



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appil 46 of 2006

**ROY IMBUKURE & OTHERS.....
APPLICANT**

versus

THE PERMANENT SECRETARY

MINISTRY OF HEALTH & OTHERS.....RESPONDENT

JUDGMENT

On 1st February 2006 the applicant obtained leave of this court to bring Judicial Review Proceedings. The Notice of Motion was filed on 2nd February 2006 and it seeks the following orders.

- 1) That the court do issue a permanent order of certiorari to quash the decision and proceedings of the Board of Management of the Kenya Medical Training College, Nairobi as communicated by the 3rd respondent on behalf of the Board of the management of KMTC Nairobi expelling the 1st applicant and suspending the 2nd 3rd and 5th applicants for one year, all 2nd and 3rd year students at KMTC
- 2) That all consequential directions as may be deemed necessary be given.
- 3) The costs of this application be paid for

The application is brought pursuant to Order 53 Rule 3(1) Civil Procedure Rules. It is supported by the Statutory Statement and verifying affidavits sworn by Roy Imbukure, Ongubo Peter Ondieki, Sultan Peru Richard, Kennedy Odhiambo Oruonjo and Christine Atieno Odinga, – the applicants herein.

The requisite notice to the Registrar was filed in court on 31st January 2006. Mr. Sumba is counsel for the applicants.

The application was opposed. Mr. Ombwayo appeared for the 1st and 5th respondents. No replying affidavit was filed by the respondent except a notice of Preliminary Objection which the court directed that it be taken up in the hearing of the main motion.

Mr. Thongori appeared for the 2nd and 4th respondents. Replying affidavits were filed in opposition to the application by Dr. Kingondu, Director of KMTC and a member of the Board of the College and Dr. Karanja swore a further affidavit dated 10th March 2006. Dr. Karanja is the Deputy Principal of KMTC and had authority to swear the affidavit.

This matter was canvassed before me on 16th March 2006. It was common ground that the expulsion of the 1st applicant and suspension of the 2nd to 5th applicants was not denied, it was also common ground that the source of the conflict between the Kenya Medical Training College (hereinafter referred to as KMTC) students and their administration was initially a confrontation between one student and a security guard at the dining hall on 3rd November 2005

The 1st applicant gave the background of the incident whereby he alleged that after the security guard refused the student to join the queue from where he had left it, it led to students protests that disrupted lunch and the principal, deputy principal and security officer went to the kitchen to intervene. The students demanded removal of the security guard and stoppage of harassment of students which the principal took lightly. 1st applicant and his vice were asked by students to speak to the administration. The students then refused to take supper and called for a meeting for 4th November 2005 and the applicant issued the requisite notice to the principal and director. At the meeting the students raised several grievances and continued to boycott meals till the director addressed them. On 7th November 2005 the students boycotted classes and the students' leaders were asked to get the director to address students but he was unavailable.

The students marched to Afya House to air their grievances and a task force of 4 officials was asked to address the grievances. On 8th November 2005 the students staged a sit in and failed to attend classes till their grievances were met.

On 9th November 2005 when at the graduation square, police came in and the 1st applicant and other leaders beseeched the administration to withdraw police to avoid any violence but they did not heed. The student leaders prevented students from throwing stones. The 1st and 2nd applicants were summoned to the principals office and while there is when they heard noises as the students believed the 1st applicant was under arrest. The students were calmed but an announcement was made by public address saying that all students vacate college by 7.00 p.m. Police were present and threw tear gas canisters. Most students left that night while others left next day. On 15th November 2005, 1st applicant received a telephone call to attend a meeting on 17th November 2005. He did attend, but it turned out to be a disciplinary Board Meeting. He was questioned about his involvement in the unrest. He was released to go home and when the college reopened on 4th January 2006, he received an expulsion letter. He did not understand why the expulsion. Yet he only played his role as a student leader in accordance with their constitution. He denied having been told in advance what the meeting of 17th November 2005 was all about till he attended. The rest of the applicants agreed with the 1st applicant save for the 3rd and 4th who denied that they were ever called to the disciplinary committee meeting and were therefore not given a hearing at all before their suspension.

