



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JR CIVIL APPLICATION NO. 117 OF 2009**

**IN THE MATTER FOR AN APPLICATION TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS BY MONICAH KARIMI NJIRU**

**AND**

**IN THE MATTER OF EGERTON UNIVERSITY ACT CAP. 214 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE DECISION OF THE EGERTON UNIVERSITY SENATE MADE ON THE 6<sup>TH</sup> OCTOBER TO DISCONTINUE**

**SUBJECT HEREIN FROM EGERTON UNIVERSITY**

**AND**

**IN THE MATTER OF ORDER LII OF CIVIL PROCEDURE RULES THE LAW REFORM ACT CAP. 26, THE JUDICATURE ACT CAP. 8 THE**

**EGERTON UNIVERSITY ACT CAP.214 LAWS OF KENYA AND STATUTES MADE THERE UNDER**

**BETWEEN**

**MONICAH KARIMI**

**NJIRU.....APPLICANT**

**VERSUS**

**EGERTON**

**UNIVERSITY.....RESPONDENT**

## JUDGMENT

The ex parte applicant, **Monica Karimi Njiru**, filed the Notice of Motion dated 25/11/2009 seeking, the following Judicial Review orders against the Egerton University:-

1. ***That an order of certiorari do issue directed to the respondent removing to the High Court for purposes of being quashed the decision of the Egerton University Senate made on 24<sup>th</sup> September 2009 discontinuing the applicant from Egerton University and all or any other decision, minutes and or proceedings approving, recommending and authorizing the discontinuation of the applicant herein on 24<sup>th</sup> September 2009.***
2. ***That an order of mandamus do issue directed against the Chancellor, Egerton University to compel him to forthwith reinstate the applicant as a student and release the applicant's Degree Certificate award of Second Class Honours, Upper Division.***

The Notice of Motion was supported by a statutory statement and supporting affidavit dated 10/11/2009, a supplementary affidavit of the applicant dated 2/11/2010, submissions and authorities filed by Mose and Milimo, Advocates for the applicant. Mr. Bundi urged the application on behalf of the applicant.

The application was opposed and a replying affidavit was sworn by **Silas Mwaniki Ngari**, the Registrar (Academic Affairs) of the respondent. Submissions and authorities were filed by Sheth and Wathigo Advocates for the respondent. Mr. Kisila appeared for the respondent at the hearing of the application.

The issues that seem to arise are:-

1. **Whether the application is defective and incompetent;**
2. **Whether the respondent observed rules of natural justice;**
3. **Whether the respondent was biased, abused office and the decision was arbitrary (irrational);**
4. **Whether there was procedural impropriety;**
5. **whether the applicant's legitimate expectation was breached;**
6. **Whether the applicant was still a student;**
7. **Whether Judicial Review orders can be granted.**

**Monica Njiru** was admitted to Egerton University on 13/7/2004 for a Bachelor of Education and Human Resource (Science) Course. She completed her final examinations in October, 2008 and passed with a 2<sup>nd</sup> Class Honours, Upper Division. She was due to graduate on 5/12/2008, but when she went to enquire about the graduation programme in November 2008, her name did not appear on the grandaunt's list. She enquired from the Dean who promised that the mistake would be rectified and she would be included in the 2009 graduation. However, on 6/10/2009 she received a letter from the Registrar, Academic Affairs informing her that she had been discontinued due to examination malpractice in Chemistry 203, yet she had passed with 'B' in the subject. She exhibited her transcripts for the 4 years – **MKEx.2-3**. The letter of discontinuation is marked **MK 5**. It is her case that the meeting held on 24/9/2009 in which an adverse decision was made against her offended the rules of natural justice as she was not aware of it; that the Senate acted beyond its power as they failed to follow the laid down regulations and the decision was laced with malice and bad faith and it breached her legitimate expectation that she would be awarded a degree. As a result, she has suffered psychologically and mentally and missed out on employment. Despite demand, vide the Advocate's letter of 23/10/09, the respondent did not respond.

