



REPUBLIC OF KENYA

High Court at Kakamega

Judicial Review 6 of 2013

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN (BOG) SIGALAGALA POLYTECHNIC 1ST RESPONDNT

EXPARTE

NELSON OGWERO APPLICANT

THE DEPUTY PRINCIPAL SIGALAGALA POLYTECHNIC

THE PRINCIPAL

THE DEAN OF STUDENTS..... INTERESTED

THE REGISTRAR..... PARTIES

THE HEAD OF DEPARTMENT

J U D G M E N T

In his notice of motion dated 25.2.2013 the Ex-parte applicant is seeking orders of certiorari and prohibition against the respondents. The application seeks to quash the proceedings and decision of the respondents made on the 11.1.2013 expelling the applicant from Sigalagala Polytechnic. The application is supported by the applicant's affidavit and statement of facts. The respondents filed a reply to the application sworn by BERNADETTE CANUTE the principal of the college.

Mrs. Osodo, counsel for the applicant submitted that the applicant was expelled from Sigalagala Polytechnic without being given a hearing. The expulsion is against the provisions of the Education Act Cap 211 of 2012. The reasons given for the expulsion are that the applicant deliberately refused to sit for the November-December 2012 exams and that he was a student leader who spearheaded the students to strike. The applicant was not called for hearing when the Executive Board made its decision. Counsel contends that the applicant applied for deferment of the exams and the reason given was that he did not have the registration fee for the exams.

Mr. Ojienda for the respondents submitted that when the application for leave was made it gave five grounds upon which the application was made but the current application has given six grounds and

this is contrary to the provisions of **Order 53 rule 4**. Counsel further submitted that when the application for leave was made statements, grounds and affidavit are supposed to be annexed. No statement or affidavit was annexed when leave was being sought. A Board of Governors meeting was held in January 2013 and a decision was made. Rules of natural justice were complied with. There is no evidence that there was malice or arbitrariness in reaching at the decision. There is no specific section of the Education Act which is alleged to have been contravened.

In an application for an order of certiorari the main concern of the court is the procedure used to reach at the decision which is being challenged. The court is not concerned as to whether the decision is correct or not. The supporting affidavit to the application is in line with the submissions the counsel for the applicant. The applicant admits that he was the chairman of the Students Union and he was to sit for his City & Guild Examination in November and December 2012. He annexed a letter dated 3.10.2012 seeking deferment of his final exams and also applying to be registered for Diploma in Information Communication Technology. The reason given in that letter is that he was not going to be able to meet the examination registration deadline due to lack of registration fees. There was no response to that letter. The replying affidavit states that the request to be registered for a Diploma was declined. A letter dated 11.1.2013 has been annexed showing that the applicant's request for registration for a new course was irregular and was declined. It is also stated in the said letter that the applicant deliberately refused to sit for the examinations for City & Guild that were to be undertaken in November/December 2012. It is indicated further that the Board of governors had sat on the 11.1.2013 and resolved that the applicant was no longer a student of the Polytechnic. There is no mention of the applicant's request to defer his examination for lack of examination registration fees.

The basis upon which the respondents exercise their powers to deal with students derive from the Education Act. According to Halsburys Laws of England 4th Edition Volume I it is indicated as follows:-

“The traditional test for determining whether a body of persons is subject to Judicial Review is the source of the power.... If the duty is a public duty the body in question will be subject to the Public Law”

In the case of **CAPTAIN GEOFFREY KUJOGA MURUNGI V ATTORNEY GENERAL Misc. Civil Application No. 293 of 1993** the court stated as follows:-

“Certiorari deals with decisions already made....Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice, or contrary to the law. Thus an order of certiorari is not a restraining order”

As stated herein above the respondents derive their powers to expel or discipline students from the provisions of the Education Act 2012. Section 31(g) of the Act gives the respondents mandate to manage public institutions. The respondents were therefore within their powers to decide the nature of punishment to be meted out on the applicant. The main issue is whether in exercising that role the respondents exceeded their powers or acted contrary to the law. In the case of **O'RELY V MACKMAN [1983] 2 A.C. 237, 279** the court stated as follows:-

“whenever any person or body of person has authority conferred by legislation to make decisions....., it is amenable to the remedy of an order to quash its decision to make error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made.”

The respondents made an administrative decision to expel the applicant. It is clear that the Principal of Sigalagala Polytechnic had been posted to the college and there was a position to her posting. The

applicant herein wrote a letter to the Director of Technical Education on behalf of his fellow students dated 6.12.2012 rejecting the posting of the new Principal. Similarly one HERBERT SORE MAKATIANI the councilor for Khayega ward wrote a letter addressed to the Secretary, Teachers Service Commission dated 5.12.2012 objecting to the appointment of BERNEDATTE CANUTE as the principal of Sigalagala Polytechnic. The respondents contend that on the 10.1.2013 at about 11.25 a.m. the applicant mobilized students to demonstrate and demanded to be addressed by the County Education officials from Kakamega. Similarly in the minutes of the meeting held on the 11.1.2013 the applicant went to Shamberere where I believe the new Principal was working for purposes of vetting the suitability of the new Principal.

From the documents provided by the respondents it is established that the applicant was never called to explain himself as to the allegations leveled against him. The respondents have annexed statements from other students indicating that the applicant mobilized other students leading to the strike. The respondents also contend that there was no fees pending from the applicant and annexed a letter from one **CHRISTOPHER** who is the applicant's guardian indicating that he has fully paid the fees. The applicant's position is that he had not paid the examination registration fees and there is no proof that indeed the examination registration fees had been paid. The request by the applicant to request for deferment was made in early October way before the new Principal was posted to the Polytechnic. It is clear that there was no deliberate refusal by the applicant not to sit for the exams. The born of contention is that the applicant was not accorded a hearing and therefore the rules of natural justice were not followed. As stated herein above judicial review orders involve the process of reaching at a decision and not the decision itself. Article 47 of the Constitution states as follows:-

47 (1) "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

The respondents took an administrative action which affected the rights of the applicant. It was incumbent upon the respondents to have summoned the applicant and hear from him after informing him the allegations against him. It is clear that the applicant was expelled without being given a hearing. The strike occurred on the 10.1.2013 and the following day a meeting of the Board of Governors was convened whereby the decision to expel the applicant as well as not to register him for another course was made. The decision was made in haste without giving the applicant a hearing and cannot be allowed to stand as it contravenes the rules of natural justice which state that nobody shall be condemned unheard and the decision also contravenes the provisions of Article 47 of the Constitution. There was no fair administrative action and the decision to expel the applicant has the effect of affecting his livelihood.

The applicant sought orders of certiorari and prohibition. I do find that only the order of certiorari is relevant to the applicant and the same is hereby granted. An order of certiorari shall issue removing the decision of the respondents to expel the applicant and not to register him for another course shall be brought to this court and the same shall be quashed. The applicant shall continue to be a student of Sigalagala Polytechnic and is free to register for another course of his choice. There shall be no orders as to costs.

Delivered, dated and signed at Kakamega this 29th day of May 2013

SAID J. CHITEMBWE
J U D G E