REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL J. R. APPL. NO. 324 OF 2009

IN THE MATTER OF: AN APPLCIATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS TO COMPEL THE RESPONDENTS TO RE-ADMIT THE APPLICANTS TO COMPLETE THEIR STUDIES

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION TO PROHIBIT THE RESPONDENTS FROM EXPELLING AND/OR DISCONTINUING THE APPLICANTS FROM K.M.T.C

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI TO QUASH THE RESPONDENTS ACTION OF REFUSING TO RE-ADMIT THE APPLICANTS TO K.M.T.C

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP. 26, LAWS OF KENYA SECTION 6 OF THE KENYA MEDICAL TRAINING ACT CAP 261

BETWEEN

REPUBLIC……..……APPLICANT

VERSUS

1. BOARD OF MANAGEMENT K.M.T.C
2. ACADEMIC BOARD K.M.T.C.……RESPONDENTS

EX-PARTE APPLICANTS: 1. PENINAH WANJIRU MIRUGI

2 SAMSON KIPCHOGE KANDIE

JUDGMENT

INTRODUCTION

1. This matter is partly academic. It involved the admission of the ex parte applicants into the Kenya Medical Training College whose board of Management and academic board are sued as 1st and

2nd respondents, respectively. By an order of the court that grant of leave to file judicial review proceedings should operate a stay of decision to remove the ex parte applicants as students of KMTC, the students reinstated to study as the College, and so far as the court is aware are still students therein. Upon grant of the order that leave granted do operate as stay '***so that the applicants may be re-admitted to K.M.T.C***' the main relief for readmission of the student sought in the proceedings had been granted. The question in the judicial review proceedings is whether in taking a decision to remove them from the institution, the respondents had violated the rule of natural justice as to opportunity to be heard.

2. When the matter came up for highlighting of submissions, Counsel for the applicants, Mr. Kabebe, in the absence of counsel for the respondent who Had been duly served and who had already filed written submissions dated 30th May 2012, confirmed and urged as follows – '

> **"Since the matter was filed, the applicants have been continuing their studies and they are almost finishing their studies with the respondent. It would not be prejudicial to the respondents if the orders are made. We pray for the costs of the application. The applicants were denied a right of hearing and they had a good reason to come to court. We therefore pray for the relief sought and for costs.**

3. The practical question before the court is, therefore, the appropriate order for costs, which in under section 27 of the Civil Procedure Act is in the discretion of the Court to be exercised in accordance with the principle that costs follow the event. For this reason, the Court must determine the respective merits of the parties' cases.

THE APPLICATION

4. By a Chamber Summons dated the 10th July 2009, the Ex Parte applicants herein, PENINAH WANJIRU MIRUGI and KANDIE KIPCHOGE SAMSON sought leave to apply for judicial review orders as follows:

a. **That an order of mandamus do issue to compel the Respondents to re-admit the Applicants to complete their studies.**
b. **That an order of prohibition do issue to prohibit the Respondents from expelling and/or discontinuing the Applicants from K.M.T.C**
c. **That an order of certiorari do issue to quash the Respondents' decision of refusing to re-admit the applicants to K.M.T.C**

THE STATEMENT

5. The grounds upon which the relief was sought were set out in the supporting affidavits of PENINAH WANJIRU MIRUGI and KANDIE KIPCHOGE SAMSON, the Statement of facts accompanying the application dated 10th July 2009:

i. That the Respondents place an advertisement on the daily newspapers, including the Standard Newspaper of 18.04.08, inviting applications for training opportunities in various courses including a diploma course in Clinical medicine.
ii. That the Applicants made an application, in response to the aforesaid advertisement in the procedure provided for in the advertisement expressing their interest in a Module II Parallel Diploma Course in Clinical medicine.
iii. That the Respondents thereafter accepted the Applicants application and offered the applicants admission for pre-service training 2008-2009 Parallel Module II Diploma Course in clinical medicine for a training period lasting three years.
iv. That the Applicants reported to the college on 18.09.2008 as per the admission letter, with all the relevant documents and were admitted with admission Nos. 1726 and 1632, respectively.
v. That the applicants then commenced their 1st semester on 06.10.08 which lasted until the 5th of February 2009 when the 1st semester ended upon completion of the end of the semester exams

which the applicants sat for and were yet to receive their results at the time of filing the application.

vi. That the applicants then reported for the 2nd semester as per the college calendar which began on the 6th of March 2009. They were, however, not allowed to sign the readmission form which they were supposed to sign on reporting. They were also not given any registration numbers as required by the deputy principal. The said actions by the Respondents amounts to an excessive and unwarranted use of power contrary to Section 6 of the Kenya Medical Training Act Cap 261 Laws of Kenya

vii. That despite a demand letter having been sent to the Respondents demanding an explanation for their actions, no answers were forthcoming.

viii. That the Respondents' actions occasioned great loss to the Applicants who were not attending classes despite the institution being on session and considering the fact that the applicants were duly admitted and had attended classes and sat for exams of the 1st semester.