In opposing the application, in addition to the undisputed facts, the Registrar said that after the Applicant had successfully completed her course, on 3/9/08, she was found impersonating another student, Deborah Amana, during the Chemistry 203 re-sit examination. The invigilator noticed that she was not Deborah, took a photograph of the Applicant on her mobile phone and called University security. The applicant and Deborah were questioned soon thereafter and statements taken from them and the witnesses. In her statement, she admitted having impersonated Deborah. The applicant's statement was exhibited as **(SMN3)**. The applicant was informed that she would appear before the Faculty's Disciplinary Committee and she was duly notified vide a letter dated 12/9/2008 **(SMN4)**. The said meeting was held on 15/9/08 in

which the two students were invited, the invigilator and witnesses and minutes were taken (SMN5). The applicant was given an opportunity to be heard, gave her statement in which she admitted the malpractice and begged for leniency. The respondent found these to be grounds to punish the two students for examination malpractice under the Egerton University Statute, XXV (S3.1) and recommended the Senate to discontinue the students. The Senate met on 24/9/09 (SMN7) and upheld the decision to discontinue the applicant and the decision was communicated to the applicant by a letter dated 6/10/09. It is the respondent's case that the respondent acted within its powers as provided under Egerton University Statutes and Act.

***Whether the application is defective and incompetent;*** I have now considered the statutory statement, affidavits filed by both parties and authorities that have been cited. Before I attend to the merits of the case, I think it is necessary to address the respondent's contention that the verifying affidavit filed in support of the application is incurably defective. Apart from the verifying affidavit dated 10/11/2009, filed with the Chamber Summons, seeking leave of the court to commence Judicial Review proceedings, was also a supporting affidavit sworn by the applicant in which she depones to the facts of the case. **Order 53 Rule 1(2) of the Civil Procedure Rules** requires that the Chamber Summons for leave be accompanied by a statement of facts and verifying affidavit. It reads:-

***“O.53 R.1(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.”***

The above provision allows for the filing of more than one affidavit, if necessary. In this case, the fact that the applicant referred to one affidavit as “**supporting affidavit**” instead of verifying affidavit, does not make the affidavit incompetent. I however, note that apart from the facts being contained in the supporting affidavit, the same are repeated in the statement. The above quoted rule provides that the statement shall only contain name of the Applicant, relief sought, grounds upon which it is sought. The facts have to be in the affidavit. The court will only strike off paragraph B of the statement of facts which contains facts (paragraph 1-26). In **Commissioner General, Kenya Revenue Authority Vs Silvanus Onema Owaki CA No. 45 of 2000**, the Court of Appeal in interpreting Order 53 Rule 1(2) said that facts are supposed to be contained in the affidavit. The court said;

***“The statement should contain nothing more than the name and description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”***

Further to the above, the applicant, apart from setting out the grounds upon which the application is preferred in the statement, more grounds were set out on the face of the application, which offends **Order 53 Rule 4(1) Civil Procedure Rules**. The only grounds that the court can consider are those contained in the statutory statement. The grounds on the face of the application are struck out. However, I find that the application is not competent. The cases of **Commissioner General, Kenya Revenue Authority Vs Silvano Onema Owaki t/a Marenga Filling Station, CA No. 45 of 2000 (ur)** and **CA No. 259 of 2004 – Egerton University Vs Republic** are not comparable because in the above cited cases, the verifying affidavits did not contain any facts unlike this case. In this case, there are facts contained in the supporting affidavit.

Under Order 53 Rule 4(1) of Civil Procedure Rules, the prayers sought in the Notice of Motion must be similar to those in the statutory statement. The said rule provides as follows;

***“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the statement.”***

The prayers sought in the Applicant's statement are not similar to those sought in the main motion. In the

statutory statement, the Applicant sought leave to apply for orders of certiorari and mandamus. Actually what the Applicant sought in the statement are the orders that should have been contained in the chamber summons. Leave was granted and the prayers for leave were therefore spent. In the notice of motion, the Applicant seeks substantive orders of certiorari and mandamus, which are totally different from the statement. That anomalously renders the application incompetent.

