REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW NO. 40 OF 2010

PAUL ORWA OGILA.....APPLICANT

VERSUS

ST. JOSEPH MEDICAL TRAINING COLLEGE.....RESPONDENT

R U L I N G

The ex-parte applicant **Paul Orwa Ogila** moved to the seat of justice by way of an ex-parte chamber summons dated the 4th day of October 2010 and filed on the 6th day of October 2010. it is brought under order (53) LIII rules 1 and 2 of the CPR, section 8 and 9 of the Law Reforms Act Cap 26 of the Laws of Kenya, section 3A of the Civil Procedure Act and all enabling provisions of law. Five reliefs are sought and these are"-

(1) That this honourable court be pleased to grant the applicant leave to bring Judicial Review proceedings against the respondent herein by way of an order of certiorari to quash the disciplinary proceedings and the decision of the respondent suspending the applicant from the respondent college with effect from 20th September 2010 and further requiring the applicant to pay the sum of Kshs. 60,000/= before re-admission in to the respondent college.

(2) That leave, once granted to operate as stay of the proceedings in question and the orders of the respondent suspending the applicant from the respondent college with effect from 20th September 2010, thereby allowing the applicant to forthwith continue with his training and education at the respondent college pending hearing and determination of the matter.

(3) That this honourable court be pleased to grant the applicant leave to bring Judicial Review

proceedings against the respondent herein by way of an action of mandamus to compel the respondent to unconditionally re-admit the applicant into the respondent college.

(4) That the applicant be at liberty to apply for such further orders and directions as the honourable court may deem fit and just to grant.

(5) That the costs of this application be provided for.

The application for leave is anchored on the statement, verifying affidavit and annexture, leave was granted by Aroni judge on 6-10-2010 and leave was granted to operate as stay.

The substantive notice of motion is dated 14th day of October 2010 and filed on the 22-10-2010. The heading indicates that the notice of motion was being presented pursuant to the leave of court granted on 6th October 2010, under the provisions of order LIII of the Civil Procedure Rules, section 8 and 9 of the Law Reforms Act Chapter 26 of the Laws of Kenya, section 3A of the Civil Procedure Act and all other enabling provisions of the law. Three reliefs are sought and these are:-

(1) That this honourable court be pleased to grant the applicant herein Judicial Review Order of certiorari and mandamus.

(2) That the Judicial Review orders once granted shall be for the orders of certiorari to bring before this honourable court to investigate and quash the decision by the respondent dated 27th September 2010, to wit the ex-parte applicant was suspended from continuing his training for six (6) months with effect from 20th September 2011 and condemned to pay a fine of Kshs. 60,000/= as a pre-condition to re-admission into the respondent's college. Of mandamus to compel the respondent to forthwith and unconditionally re-admit the applicant into the respondent college to continue with his training and education until completion.

(3) That the costs of this application seeking leave to file Judicial Review orders and notice to the Registrar be provided for.

It is noted that the substantive application is indicated to be supported by the grounds in the body of the application. There is also an affidavit in support of the notice of motion deponed by one Paul Orwa Ogila deponed on the 18th day of October 2010. The supporting affidavit has annextures which had been annexed to the verifying affidavit in addition therein the statement as well as the verifying affidavit and the annexture there to.

There is a replying affidavit deponed by one sister **Beatrice Achieng Osanga** on the 11th day of November 2010 with annextures thereto. The filing of the replying affidavit attracted a further affidavit from the ex-parte applicant.

Parties elected to proceed by way of submissions followed by oral highlights. Those for the applicant are dated 30-3-2011and filed on 5-4-2011. A perusal of the same reveals that the following have been stressed:-

- **That the ex-parte applicant was suspended from the institution for six months with a condition that his return to the institution would only be sanctioned if the ex-parte applicant paid all the outstanding fees and pays a fine of Kshs. 60,000/=.**

- **That when the ex-parte applicant sought leave to seek judicial review and sought an order that the leave granted to operate as stay of the suspension, the ex-parte applicant went back to the college to resume his studies but due to the hostility displayed against him forced him to seek transfer to another institution which was granted.**

- **With regard to issues for determination. it is contended that the respondent was in breach of the rules of natural justice. It is the ex-parte applicant's contention that these were breached as the decision to suspend him was taken without giving him a chance of being heard on the accusation leveled against him before his suspension.**

(ii) That the respondent is an administrative body charged with administration of a public office and for this reason it is a proper candidate as the addressee of the said relief.