RESPONSE

6. The Respondents filed the following Grounds of objections on points of law that:

i. The application is fatally incompetent and an abuse of the process of this court for failure to comply with the mandatory provision of the law.
ii. The application failed to demonstrate a *prima facie* case as against the Respondents to warrant the grant of the prayers sought.
iii. The application is misconceived as the applicants have avenues for alternatively remedy.
iv. The whole academic year having since been spent the application has been overtaken by events.

7. On 23rd September, 2009, Mohammed Ibrahim, J. (as he then was) after considering the application granted leave and directed that the application be filed within 21 days and ***'that the grant of leave to apply for Judicial Review Orders to operate as a stay of the Respondents' actions so that the applicants may be re-admitted to K.M.T.C and be given registration numbers to enable them to complete their second semester.'***

THE NOTICE OF MOTION

8. On 15th October 2009, the ex parte applicants filed a Notice of Motion dated the same date in which the substantive orders of judicial review were sought as prayed in the Statement that:.

1. An order of mandamus to be granted to compel the Respondents to re-admit the applicants to complete their studies.
2. An order of prohibition to prohibit the Respondents from expelling and/or discontinuing the applicants from K.M.T.C.
3. An order of certiorari to quash the respondents' decision of refusing to re-admit the applicants to K.M.T.C

9. On 10th October 2009 an application for stay of execution of the grant of stay was filed by the Respondents supported by an affidavit sworn by BERNARD WAMBUA KAMUTI seeking orders that:

i. The court stay the execution of the order made on 23rd September 2009 to the effect that the grant of leave to apply for judicial review orders do operate as a stay of the Respondent's actions so that the Applicants be admitted and be given registration numbers to enable them complete their studies.
ii. The court be pleased to stay, set aside and or reverse the orders made on 23rd September 2009 to the effect that the grant of leave to apply for judicial review orders do operate as a stay of the Respondent's actions so that the Applicants be admitted and be given registration numbers to enable them complete their studies.

10. A notice of preliminary objection dated 15th October 2009 was filed by the Applicants stating that

the court had no jurisdiction to hear the application and the Chamber Summons dated 10th July 2009 was heard *inter partes* and cannot be heard a new as proposed by the Respondent. The applicants also filed a Notice of Motion dated 15th October 2009.

11. When the application of 10th October 2009 was heard before Justice Mohamed Ibrahim on the 4th of November 2009, it was rejected and he ordered that the substantive Notice of Motion filed on 15th July 2009 be heard on priority basis.

CONTEMPT OF COURT

12. An application was made on the 8th of March 2011 for an order that the Court grant leave to the Applicants to institute contempt of court proceedings against the Respondents namely the Director of KMTC (Dr. Olango Onudi) and the Principal (Mr. Bernard Kamuti). When the application was heard on 10th March 2011, Justice Ibrahim granted leave for the applicants to institute contempt of court proceedings and for the same to be filed within ten (10) days.
13. The contempt of court application dated 17th March 2011 for contempt to be instituted against the Respondents was heard before Okwengu, J. (as she then was) on 11th July 2011. A ruling was made on 29th July 2011.
14. By a letter dated 29th July 2011, the parties consented to the following;

i. Subject to the two applicants Peninah Wanjiru Mirugi and Samson Kipchoge Kandie being re-admitted into the Kenya Medical Training College, Portreitz, Mombasa to undertake a course in diploma in clinical medicine and proceed with such training at the commencement of the 2nd semester starting in March, 2012 the orders made by the Court in 29th July 2011 committing Dr. OlangoOnundi and Mr. Bernard Wambua Kamua to prison for 6 months for contempt of the court orders issued on 5th October 2010 upon the determination of the Notice of Motion dated 17th March 2011 and for further attachment and sequestration of the personal properties of the said Dr. Olango Onudi and Bernard Wambua Kamuti for the aforesaid contempt shall be stayed and shall not be enforced, provided always that if there is default in re-admitting the said two Applicants as aforesaid, the said committal orders shall be enforced.
ii. The Respondents shall not take any action that would negate or contradict the agreement contained in (1) above.
iii. The respondents to pay for costs for the application for judicial review dated 10th July 209, the Application for Notice of Motion dated 15th October 2009, Application for contempt dated 8th March 2011 and Application Notice dated 17th March 2011 to the applicants and the costs shall, if not agred upon within 21 days from today, be taxed.

