that at the first instance a request must be made to the party holding the information and it has to be shown that the request was denied.

10. The exparte applicant has not shown that he requested for the information sought and his request

was turned down. It was submitted that the application herein has no merit as it seeks orders of self-entitlement whereas the duty of examining the exparte applicant is vested on the experts who are University examiners and external examiners. Mr. Mukele posed a rhetorical question on if the court was being asked to usurp the powers of the University and responded that this cannot happen.

11. It was submitted for the respondent that the exparte applicant is asking for re-tallying of the results which can be done depending on the circumstances such as by the exparte applicant demonstrating that the law has been contravened.

Mr. Mukele prayed for the application to be dismissed with costs.

Determination of the application

12. The issues that call for determination are-

i. Whether the exparte applicant has established grounds for grant of Judicial Review remedies;
ii. Whether Judicial Review remedies of certiorari and mandamus should be granted to the exparte applicant; and
iii. Who should meet the costs of the application?

Certiorari and mandamus

13. The grounds for grant of the remedies for Judicial Review were well defined by Lord Diplock in the case of **Council for Civil Service Unions Vs. Minister for Civil Service [1985] A.C. 374 at 401D** where he stated that:-

> ***"Judicial Review has I think developed to a stage today when ..... one can conveniently classify under three heads the grounds upon which administrative action is subject to control of judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ..... By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it ..... By "irrationality" I mean what can now be succinctly referred to Wednesbury unreasonableness" ..... it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it ..... I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."(emphasis mine).***

14. The exparte applicant has moved this court for grant of orders of certiorari as he is aggrieved by the award of a 2nd class honours degree, upper division. In paragraph 4 of his affidavit, he deposes that the marked scripts are never returned to students to verify the results. He deposes in paragraph 5 that he has information that he scored marks that would lead him to being awarded a 1st class honours degree. He avers in paragraphs 6 and 7 of the said affidavit that he is entitled to fair administrative action whose procedure is fair and open but the fair procedure has been compromised hence the award of a 2nd class honours degree, upper division.

15. The exparte applicant in his affidavit also deposes that his legitimate expectations (sic) have been thwarted and he is entitled to equal treatment as other students. He avers that the action of the respondent of not awarding him 1st class honours is discriminatory. He deposes in paragraph 17 of his affidavit that the graduation ceremony was fixed for 24th November, 2014 and once conferred the degree at graduation, he would have no right of appeal.

16. In response to the foregoing depositions, the respondent filed a replying affidavit on 8th May, 2015. The affidavit was sworn by the Deputy Vice Chancellor Professor Romanus O. Odhiambo. Paragraphs 6 and 7 of his affidavit disclose the procedure followed in administration and evaluation of examinations. He deposes that the examinations are firstly internally administered and evaluated before being submitted to external examiners for thorough evaluation and assessment. It is after the above has been undertaken that the respondent's senate proceeds to grade and award degrees. The deponent in paragraph 11 deposes that the final degree classification awarded to a student depends on the outcome of the computation of the average of all the units taken during the course duration. In paragraph 12, the deponent avers that in this case, the exparte applicant attained an average mark of 68.55% which falls under the cadre of 2nd class honours degree, upper division.

17. In paragraph 16 of the said affidavit, the deponent avers that the applicant has failed to pursue the dispute resolution mechanisms or raise his grievances (sic) or complaint with the respondent for consideration. He adds that the exparte applicant has neither appealed nor sought for a review in respect of his final degree classification.

18. In the case of **R. Vs The Commissioner for Cooperative Development Kariobangi Housing and Settlement Cooperative Society Ltd Exparte David Mwangi & 13 others, HC Misc. 805 of 1990**, Bosire J, as he then was, quoted with approval from Halsbury's Laws of England 4th Edition Vol. II page 805 para 1508 as follows:-

> ***"Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite ground for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles".***

19. In the instant application, the exparte applicant is relying on information he was given by 3rd parties whom he has not disclosed in his affidavit. That information is therefore not verifiable. His verifying affidavit therefore offends the provisions of Order 19 rule 3 (1) of the Civil Procedure Rules which provides that:-

> ***"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:***
>
> ***Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".***

20. The exparte applicant's sources of information are phantoms that remain faceless and nameless throughout his affidavit. I am therefore in agreement with the learned counsel for the respondent, Mr. Mukele, that the exparte applicant's application is anchored on rumours and conjecture.

21. It is apparent from the exparte applicant's application and verifying affidavit that he is challenging both the decision making process of conferment of a 2nd class honours degree, upper division as well as the award, as in his view he is entitled to a 1st class honours degree. This calls for this court to refer to the scope of the remedy of Judicial Review.

22. The Supreme Court practice of England 1997 vol. 53/1-14/6 states:-

> ***"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision – making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is***

given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Brightman in Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155 P 1173"

23. To shed light on the Wednesbury principle; it states that -

> ***"Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision." See Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223 per Lord Green MR***.