(iii) Further that the decision was arrived at following a decision by a bench chaired by the complainant herself contrary to the now trite rule that a man should not be a judge in his own cause.

- **Contends that the college committee is of quasi-judicial nature and are bound by the rules of natural justice.**

- **It is his stand that there can be no justice where the complainant is a judge in his own cause. By the complainant sitting as a judge in his own cause, the proceedings as well as the resultant decision are not free from bias giving rise to unfairness.**

- **That he is properly before the seat of justice and he should be granted the relief he is seeking from the court.**

- **The decision reached by the institution is a proper candidate for quashing because the decision to fine the ex-parte applicant is not provided for in the college rules as well as the Nursing Council of Kenya policy.**

- **Maintains he is entitled to a pronouncement on merits on the complaint raised to protect his profession considering that his past conduct might come back into question.**

The respondent's opposition is anchored on the replying affidavit

mentioned herein, and highlights in the submission dated 11th day of April 2011 and filed on the 11th day of April 2011. A perusal of the same reveals that the following have been stressed:-

- That the motion for judicial review is not properly before this court for the following reasons:-

(i) The application for leave was presented to court the same date as the notice to the Registrar

contrary to the rules which require that the notice to the Registrar be presented a day before the presentation for leave.

(ii) The supplementary affidavit filed on the 10th February 2011 was filed without leave of court and the same should be expunged from the record.

- **Contends that case law on the subject demonstrates that judicial review is a relief against public institutions and not private institutions.**

- **Denies allegation that there was breach of the rules of natural justice as the ex-parte applicant was given an opportunity to be heard on the 17th day of September 2010, alone and on the 20th day of September when he came with his mother.**

- **That since the ex-parte applicant has left the institution the orders sought will not serve any purpose.**

- **That the foregoing not withstanding, they contend that there is no merit in the application and the same should be dismissed with costs.**

In their oral highlights, the counsels of both sides reiterated the contents of their deponments and the written submissions.

On case law, the ex-parte applicant referred the court to the case of **Hypoleto Cassiano De Souza –VS- Chairman Members of the Tanga Town Council [1961] EA 377 where it was held *inter alia* that "the hearing before the Finance Committee was clearly a judicial or quasi judicial proceeding and while there was no objection whatever to discussion of the matter before hand in private and arranging procedure, it was objectionable though not of itself fatal that the complainants should be closeted with the Finance Committee for fifteen minutes before the appellant was admitted it was immaterial that their presence may not have influenced the decision.**

(iii) It was difficult to conceive why any tribunal which intended fairly to listen to both sides would not give some information to an appellant whose advocate said he was embarrassed by not knowing the precise case which he had to meet.

(iv) Certiorari granted to bring up and quash the decision of the Finance Committee and the decision of the council dismissing the appellant. Mandamus granted addressed to chairman and members of Tanga Town Council allowing directing them to hear and determine the complaint against the appellant in accordance with the provisions of staff regulations and principles of natural justice.

The case of **Republic –VS- The Kenya National Examination Council respondent ex-parte Kemunto Regina Ouru (suing through father and next friend James Ouru and 128 Others** decided by M.K. Ibrahim judge as he then was now judge of the supreme court on the 20th day of May 2009 in which a decision of the Kenya National Examination Council to cancel a chemistry examination paper without making inquiries was faulted by the court because:-

"There was no hearing and absolutely no opportunity was granted to the candidates and the school to make any representations before they were condemned. Natural justice is about fair procedure and fairness generally.

The respondent on the other hand referred the court to the case of **Misc. Application Nairobi No. 1723 of 2004 in the matter of an application by Maurice Omondi Odumbe –VS- Kenya Cricket Association & 2 Others** decided by R.V.P Wendoh on the 25th day of May 2006. At page 5 of the ruling line 2 from the top, the learned judge quoted with approval from Halisburys Laws of England 4th edition volume 1 (1) paragraph 6 thus:-

"Broadly speaking a public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private benefit. Not every such person or body is expressly defined as a public entity or body and the meaning of public authority or body may vary according to the statutory context. The fact that a person or body exercises functions of public nature does not conclusively establish that such a person or body is a public entity. Quashing or prohibiting orders will issue to a body only if its functions are of a public and not merely private nature".