15. Taxation of a Party and Party Bill of Costs dated 3rd October 2011 came up before the Deputy Registrar (Ekhubi, RM) when the parties further agreed that –

> **"By consent, the bill of costs be marked stood over generally pending the hearing and determination of the Notice of Motion dated 15th October 2009."**

16. When the matter came up for hearing on 29thMarch 2012 before Lady Justice Kasango, the parties agreed to file written submissions to the Notice of Motion dated 15th October 2009 and it then came up for highlighting of the submissions on 3rd December 2013 when judgment was reserved, and owing to pressure of work and intervening out of station assignment, this court has not ben able to deliver the judgment before now.

THE PARTIES SUBMISSIONS

17. The Respondent's filed on 30th May 2012 their written submissions dated 28th May 2012 through their advocates, M/S Onsando Ogonji & Tiego, in which they submitted that:

a. The 1st Respondent vide an advertisement in the Standard Newspaper on 18.04.2008 advertised the availability of training opportunities for various courses it was offering for the academic year 2009/2010.
b. The advertised opportunities were only available for qualified candidates and specific minimum requirements were spelt out.
c. Payment of the application fees did not guarantee admission.
d. **When the application forms were sent to KMTC headquarters for verification, it was discovered that the 1st Applicant had not met the basic minimum entry requirements of KCSE aggregate C plain as she had obtained C-. She had also obtained D+ and D plain in English and Kiswahili respectively. What was required was a C Plain.**
e. **The verification process also revealed that the 2nd Applicant had not obtained C- in any two of the following subjects, Physics, Physical Sciences, Chemistry, Mathematics or Agriculture as stipulated in the advertisement.**
f. **Investigation launched unearthed that one Samuel Kipytor Kiplallam who in the application forms of the both Applicants been respectively referred to as their spouse and guardian.**
g. **That the said Samuel Kipyator Kiptallam was at the time a lecturer at the Port Reitz College coordinating the higher diploma course and had been the one who initially processed and approved the application forms.**
h. **Upon being sought to offer an explanation, the said Samuel Kipyator Kiptallam absconded from employment.**
i. **The reasons for discontinuation of their courses was verbally made to the ex-parte applicants upon reporting back to college for the 2nd semester.**

18. It was further submitted that under Section 5 (a), (b) and (f) of The Kenya Medical Training College Act (Cap 261) of the Laws of Kenya the functions of the Kenya Medical Training College are set out. Under Section 5(a) thereof, the college has the duty of providing facilities for college education for national health manpower requirements. Under Section 5(b) it is charged with the responsibility of providing opportunity for Kenyans wishing to continue with their education. Section 5(f) gives it the responsibility to conduct examinations for and grant diplomas, certificates or other awards. Admission of a candidate is only open to persons accepted as being qualified as by Section 6 of the said Act.
19. For the applicants, Mr. Kabebe advocate of M/S Gikandi & Co. Advocates, who attended the highlighting session emphasized that the applicants were denied a right of hearing and referred to skeleton submissions dated 15th November 2012 and filed on 16th November 2012. However, these submissions were not on the court file and court had to refer to the pleadings and affidavits filed for the applicants in the matters as set out above.
20. The following cases were highlighted in the submissions;

1. **Edward Machi Mitei v John M Kileges & 2 others [2006] eKLR**

   The Plaintiff sought judgment for a declaration that he was the lawful owner of the suit premises and an order directing the Land Registrar to remove a caution which had been filed by the first defendant. Musinga, J. in his ruling held that the registration of the plaintiff as the absolute proprietor of the suit premises was fraudulent and ordered the third defendant to rectify the register by canceling the name of the plaintiff as the registered proprietor of the same and restoring the name of the third defendant in place of the plaintiff.

   The respondents relied on this decision to urge that the court should endorse the refusal by the Respondents to re-admit the ex-parte Applicants pointing out that the orders sought are merely discretionary and this court should find that it has no jurisdiction to grant the same.

