



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

(NAIROBI LAW COURTS)

Misc Appli 267 of 2008

IN THE MATTER OF APPLICATION BY PATRICK VONYOLI KAVULI

AND

**IN THE MATTER OF KENYA MEDICAL TRAINING COLLEGE ACT, CAP 261 LAWS OF
KENYA**

BETWEEN

PATRICK VONYOLI KAVULI..... APPLICANT

AND

THE BOARD OF MANAGEMENT,

**KENYA MEDICAL TRAINING..... 1ST
RESPONDENT**

THE PRINCIPAL,

KENYA MEDICAL TRAINING COLLEGE..... 2ND RESPONDENT

THE PRINCIPAL,

**KENYA MEDICAL TRAINING
COLLEGEMACHAKOS..... 3RD RESPONDENT**

J U D G M E N T

Before me is a Notice of Motion dated 16th May, 2008 filed by J.M. Njage & Company advocates on behalf of the applicant **PATRICK VONYOLI KAVULI**. The respondents are named as **THE BOARD OF MANAGEMENT KENYA MEDICAL TRAINING COLLEGE (1st respondent)**; **THE DIRECTOR, MEDICAL TRAINING COLLEGE (2nd respondent)** and **THE PRINCIPAL, KENYA MEDICAL TRAINING COLLEGE MACHAKOS (3rd respondent)**. The Notice of Motion (**application**) was brought under Order 53 Rule 3(1) of the Civil Procedure Rules. The orders sought are as follows-

- (a) *An order of certiorari to move into this court and quash the decision of the 3rd Respondent communicated to the Applicant vide the letter dated 10th April, 2008.*
- (b) *An order of mandamus directed to the 2nd Respondent to immediately and unconditionally re-admit back to Nairobi College the Applicant.*
- (c) *An order of prohibition prohibiting the Respondents from discontinuing the Applicant from college attending classes and being taught like all other students in the applicant's class, and enjoying the college boarding facilities and participating in all college activities like any other student members of the applicant's college.*
- (d) *Stay of the decision made by the 3rd Respondent as communicated vide the aforesaid letter dated 10th April, 2008 pending the determination of this application.*
- (e) *Costs of this application be provided for.*

The application was grounded on the **STATEMENT** dated 9th May, 2008 filed with the Chamber Summons for leave as well as the **AFFIDAVIT VERIFYING THE FACTS RELIED ON** sworn by the applicant on 9th May, 2008, also filed with the Chamber Summons for leave.

The grounds of the application are, inter alia, that the applicant was in danger of failing to pass his college finals because he had been wrongfully discontinued from college; that the respondents discontinued the applicant without giving him an opportunity to be heard; that the committee (*if any*) was improperly constituted; that the actions of the 3rd Respondent were in total violation of the law, as he was the Principal; and that the 3rd respondent failed to take into consideration material and relevant facts and therefore arrived at the wrong decision.

The applicant also, through his counsel, filed written submissions. In the written submissions, the facts underlying the case were summarized. It was emphasized that the applicant was not given a chance to be heard. Reliance was placed in *ECS Wade and A.W. Bradely on Constitutional and Administrative Law pages 649 to 650* wherein the requirements of natural justice were said to be fulfilled only where the applicant was availed-

- (i) *The right to be heard by an unbiased tribunal.*
- (ii) *The right to have prior notice of charges leveled against him.*
- (iii) *The right to be heard in answer to the charges against him.*

Reliance was also placed on the case of *HYPOLITO CASSIANO DE SOUZA -VS- CHAIRMAN & MEMBERS OF THE TANGA TOWN COUNCIL [1961] E.A. 377* where the Court of Appeal for East Africa stated-

“The person accused must know the nature of the accusation. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view.”

It was also contended that the respondents acted in excess of their powers as laid down under the law. Reliance was placed on the case of *ERIC KIMANI MUIRURI -VS- THE BOARD OF GOVERNORS, UPPER HILL SCHOOL & ANOTHER – HC Misc. Application No. 783 of 2007*. It was contended that the respondents acted in excess of their powers under the Kenya Medical Training College Act.

In response to the application, the respondents filed a notice of preliminary objection on 30th July, 2008. The objections were as follows-

1. ***The entire application is incurably defective.***
2. ***The affidavit verifying the Statement of Facts relied on is defective in so far as the jurat is on a separate page.***

On the same 30th July, 2007 the respondents filed a replying affidavit sworn by **B.M. KONDO**, who is the 3rd respondent. It was deponed in the said affidavit, inter alia, that the application was incurably defective; that the applicant had been a persistent trouble maker having been suspended from college previously on two occasions for being drunk, disorderly, and fighting other students, and was on 16th October, 2007 expelled from the college hostels owing to his unruly behavior. It was also deponed that the applicant was charged with a criminal case regarding drugs at Machakos hospital.

It was further deponed that the applicant was informed in the presence of his father that the disciplinary committee would sit on 25th March, 2008 to deliberate on his case, but the applicant and his father did not show up. Again he was given a chance to appear before the disciplinary committee on 8th April, 2008 and was summoned by letter, but the applicant still failed to appear before the disciplinary committee. It was then that the decision to discontinue him from studies was made. It was also deponed that the rule that no-one should be condemned unheard did not mean that the applicant had a right to be awaited indefinitely to present his case. It was deponed further that the 3rd respondent acted within the ambit of section 8(c) of the Kenya Medical Training College Act (Cap. 261 Laws of Kenya).

The respondents also, through their counsel, filed written submissions on the preliminary objections on 7th November, 2008. The thrust of the written submissions was to expound on the two preliminary objections raised. These relate to the title of the Notice of Motion and the jurat of the affidavit.