The case of **Kenya National Examination Council appellant –VS- Geoffrey Gatheri Njoroge & 9 Others Nairobi CA No. 266 of 1996** decided by the court of appeal on the 21st day of March 1997. The following have been highlighted:-

(i) At page 8 of the judgment line 5 from the bottom, it is stated:-"An order of prohibition is an order which issues from the high court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in exercise of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings".

(ii) At page 9-10 an order of mandamus is of a most extensive remedial nature and is in the form of a command issuing from the high court of justice, directed to any person, corporation or inter 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 he done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue incases where although there is an alternative legal remedy, yet that mode of redress is less convenient beneficial and effectual----------. An order of mandamus will compel the performance of a public duty which is imposed on a person by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed----------".

(iii) At page 12 line 6 from the top it is stated:- "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 reason.

The case of **Republic –VS- Pwani University College ex-parte Maina Mbugua James & 2 Others Malindi HCCC Misc. App. No. 28 of 2009** decided by Omondi judge on the 28th day of April 2010. In issue was the validity of the disciplinary measures taken against the ex-parte applicants leading to expulsion. The grounds for challenge was that the ex-parte applicants had not been given an opportunity

to prepare defence, cross examine witnesses, call their witnesses, defence thwarted by the disciplinary committee, engage an advocate to defend them, a decision
had already been taken to expel them from the institution even before the hearing.

At page 6 of the ruling, the learned judge made observation that there was no dispute that the ex-parte applicants were students at the respondents, there had been instances of violence between the students and the residents of Kilifi, the ex-parte applicants were suspected to have been deeply involved, disciplinary measurers were initiated against them and subsequently expelled.

In judicial review the ex-parte applicants' case stood faulted because of the following:-

(a) The ex-parte applicants were furnished with charges.

(b) They never applied to call witnesses despite the respondent's indicating that certain persons mentioned by the ex-parte applicants be called.

(c) They never sought to cross examined any of the witnesses fronted by the respondents. No request was made for a desire to have legal representation having been faulted all complaints raised, the court declined to intervene on behalf of the ex-parte applicants.

Lastly the case of **Suba –VS- Egerton University [1995-1998] 1 EA**

303 decided by Mbito judge as he then was, where the learned judge held ***inter alia*** that:-

(1) In determining whether to issue a writ, the court had to determine whether the offending body had acted in breach of its legal powers in making the quasi- judicial decision alleged to have breached the complainant's right. The applicant had to show that there resided in him a legal right to the performance of a legal duty by the respondent. In this instance, there was no legal requirement for the respondent to admit the applicant on a particular date nor did the applicant have a right to complete the studies by 1997. The preparation of charts of study was purely administrative and there was no need to consult with the applicants.

(2) Moreover the University Act was not discriminatory and infact prohibited discrimination. Here all the respondent had done was to set out a program as to have those entitled to its services were going to be served and it was not discriminatory for students to be allowed to study at different times.

(3) The issue of prerogative writs was a matter for the discretion of the court and the court did not act in vain in this instance even if the applicants made a case for any prerogative writs the order would not enable the applicants to commence their studies at the same time as the other students and therefore no useful purpose would be served by the grant of the orders sought.

(4) Order LIII rule 3 of the CPR provide that where leave was granted for an application for a prerogative writ, the application had to be made within 21 days. This was a mandatory requirement and the court would not entertain an application filed out of time without an extension of the period having been granted (Osolo –VS- Ochola [1995] LLR 365 {CAK}) followed in this

instance application had been filed one day out of time. Extension having been granted. The application was accordingly not properly before the court as it had been filed out of time without leave of court.

This court has given due consideration to the a fore set out rival arguments as well as submission, and the same considered in the light of principles of case law cited to court and the court proceeds to make the following findings on the same:-

(1)It is undisputed that the applicant herein has approached the seat of justice vide an application by way of judicial review. This being the case, case law cited and assessed herein is to the effect that this is a unique procedure confined to the provisions of sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and order 53 CPR and rules made there under its procedure is distinct from other procedures known in the Civil Procedure Process. The case law further adds that the procedure has to be strictly followed otherwise no relief will be accessed. This being the case it follows that in order to succeed it has to be demonstrated by the applicant that he has brought himself within the ambit of the ingredients required to be established before one can earn such a relief.

(2) Vide order 53 rule 7 CPR, where one seeks the relief of certiorari, it has to be demonstrated that the applicant has exhibited the order, warrant, commitment, conviction, inquisition or record sought to be quashed. The applicants' complaint herein for which this relief is sought is the decision of the respondent dated 27th September 2010. A perusal of the record reveals that this decision was annexed to the verifying affidavit as annexture P001.