2. **INNOCENT MADARAKA ONSONGO & another v REPUBLIC [2006] eKLR**

   An application was filed under Rule 4 of the Court of Appeal Rules (Rules) for orders that the applicants be granted leave to file and serve a Notice of Appeal out of time and the same

be deemed to have been filed and served so as to validate the memorandum of appeal filed. In his ruling, Githinji, JA. held that if he were to allow the application he would in effect be exercising jurisdiction which he did not have – that is, allowing the filing of second appeal and thereby perpetuating an illegality.

3. ***Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others*** Civil Appeal No. 266 of 1996 [1997] eKLR the Court of Appeal described the scope of an order of mandamus as follows:

> ***"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 or 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.*"

On the question of whether the Council was in law bound to hear a candidate before it canceled the results the court took the view that it might place an unnecessarily heavy burden on the shoulders of the Council to insist on a hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to marking of examinations.

4. **Misc. Appl. No. 1214 of 2004 Charles Kanyingi Karina vs The Transport Licensing Board** where Nyamu, J. (as he then was) held,

> *"It would defeat the purpose of the new transport regulations to ensure road safety, discipline and the giving of a human face to the use of Kenyan roads, especially by the class of road users commonly known as 'matatu' operators, if the Transport Licensing Board was to hear them before making its decision to suspend the use of their motor vehicles when they are found to have infringed the regulations"*

ISSUE FOR DETERMINATION

21. The issue for determination before the court is whether the applicants are entitled to the judicial review orders of mandamus, prohibition and certiorari for alleged breach of their right to be heard before discontinuation from the courses of study on grounds of alleged non-qualification to undertake the chosen courses.

DETERMINATION

22. On the merits, it can never be the duty of the Judicial Review court to determine the qualification or otherwise or otherwise of an applicant for purposes of an admission to a school, college or university. Admission qualifications are the province of the given institution's Admission's Board. As the Court in ***Kenya National Examinations Council v. R. ex. p. Geoffrey Gathenji Njoroge***, supra, observed applying the same principle with respect to examinations:

> "***the High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any particular candidate. That duty or function lies wholly within the province of the Council and no court has any right to interfere.*** *To conclude this aspect of the matter,* ***an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is***

> ***wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.*** *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."***

23. However, when it is considered to take disciplinary action against a student at a school, college or university, the student should be given a reasonable opportunity to answer to the charges leveled against him to enable the tribunal make a decision. (see ***DANIEL NYONGESA & OTHERS V EGERTON UNIVERSITY COLLEGE***, Civil Appeal No. 90 of 1989). If the tribunal after taking into consideration the rules of natural justice for the hearing of the student makes a decision to discontinue or not to admit a student, the court does not substitute its view in the place of the school's board or other responsible organ.
24. Where it is shown that the student was not given an opportunity to defend himself or explain or otherwise to answer to the charge, the court will quash the decision so taken, for offending the rule of natural justice (in today's world see Article 47 of the Constitution and the Fair Administrative Action Act of 2014). In ***De Souza v. Tanga Town Council***, (1961) EA 377, 386-387, Sir Kenneth O'connor, P. sets out the general principles as to the procedure before domestic or administrative tribunals as follows:

> *"The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of* ***University of Ceylon v. Fernando*** *(1960) 1 ALL ER 631. I think that the principles, so far as they affect the present case, may be summarized as under:*

1. *If a statute prescribes, or statutory rules or regulations nbinding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed. Lord Shaw of Dunfermline said in* ***Local Government Board v. Arlidge*** *(1915) AC 120, at p. 138 "If a statute prescribes the means it" (the Local Government Board) must employ them"; and in University of Ceylon v. Fernando, p. 638 Lord Jenkins, delivering the judgment of the Board and speaking of a clause in the "General Act" of the University of Ceylon, said:*

> *"If the clause contained any special directions in regard to the steps to be taken by the vice-chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions."*

2. *If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue:* ***De Verteuil v. Knoggs*** *(1918) AC 557, 560.*
3. *In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means (per Lord Shaw in* ***Arlidge's*** *case). It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best: per Lord Loreburn, L.G., in* ***Board of Education v. Rice and Others*** *(1911) AC 179 at p. 182; and* ***Arlidge's*** *case. A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant: University of Ceylon, at p. 636 and p. 319. In this respect* ***Fernando's*** *case seem to go further than some previous eminent opinion (See e.g. the dictum of Lord Parker , CJ., in* ***R v. Agricultural Land Tribunal ex parte Bracey*** *(1960) 1 W.L.R at p. 913:*