The Director of KMTC swore a lengthy affidavit of 70 paragraphs. I do find that the said affidavit is too generalized and paragraph 7, 15 to 37, the deponent levelled accusations against the applicants and referred to their involvement in what happened at the college. He does not state the source of his information. He has not told court that he witnessed what the applicants did personally.

The court will expunge those paragraphs from the said affidavit. Mr. Sumba also submitted that the annexures to both the replying affidavits are irregularly annexed. These annexures are referred to at

para 56 as JHPK 1. They are then numbered A B & C. However all these annexures are not signed or certified as true copies. Similarly the annexures to the affidavit of Dr. Karanja though headed, Report of Committee Meeting held on 14th November 2005, it is not signed by any chairman or secretary. The court cannot ascertain whether it is authentic. The court will generally ignore the annexures to the respondent's affidavits.

Having done that, I turn to the respondent's version of the events leading to the closure of KMTC and eventual expulsion and suspension of the applicants. Dr. Kingondu deponed that after the incident with the guard, the students held unauthorized meetings on 4th November 2005, they refused to resume classes, addressed the press. They continued with the boycott till 9th November 2005 when they gathered at the graduation square, and demanded to be addressed by the Director. Police were called and the students became rowdy, throwing stones, causing injuries and damage to property.

The college was closed on the same day and on 17th November 2005, the applicants were called for interview before the disciplinary committee and they were alleged to have violated students' Rules and Regulations and the respective actions were taken to expel or suspend them. The students were amongst others punished by the Board and according to the Director, due process was followed. Dr. Karanja repeated what was deponed to by the Director.

In their submissions, counsel for the respondents raised issues that need to be addressed even before the court considers the merits of this application.

Mr. Ombwayo for the 1st and 5th respondent submitted that no specific orders are sought against the 1st and 5th respondents. 1st respondent is the Permanent Secretary, Ministry of Health whereas the 5th Respondent is the Attorney General. He urged that the Permanent Secretary is just a member of the Board and can not be sued in his personal capacity nor was the Attorney General a member of the KMTC Board whose decision is sought to be quashed.

The 2nd limb of Mr. Ombwayo's objection was that the applicant did not comply with Order 53 Rule 7 as they did not lodge the decision sought to be quashed with the Registrar nor is it before court as is required. The court therefore has nothing to quash and the applications should be dismissed. Mr. Thongori associated himself with the above arguments. Mr. Thongori added that 2nd, 3rd and 4th respondents do not exist as distinct legal entities and the orders should have been sought against KMTC. He submitted that that was a fatal misjoinder of parties.

The Kenya Medical Training College Act (Cap 261) makes provision for governance, control, management and other connected purposes of the KMTC. Section 3 of the said act establishes and provides for incorporation of the college.

It provides as follows:

3 (1) There shall be established a college which shall be the successor to the Government in respect of the institute hereto known as the College of Health Professions Nairobi and which shall include

(a) The medical training centers specified in the schedule and

(b) Such other institutes as the minister may; from time to time in consultation with the Board of Management, by notice in the Gazette, declare to be constituent training centres of the college.

(2) The college shall be a body corporate by the name of the KMTC with perpetual Succession and a common seal, and shall, in that name be capable of

(a) Suing and being sued;

(b)

(c)

(d) Doing or performing all other things or acts including entering into such contracts as may be necessary or expedient for the furtherance of the provisions of this Act which may lawfully be done by a body corporate.”

My understanding of the above provision is that KMTC being a corporate body and the successor of the Government and having been given authority to sue and be sued, was the right person to be sued in these proceedings.

The order sought cannot be obtained from the Permanent Secretary, the Chairman of the Board, the Director and Principal of KMTC and Hon. Attorney General in their personal, or official capacities as sued in this application.

Section 10 (1) of the Act provides for establishment of a Board of Management of the College. The persons named as the respondents are some of the members of that Board.

The functions of the Board are provided for under S. 10 of the Act and S. 10 (2) (f) provides that it is Board of Management in Consultation with the Academic Board, which makes regulations governing the conduct and discipline of students of the college.