(3) Vide order 53 rule 1 (1) CPR leave of court must be sought before the substantive application is filed. This has been demonstrated to exist as the same was granted by this court on 6-10-2010.

(4) Vide order 53 rule 1 (2) (2) CPR the application for leave is to be sought ex-parte in the first instance and the same has to be accompanied by a statement setting out the name and the description of the applicant, the relief sought and the grounds on which it is sought and by affidavit verifying the facts relied upon. A perusal of the record reveals that indeed the application for leave was accompanied by a statement, which gives the name and description of the applicants, the reliefs sought therein also a verifying affidavit together with annextures. This rule has therefore been complied with.

(5) Vide order 53 rule 2 CPR the relief of certiorari can only issue if leave for the same is sought before the expiry of 6 months from the occurrence of the events complained of. The applicant is within the ambit of this provision because the suspension was on 27-9-2010 while the application was presented on 6-10-2011.

(6) Vide order 53 rule 3 (1) CPR the substantive application is required to be presented to court within 21 days of the granting of leave to apply for the same. Herein leave was granted on 6-10-2010. Whereas the substantive application was filed on 22-10-2010 this within the 21 days stipulated by the rules.

(7) Vide order 53 rule 4 (1) CPR all the paperwork that accompanied the application for leave is the same paper work which is to accompany the substantive application meaning that no additional papers are to be filed with the notice of motion without leave of court. Applying this to the notice of motion filed on 22-10-2010 it is evident that there is indeed a statement and a verifying affidavit bearing the date stamp of 6-10-2010 next to the notice of motion. The substantive application has

grounds in the body of the application. It is also accompanied by supporting affidavit in support of the motion. By putting grounds in the body of the application and adding a supporting affidavit, the applicant was trying to mix up the ordinary Civil Procedure process with the special Civil Procedure process of judicial review.

No doubt this is the reason as to why the respondent termed the substantive application irregular. Infact the entire substantive application would have stood faulted had it not been that there is mention at the end of the grounds that the **"application is grounded on the grounds setout in the statement annexed as well as the affidavit of the applicant presumably the verifying affidavit".** This note saves the application because this court has judicial notice of the fact that when the substantive application is filed, the paper work accompanying the application for leave are refilled alongside it or there is just a reference to them in the body of the application that the application is grounded on the grounds in the statement and the verifying affidavit and annexture Either way the paperwork would be in order and would be dealt with on its merits.

This being the correct position in law it means that the grounds in the body of the application, the supporting affidavit deponed and filed simultaneously with the substantive application are struck out together with further affidavit also filed without leave.

The striking out of the said offending papers not withstanding the court is alive to the constitutional provisions namely Article 22 (3) (d) and 159 (2) (d) which prohibits the court from leaning towards upholding technicalities. These read:-

"Article 22 (3) (d) the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities--------.

"Article 159 12 (d) justice shall be administered without undue regard to procedural technicalities----------".

This court has construed these provisions and applied them to the rival arguments herein on technicalities, and the court is satisfied that the said provision provide a shield against procedural technicalities only and not substantive technicalities. Substantive technicalities are those which go to the root of the substance of the litigation. Herein want of form attaches to the inclusion of the grounds in the body of the substantive application, filing a supporting affidavit for the substantive application and a further supporting affidavit. As mentioned earlier on herein, the error would have been fatal had it not been for the inclusion of the words that the substantive application is also anchored in the statement and verifying affidavit. The inclusion of this phrase or words provided a shield for the substantive application in that even if these other appendages are struck out, the substantive application can still survive and be considered on its merits on the basis of the presence on the record of the paper work procedurally required to support it. The court will therefore strike out the grounds in the body of substantive application, supporting affidavit and further affidavit, but the substantive application still stands for it to be considered on its own merits.

Turning to the merits, it is evidently clear that the applicant seeks two reliefs namely certiorari and mandamus. The principles or ingredients required to be established before one can get this relief have already been set out herein during the assessment of the case law cited and the major ones are that:-

(i) These reliefs are not available to disputes between litigants in their private capacities see Republic –VS- Kenya Cricket Association & Another ex-parte Maurice Omondi Odumbe Misc. App. Nairobi HCCC 1723 of 2004 (supra) it matters not that the private entity is performing a public function.