On the title or heading of the Notice of Motion, it was contended that the application was fatally defective because the **REPUBLIC** was not named as the applicant as required by law. Reliance was placed on the case of **FARMERS BUS SERVICES & OTHERS –VS- THE TRANSPORT LICENSING APPEALS TRIBUNAI (1959) E.A. 779** in which the Court of Appeal for East Africa held-

“Prerogative orders are issued in the name of the Crown and applications for such orders must be correctly intituled.”

It was contended that the above decision was followed in **KARIUKI –VS- COUNTY COUNCIL OF KIAMBU & ANOTHER (1995 – 1998) I E.A. 90**, and the case of **WELAMONDI –VS- CHAIRMAN, ELECTORAL COMMISSION OF KENYA (2002) IKLR 486**. The contentions were that the failure to enjoin the **REPUBLIC** as the applicant was fatal.

On the affidavit, it was contended that same was incurably defective because the jurat is on a completely separate page. It followed therefore that the application which was grounded on the said defective affidavit was also incurably defective. Reliance was placed on the (English) Supreme Court Practice, 1999 vol. 1 paragraph 41/1/2, which states-

“Jurat – the jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the text. The signature of the Commissioner for Oaths should be written immediately below the words “Before me.”

Reliance was also placed on the case of **REPUBLIC –VS- REGISTRAR OF COOPERATIVES SOCIETIES & ANOTHER** – EX Parte John Wangondo (2005) eKLR wherein Okwengu J. stated-

“I do uphold the submission that the affidavit sworn by Fredrick Odhiambo in support of this application is defective as the affidavit does not indicate the place where the affidavit was sworn and the jurat is also on a separate page.”

The respondents also on 7th November, 2008 filed submissions on the merits of the application. It was contended that the actions of the respondents were not ultra vires, and were done in compliance with the principles of natural justice.

Reliance was placed on the case of **R -VS- KENYA MEDICAL TRAINING COLLEGE- Ex Parte Kendagor – HC. Misc. Civil Application No. 10 of 2004** wherein Lenaola J. stated with regard to adequate notice as follows-

1. ***The business must be clearly stated.***
2. ***The date, time and place are indicated.***
3. ***Notice is issued to every person entitled to attend and receive it.***
4. ***Notice to be given in a prescribed manner.***

It was contended that proper and adequate notice was given to the applicant availing him an opportunity to present his case, but he failed or ignored to do so. Therefore, the principles of natural justice were complied with.

On the availability of the orders sought, reliance was placed on the case of **PETER BAGONKO –VS- NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY** – Misc. Application No. 1535 of 2005, wherein Wendo J. cited with approval what Bosire J. (*as he then was*) stated in **REPUBLIC -VS- COMMISSIONER FOR COOPERATIVES DEVELOPMENT, KARIOBANGI HOUSING & SETTLEMENT SOCIETY** – Ex-Parte David Mwangi, that-

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

At the hearing Mr. Mitiambo for the applicant addressed me in support of the applicant’s application, while Mr. Muigai for the respondents addressed me in support of the respondents case.

This application will not succeed on technical grounds. In **FARMERS BUS SERVICES AND OTHERS – VS- THE TRANSPORT LICENCING APPEAL TRIBUNAL [1959] E.A. 779**, the Court of Appeal for East Africa held-

“Prerogative orders are issued in the name of the Crown and applications for such orders must be correctly intituled.”

The above decision was followed in **KARIUKI –VS- COUNTY COUNCIL OF KIAMBU & ANOTHER (1995-1998) IEA 90**, at page 91, where Keiuwa J. (*as he then was*) stated-

“It was a mandatory requirement of the Civil Procedure Rules that an application for judicial review be correctly intituled (Farmers Bus Service & Others –Vs- Transport Licensing Appeal Tribunal [1995] E.A.779 followed). In this instance, the applicant erred in his intitulation of the suit and this was fatal to his application.”

The above position was reiterated in the later case of **WELAMONDI –VS- THE CHAIRMAN OF THE ELECTORAL COMMISSION OF KENYA [2002], IKLR 486**, at page 497 wherein Ringera J. (*as he then was*) stated-

“The upshot of my consideration of the grounds of objection taken is that I find the motion to be completely muddled in form and thus incompetent and also misconceived in substance. Accordingly, the preliminary objection thereto is sustained and it is, consequently, ordered that the motion be struck

out with costs to the respondent.”

I fully agree with the reasoning in the above case. In our present case the **REPUBLIC** is not the applicant in the Notice of Motion dated 16th May, 2008. Instead the ex-parte applicant is named as the applicant, contrary to the requirements of law. The application is fatally defective and cannot be salvaged. I will strike the same out with costs to the respondents.

There is another technical complaint on the affidavit verifying the facts. The jurat is on a completely separate page. This was a fatal error on the format of the affidavit. I fully agree with what was stated by Okwengu J. in ***REPUBLIC –VS- THE REGISTRAR OF COOPERATIVE SOCIETIES*** Misc. Application No. 23 of 2005 – [2005] eKLR thus-

“I uphold the submissions that the affidavit sworn by Fredrick Odhiambo in support of this application is defective as the affidavit does not indicate the place where the affidavit was sworn and the jurat is also on a separate page. It does not therefore meet the requirements of the Oaths and Statutory Declarations Act (Cap. 15).”

In our present case, the jurat is on a completely separate page.

The affidavit has therefore to be struck out. Once the affidavit is struck out, even if the application was headed in the proper form (***and I have found it was not***) it cannot stand as there will be no facts on which it can stand.

For the above reasons, I strike out both the Notice of Motion in totality with costs to the respondents.

Dated and delivered at Nairobi this 26th day of May, 2009.

George Dulu

Judge.

In the presence of-

Mr. Chesang holding brief for Mr. Mitiambo for applicant

Kevin - Court clerk.