It is settled law that an applicant approaching the court for leave to commence Judicial Review proceedings must make a full and frank disclosure of all material facts, failing which the court may decline to exercise its discretion in the applicant's favour. In **Republic Vs Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530**, the court held;

**“Judicial Review remedies are also discretionary and the applicant's conduct and the assertions made in the proceedings disentitled it from benefiting from any such discretion.”**

In the affidavit in support of her application, the Applicant totally avoided mention of allegations of cheating in an examination and claimed to have been surprised by the Respondent's action levelling allegations of examination cheating against her, a year after she had completed her course. It is not until the Registrar, **Silas Ngari**, swore his affidavit in reply, that the applicant in the supplementary affidavit, admits that there were such allegations made and that she was locked up when she was innocently taking examination copies to Deborah Amany. She further deponed that she was then coerced into writing a statement implicating her in the offence. What the applicant states in the supplementary affidavit is an afterthought and unbelievable. If indeed the respondent had acted in such a cruel manner to the Applicant, that would have been the subject of this application and that should have been disclosed at the first instance in her verifying affidavit, when the applicant approached the court for Judicial review orders. The contents of the supplementary affidavit are an afterthought and untrue and are meant to conceal the true facts from the court. The court will believe the respondent's version of events to be the correct one. It would be absurd for the applicant to complete her examinations without an incident, then be informed a year later that she had misconducted herself, an accusation that was never drawn to her attention.

The University is governed by the Egerton University Act 1987. Under Section 22 of the Act, the Council is mandated to make statutes for the government, control and administration of the University and for the better carrying into effect of the purposes of the Act. The statutes provide inter-alia for the conduct of examinations. Upon joining the University, the Applicant agreed to be bound by the said Statutes and Regulations. The Applicant exhibited the letter dated 6/10/2009 which was issued to her, informing her of discontinuation on Academic grounds. It is referred to later in this judgment. It indicates that the Respondent had acted pursuant to **Statute XXVIII Section 2.4 (IV)**, for examination malpractice. The charges which the Applicant faced were allegedly committed in 2008 and the Statutes that apply are those that govern that year. I did not find any such statute in the Statute XXVIII produced before this court. The applicable statute to Examination Malpractice is Statute XXV.

***As to whether the Applicant committed any Examination Malpractice;*** Statute XXV deals with **“Examination Irregularities and Disciplinary Procedures and Penalties.”** Section 3.1 specifically provides for examination malpractices. It reads as follows;

**(a) The following academic malpractices are considered serious and any student guilty of committing them shall be liable to discontinuation or expulsion from the University;**

- (i) Copying or reading from another candidate's script or from any other unauthorized source.**
- (ii) Bringing into the examination room any unauthorized materials relevant to the examination e.g. books, notes, electrical devices with pre-set formulae, pre-written answers, etc;**
- (iii) Abetting, aiding or covering up an examination malpractice;**

(iv) **Seeking or obtaining a deferment of examination on false pretence.**

(v) **Plagiarism.**

**(b) A candidate engaged in any other misconduct relating to examination shall be subject to suspension or warning.”**

The applicant was alleged to have been found sitting an examination for her friend Deborah. The action of the Applicant sitting for an examination for another or impersonation is not specifically covered under Section 3.1, but it can fall under a false pretence or abetting an examination malpractice. Sitting for an examination for another student is a very serious offence and falls under Section 3.1 and the consequences were discontinuance or expulsion.

**Whether the applicant was accorded a hearing;** The applicant totally denied that she was aware of any of the committee meetings where her case was considered. The Disciplinary Procedure is set out under Statute XXV, Section 3.2. An examination malpractice is supposed to be immediately reported in writing by the invigilators and examiners; The Dean should then convene the Disciplinary Committee to deliberate the case within 2 weeks; The committee will set up its own procedures unless otherwise in accordance with the protocols of the Students Disciplinary Committee; The recommendations of the sub-committee shall be reported to the Faculty Board of Examinations and Senate as soon as possible. In this case, the Registrar has set out in his affidavit the process that was undertaken. The Applicant was questioned upon being caught in the act of the cheating; the committee met on 15/9/2008, the Faculty of Science Board sat on 17/9/2008 and the Senate met on 24/9/2009, which made a decision to discontinue the Applicant. This procedure is supported by annexed Minutes and letters. This court is satisfied that the Respondent did substantially comply with due process under the Statutes and cannot be faulted on it. In any event, the Applicant did not specifically allude to what the Respondent failed to do. I find that the Applicant was accorded a hearing as required by the Statutes.