> *"It (certiorari) goes where there has been a breach of some principle of natural justice.…like receiving evidence from in the absence of one and another"*

And see per Greer, LJ. in ***Errington v. Minister of Health*** *(1935) 1 KB 249, p. 268-*

> *"he must do it in accordance with the rules of natural justice that is to say he must hear both sides and not to hear one side in the absent of the other."*

And see the remarks of Cohen, LJ. (as he then was) in ***Johnson v. Minister of Health*** *[1947] 2 ALL ER 395, at p. 405.*

4. *The person accused must know the nature of eh accusation made:* ***Byrne v. Kinematograph Renters Society Ltd.*** *(1958) 2 ALL E.R. 579, 599 approved in University of Ceylon v. Fernando.*
5. *A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view: Board of Education v. Rice and Others: and to make relevant statement they may desire to bring forward* ***De Verteuil v. Knoggs; General Medical Councilv. Speckman*** *(1943) AC 627,641.*
6. *The tribunal should see that the matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party otr from a third party, it should give the other party an opportunity of commenting on it:* ***Johnson & Co. v. Minister of Health,*** *at pp. 404, 405."*

25. According to the respondents, the applicants were discontinued from the college upon the finding that they had not fulfilled the requirements for admission into the relevant course of study as set out below:

1. When the application forms were sent to KMTC headquarters for verification, it was discovered that the 1st Applicant had not met the basic minimum entry requirements of KCSE aggregate C plain as she had obtained C-. She had also obtained D+ and D plain in English and Kiswahili respectively instead of the required C Plain.
2. The verification process also revealed that the 2nd Applicant had not obtained C- in any two of the following subjects, Physics, Physical Sciences, Chemistry, Mathematics or Agriculture as stipulated in the advertisement.

26. As the action to be taken by the respondents would lead to adverse to the loss by the applicants of their prospect of further education consequently future ability to provide for themselves, they should have been given adequate notice and facility to prepare and present their defence in accordance with ***De Souza v, Tanga Town council,*** supra.
27. The judicial review court does not delve into the merits of the case to determine the correctness of the decision of the administrative tribunal. It is concerned with the decision making process. It is clear, however, that the applicants were not given an opportunity to be heard before their discontinuation of their study. The respondents stated that the **reasons for discontinuation of their courses was verbally made to the ex-parte applicants upon reporting back to college for the 2nd semester**.
28. The giving of reasons for discontinuation is not equivalent to giving an opportunity to be heard as the applicants had no chance of contesting the findings of the respondents or their implication to the qualification of the applicants for the course. No fair opportunity was given to the applicants as parties to the controversy about their qualification or otherwise to be admitted in the relevant course of study at the Kenya Medical Training College.

CONCLUSION

29. While the Court cannot determine that the applicants were qualified and, therefore, entitled to be admitted into their chosen course of study following the invitation of application by qualified candidates, the court does determine that the decision for their non-admission into the second semester having already been admitted into the course and undertaken a full semester of study, was in breach of the rule of natural justice as to right to fair hearing and, also, offended the principle of fair administrative action under Article 47 of the Constitution. The applicants should

have been invited to answer to the charge that they did not qualify for admission into the College in accordance with its regulations and to make such representations as they wished before the decision to discontinue their study was reached.

30. Accordingly, while the court finds that an order of Certiorari may be made to quash the decision to discontinue the applicants for the reason of failure to meet the minimum entry requirements for their courses of study as no opportunity to be heard thereon was given to the applicant before the decision was made. The Court is however not able to make the orders of Mandamus and Prohibition sought, as the court is not persuaded that there exists a statutory or other duty to admit a non-qualified person into a study program of any school, college of university.

ORDERS

31. For the reasons set out above, the ex parte applicants Notice of Motion of 15th October 2009 is granted in terms of Prayer No. 3 thereof that an order of certiorari do issue to quash the respondents' decision of refusing to re-admit the applicants to K.M.T.C. I do not make any orders as to the prayers for Mandamus and Prohibition sought in the Notice of Motion.
32. As the applicants and the respondents have both partially succeeded in their respective contentions and the Court, in exercise of discretion under section 27 of the Civil Procedure Act, therefore, directs that each party bears its own costs of the suit.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THI 24TH DAY OF JUNE, 2016.

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JUDGE

In the presence of: -

Ms. Kariuki for the Ex Parte applicants

No appearance for the Respondents

Mr Silas Kaunda - Court Assistant.