(ii) Whereas the writ of certiorari issues to quash a decision already made where the decision is made without excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.

(iii) The order of mandamus issued from the high court directed to any person, corporation or an 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 incases where although there is an alternative legal remedy yet that mode of remedy is less convenient , beneficial and effectual.

------The order will compel the performance of a public duty which is imposed on a person or a body of persons by a statute and where that person has failed to perform the duty to the detriment of a party who has a legal right to be expect the duty to be performed"

(see the case of Kenya National Examination Council –VS- Republic CA 266 of 2006 [supra]).

(iv) That judicial review is not concerned with private rights or the merits of a decision but with the decision making process (see Hotel Kunste –VS- Commissioner of Lands CA 243 of 1995)

This court has duly applied the afore set out ingredients to the rival Arguments herein and the court proceeds to make the following findings on the same:-

(1) The statement of facts describes the applicant as an adult male of sound mind residing in the city of Nairobi and was at the relevant material time a student at St. Josephs Medical Training College, whereas the respondent is described as a Medical training college offering various medical courses including nursing and is registered with the Nursing Council of Kenya. Further from annexture P002 to the verifying affidavit in a document titled St. Josephs Medical Training College Nyabondo school rules and regulations, the institution is described as a medical training college Nyabondo belonging to the Catholic Arch diocese of Kisumu.

A question that arises at this juncture for determination is whether the respondent is a public body. From the above description of the disputants herein the court is of the opinion that they fall squarely into the description given by Wendoh judge in Misc. App 1723 of 2004 in the matter of **Republic – VS- Cricket Association of Kenya ex-parted Maurice Omondi Odumbe (supra)** at page 5 where the learned judge quoted with approval Halisburys Law of England 4th edition volume 1 (1) paragraph 6 thus:-

"Broadly speaking a public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not a private benefit to every such person or body is expressly defined as a public entity or body and the meaning of a public authority or body may vary according to the statutory context"

When applied to the scenario herein it is clear that it is necessary for this court to define what a public body is. This is defined in the interpretation and general provisions Act Cap 3 Laws of Kenya as:-

"Public body means:-

(a) The government, any department, institution or undertaking thereof.

(b) A local authority or

(c) Any authority, board, commission, committee or other body whether paid or unpaid which is invested with or is performing whether permanently or temporarily functions of a public nature"

Further guidance will come from the definition of a **"public office and a public officer" defined in the same Act. "A public office means an office or employment the holding or discharging of which by a person would constitute that person a public office" whereas a public officer means a person in the service of or holding office under the government of Kenya whether that service or office is permanent or temporary or paid or unpaid".**

When these provisions are construed and applied to the facts herein, it is clear that a medical training college belonging to the Catholic Arch Diocese of Kenya cannot be said to be belonging to the government just as the entire Catholic Church is a private organization performing public functions of religious worship, its institutions are likewise private institutions but performing a public function of training medical officers. They are deemed to be performing a public function in that the syllabus they teach may not be private and also they are open to admission to any willing qualified member of the public. For this reason the court agrees with the respondent's assertion that the institution is not a public body though it is performing a public function.

Turning to the relief of certiorari, on the facts the institution has rules and regulations governing the conduct of business by students and the institution. There was a legitimate expectation from both sides that these could be breached and that is why disciplinary clauses were inserted in the regulations. There has been no assertion that parties to the contract were not to adhere to the discipline regulations and the invocation of disciplinary measures in the event of any breach. This being the case, it follows that by the institution sensing breach of regulations and setting in motion disciplinary measurers, it can not be said to have acted in excess of jurisdiction, more so when it has not been asserted by the applicant that the rules and regulations were not meant to be observed and obeyed and were for cosmetic value. Their observance and obedience to them being the underlying factor in their creation, the setting in motion of disciplinary measures to ensure their observance is legitimate, expected as well as action expected of the mangers.

As for breach of natural justice rules as Omondi judge observed in the case of **Republic-VS- Pwani University ex-parte Mbugua and others (supra)** there are not standard forms of observing this norm. It could be observed orally or in writing. Here in from the applicants own verifying affidavit he went to see the administration twice. Firstly, alone and secondly, with his parent. He has not denied that there were exchanges between both sides when the subject matter of discipline came up. He was therefore heard. As to whether the hearing resulted in his favour or not is another matter.