**Whether the Applicant was notified of the charges that were leveled against her;** in her further affidavit, the applicant did admit belatedly that she was informed of the accusations made against her. By the letter dated 12/9/2008, the applicant was invited to attend the Faculty of Science Students Disciplinary Committee on 15/9/2008 at the Dean’s Office for an offence allegedly committed on 3/9/2008 in respect of Amany Deborah in Re-sit Chemistry No. 203 and she did attend.

I find the notice to have been adequate. In the case of **De Souza Vs Tanga Town Council [1961] E.A. 377**, the East African Court of Appeal considered the principles to be observed by a Tribunal or domestic body sitting in a quasi-Judicial capacity to be inter-alia; If a statute prescribed the procedure to be followed, then the same has to be observed; if no procedure was prescribed, there had to be some form of inquiry to enable the tribunal arrive at a fair determination; the tribunal had to be properly constituted; and the person accused must know the nature of the accusation made against him. I find that from what has been placed before the court by the Respondent, the above requirements were met. The applicant was notified of the charges and she was heard.

**Whether the applicant’s legitimate expectation was breached;** The Applicant complains that her legitimate expectation that she would graduate was breached. In the English case of **Council of Civil Service Unions Vs Minister for Civil Service [1995] AC 374**, the court defined the principle of legitimate expectation to mean;

**“For a legitimate expectation to arise the decision –  
Must affect the other person by depriving him of some benefit or advantage which either;**

**(i) he had in the past been permitted by the decision maker to enjoy and which can legitimately**

**expect to be permitted to continue to do until there has been committed to him some rational grounds for withdrawing it on which he has been given an opportunity to comment, or**

**(ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advance reasons for contending that they should not be withdrawn.”**

Legitimate expectation is all about fairness. Did the Respondent deviate from the normal procedure in disciplinary matters? There is no evidence of that. The Applicant is the author of her own misfortune. When the applicant joined the University, she signed the letter of offer dated 1/2/2005. She bound herself as follows;

**“I accept the offer and undertake to abide by the “Regulations governing the Association, conduct and Discipline of Students of Egerton University made under Section 13(1) (e) of the Egerton University Act 1987 which I have read and understood.”**

If the Applicant had not been involved in the malpractice, she would have graduated. The applicant has herself to blame and her legitimate expectation was not breached.

***Whether the Applicant was still a student;*** Under Statute XXV, paragraph 3.2 (g), the University can rescind a degree if an offence was committed before graduation that could have resulted in expulsion. Paragraph 3.1 provided that the academic malpractices listed thereunder, attracted the sanction of expulsion or discontinuation. Paragraph 3.2 (g) reads;

**“The University may rescind any degree or diploma awarded to a graduate who, while registered in a particular programme, committed an academic offence which if it had been detected before graduation, would have resulted in expulsion. Notification of a rescinded degree or diploma shall be communicated to all relevant parties.”**

Although the applicant had completed her course, the Respondent had the power to rescind the degree due to her misconduct.

***Whether the Applicant is entitled to the orders;*** the applicant made several other allegations of bad faith, malice and abuse of power but did not adduce any evidence in support thereof. I found earlier that the Applicant did not fully disclose to this court all material facts. She is guilty of material non-disclosure. Judicial Review orders are discretionary in nature and even if the Applicant had been entitled to any of the orders, this court would not have granted because of that lack of a candour. Secondly, the application is incompetent and lacks merit. The applicant was found guilty of a very serious examination offence. This court cannot ignore the applicant’s conduct. On that basis, the court cannot grant the orders sought as the court would be sending the wrong message to would-be offenders and it would be against public policy. I therefore decline to grant the orders sought and dismiss the Notice of Motion with the applicant bearing the costs of the Notice of Motion.

**DATED and DELIVERED this 27<sup>th</sup> day of May, 2011.**

**R. P. V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Bundi for Applicant

Mr. Kibelion for Respondent

Kennedy – Court Clerk