24. In the instant case, the exparte applicant's averments that he was not accorded fair treatment and that he was discriminated against cannot hold in view of the fact that the averments in the respondent's replying affidavit show that all the students are subjected to the same examination and evaluation is done by both the respondent and external examiners. The ex-parte applicant's examination sheets were therefore subjected to the same procedure as for all the other students. It is unfortunate that the exparte-applicant missed in the attainment of the requisite marks for conferment of a 1st class honours degree by a very narrow margin. It is however not within the purview of this court to direct universities on how to award marks to its students. It is common knowledge that for any student to attain a 1st class honours degree; they have to work exceptionally hard from their first to the last year in University and must consistently sustain excellence in their studies. Attainment of a 1st class honours degree, is no walk in the park.

25. The exparte applicant has failed to satisfy this court that he is entitled to orders of certiorari.

26. On the remedy of Mandamus, the court of Appeal in the case of **Kenya National Examination Council Vs. Republic Exparte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** cited the following from Halsbury's Laws of England, 4th Edition Volume 1 at page 111 from paragraph 89 –

> ***"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."

27. The exparte applicant was informed by the respondent through University transcripts that he would be awarded a 2nd class honours degree, upper division. Having been dissatisfied with that decision made by the respondent's senate, he did not appeal to the said senate and explain why he thought he was entitled to an award of 1st class honours degree. I am of the view that he moved to court before exhausting all the channels that were available to him for appeal.

In the case of **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others, Nairobi HCMA No. 997 of 2003**, it was held that -

"For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate".

28. It was held likewise in the case of **Republic vs. The Rent Restriction Tribunal and Z.N. Shah & S.M. Shah exparte Butt, Civil Appeal No. 47 of 1980**, where the Court of Appeal held that -

*"**if there is an equally convenient, beneficial and effective remedy available a court will generally decline to exercise its discretion in favour of the applicant for a prerogative order."***

29. This court finds and holds that the most convenient path that the exparte applicant should have taken was to appeal to the respondent's senate which is seized with the powers to regulate the conduct of examinations and to approve examination results. The judicial review remedy of mandamus can therefore not issue in favour of the exparte applicant.

Legitimate expectation and duty to act fairly

30. In paragraph 8 of his affidavit, the exparte applicant deposes that his legitimate expectations (sic) have been thwarted. That is on the award of 1st class honours degree and the duty to act fairly on the part of the respondent. The courts have set precedents on what amounts to legitimate expectation. In the case of **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was 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 charge 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 ..... in order to ascertain whether or not the respondents' decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the quantum of the amount of tax imposed retrospectively and its potential to irretrievably ruin the

applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicant's legitimate expectation based on the application of tariffs amounts to abuse of power."

31. In this case, the respondent did not promise to award the applicant a 1st class honours degree. As earlier stated, his University transcripts clearly showed his award would be a 2nd class honours degree, upper division. There is therefore no breach of legitimate expectation on the part of the respondent.

32. Having failed to disclose the source of the information that he was denied the coveted 1st class honours degree, the exparte applicant has failed to show any bias or conspiracy on the part of the respondent and external examiners or the university senate. He cannot be heard to say that the respondent did not act fairly.

Article 35 of the Constitution of Kenya

33. In his submissions, Mr. Munyendo, learned counsel for the exparte applicant cited article 35 of the Constitution of Kenya in enjoining the University to release the results and submitted that no reasons have been given as to why the results cannot be disclosed.

34. A close reading of article 35 of the Constitution of Kenya shows that for the foregoing provisions to hold, a party has to show that he/she requested for the information from a public body or a private citizen and that the information he sought was withheld unreasonably. It also has to be shown that the information is required for the exercise or protection of a right or fundamental freedom.

35. In the case of **Cape Metropolitan Council vs. Metro Inspection Services, Western Cape CC and others (10/99) [2001] ZASCA 56** the court held that:-

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that in order to make out a case for access to information ..... an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."

36. Although article 35 of the Constitution of Kenya was cited by Mr. Munyendo, for an applicant to be granted orders under article 35 (1) (b) of the Constitution of Kenya, he/she has to show that the information is sought "**for the exercise or protection of another right**". This has not been done in the instant case. Furthermore, the remedies of certiorari and mandamus are the ones being sought in this case.

Conclusion

37. I appreciate the authorities availed by the learned counsel for the respondent, Mr. Mukele. Although I have not cited all of them in determining this application, I must add that they were very illuminating to this court.

38. The analysis in this ruling and the authorities I have cited indicate that the exparte applicant has failed to show that the respondent acted illegally, irrationally and with procedural impropriety.

39. I hereby dismiss the application dated 8th December, 2014 with costs to the respondent.

DELIVERED, DATED and SIGNED in open court at KAKAMEGA on this 19TH day of FEBRUARY,2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... for the exparte Applicant

..... for the Respondent

..... Court Assistant