Turning to mandamus, from the assessment herein. This relief is only available where there is breach of a public right owed to the litigant by a public institution or public officer which public officer is mandated by statute or law to perform and which he/she has failed to perform to the detriment of the applicant. Herein, having ruled that the applicant is a private individual and the institution is a private institution, the issue of a public right arising in relation to the institution does not arise. The applicant is not compellable under the Kenyan Law to train as a nurse. It is his private decision to train as one. Neither is he compellable to train at this institution. He could choose to train here or any other as demonstrated by his move to reroute his studies to another institution when the dispute arose.

Like wise the institution is performing a public function in that admission is not pegged on signed up

members. It cannot be compelled to accept the applicant or any other. It has a discretion. There is no statutory requirement for it to elect to be have in one way or another other than may be one of requirement that it complies with legal requirements with regard to the nature of the training to conform with the minimum standards of training for such like minded institution. It is therefore not within the mandate of the court to compel the institution by way of an order of mandamus to either discipline or not to discipline the applicant or to discipline him in any particular manner. The general principle with regard to the affairs of private institutions ***vis a vis*** the power of intervention by the courts in the affairs in which this court has judicial notice is that they should be allowed to run their affairs without the interference of the court except where they have out stepped their mandate as per their constituting documents or are in breach of law.

Herein the institution was within its mandate to institute disciplinary measures against the applicant for alleged breach of its rules and regulations. The applicant has no vested legal right making him to be immune from discipline by the institution capable of being protected by this court. By agreeing to join the institution and signing up to obey the rules and regulations he also correspondingly signed up for the right to be disciplined by the institution.

With regard to one availabity of an alternative remedy which is less efficient or in effective, this court is of the opinion that being a private dispute the applicant has recourse to an ordinary civil suit to seek a declaration to the effect that the disciplinary measures taken was unlawful, excessive or is unwarranted.

(ii) He can seek to have the same rescinded.

(iii) He can seek a declaration that the fine ordered to be paid is without basis.

(iv) He can also seek compensation.

For the reasons given in the assessment, the court proceeds to make the following orders on the disposal of the applicants notice of motion dated 14-10-2010 and filed on 22-10-2011:-

(1) Application for leave to apply for judicial review was procedurally done.

(2) The substantive application was also presented within the stipulated 21 days period upon the granting of leave.

(3) Indeed the inclusion of the grounds in the body of the application as well as the filing of the supporting affidavit and further affidavit are irregular as there are procedures applicable to ordinary civil procedure processes and not the special and unique judicial review processes under section 8 and 9 of the Law Reform Act and order 53 CPR proceedings. However, by the applicant including the phrase "and is also supported by the statement and verifying affidavit". The application was thereby validated and could stand and be considered on its own merit even if the offending paper work is struck out.

(4) By reasons of what has been state above in number 3 the grounds in the body of the substantive notice of motion, the supporting affidavit as well as the further affidavit be and are hereby struck out.

(5) The balance of the application is curable under Article 22 (3) (d) and 159 (2) (d) of the Kenyan

constitution and the same is a proper candidate for determination on its own merit.
(6)On the merits both the writof certiorari and mandamus sought by the applicant are not available to the applicant because of the following reasons:-

(i) Although the respondent is an institution performing a public function it and its officers do not fall within the definition of a public institution and public officer within the meaning ascribed to those two words in the interpretation and general provisions Act Cap 2 Laws of Kenya.

(ii) The institution has in place rules and regulations which the applicant signed up to and for this reason there is a legitimate expectation on both sides that breach invites the setting into motion of disciplinary measures. Therefore the issue of excess jurisdiction does not arise as none has been demonstrated to exist. Further judicial review is not concerned with the mode of execution but the process leading to execution.

(iii) There is no set standard form of observance of the rules of natural justice. These could be oral or in writing. Formal or informal. Herein it is on record that the applicant was heard and so breach of natural justice does not arise in the circumstances of this case.

(iv) The order of mandamus is not available to the applicant because there is no statutory right vested in the applicant requiring him not to be disciplined by the institution capable of being protected by this court. What the respondent set out to do was within its rules and regulations.

(v) There is an alternative effective remedy available to the applicant namely a civil action to declare the institution of the disciplinary proceedings irregular, unwarranted and the imposition of the fine unlawful.

For the reasons given above the substantive application is dismissed with costs to the respondent.

Dated, delivered and signed at Kisumu this 28th day of September, 2011.

ROSELYN N. NAMBUYE
JUDGE

RNN/va