From the proceedings and documents on the file, it is not in dispute that it is the Board that made the decision to expel or suspend the applicants. They did it on behalf of the KMTC. The letters written to the applicants were written by the Director on behalf of the Board of Management of KMTC. It is the decision of the KMTC that is challenged and being a body corporate should have been the one to be sued. There has been a fatal non joinder of the respondents to this application as the order sought cannot be obtained from them as sued.

The second issue raised by Mr. Ombwayo is the failure to lodge the decision of KMTC Board to the Chamber Summons, by the applicant and which decision is sought to be quashed by an order of certiorari. Order 53 Rule 7 (1) provides as follows:

“incase of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion, he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court.”

That provision is couched in mandatory terms. The proceedings and decision of the Board whose validity the applicant challenges was not annexed to the chamber summons nor was it served on the Registrar. It has not been filed even after the commencement of the proceedings.

The applicant only annexed the letters addressed to the applicants dated 3rd January 2006 expelling or suspending the applicants. If for some reason the applicants were unable to lodge a copy of the proceedings and decision of the Board, the applicant is mandatorily required to account for the failure to lodge it to the satisfaction of the court. Nowhere in the application did the applicant attempt to explain why the said decision could not be lodged. It is not until the respondents raised the issue that the applicants’ counsel submitted that the applicants could not access it. That is not a satisfactory explanation leave alone it being one. Had the applicants raised it before court at an earlier stage, may be the court could have requested the respondents to avail it to the court. The Court of Appeal in **SAMSON KIREREA M’RUCHIU V MINISTER OF LAND SETTLEMENT & OTHERS C.A. 21/99** Justice Kwach, Bosire and Okubasu in considering Order 53 Rule 7 (1) said,

“compliance with the above provision is a precondition to seeking an order of certiorari. An

applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his motion under Order 53 Rule 3 Civil Procedure Rules. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity”

What I understand the judges to mean is that the decision to be quashed can be lodged after the filing of the application but before the hearing of the motion and that failure to lodge the decision can be taken up as a preliminary point and disentitle one to a hearing. In light of the above cited case, I do find that the application before me is a nullity because there is really nothing to quash. I do find that the failure to avail the proceedings or give a satisfactory explanation offends provisions of Order 53 R 7 (1) Civil Procedure Rules and I do uphold the 1st and 5th respondents objection. On that basis alone, the applicants’ Notice of Motion will therefore stand struck out.

Despite the above finding this court will go ahead to consider whether or not the rules of natural justice had been breached by the respondents; and whether the Board acted ultra vires its powers.

The remedy of Judicial Review is concerned with reviewing the decision making process but not the merits of the decision. The said remedy is to ensure that the individual is given fair treatment by the authority to which one is subjected.

The applicant seeks an order of certiorari to quash a decision. **HALBURYS LAWS OF ENGLAND 4TH ED VOL II page 805 para 1508**, says that of that order;

“Certiorari is a discreatory remedy which a court may refuse to grant even when the requisite grounds for its grant exist. 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 a judicial one must be exercised on the basis of evidence and sound legal principals.”

It means that the order of certiorari will only issue in cases whose circumstances are deserving and it depends on the special circumstances of each case.

I have carefully considered the case before me. The applicants who had gone home upon closure of KMTC were called on phone and told to attend a board meeting. The applicants were not told the nature of the meeting they were to attend. It turned out that they were going to attend a disciplinary committee. The applicants had not been notified of what the meeting was all about. No charges were framed against them so that they would know how to defend themselves. In the case of **REP V BONIFACE MUTHENGI Headmaster Kitui High School & 2 others Misc App 45/01**, the court found that students who had been suspended did not know the charges they faced before appearing before the steering committee; the accusers did not disclose the source of the accusations. I do agree with the finding of the judge in that case. The respondent’s should have informed the applicants what, charges were leveled against them or for what reasons they were summoned. Failure to do so prejudiced the rights of the applicants. It does not matter whether the applicants gave evidence that was coached or not. That omission amounted to a breach of the “Audi Alteram Partem rule” that is that they were not given a fair hearing.

The 3rd and 4th applicants denied ever having been summoned by phone or otherwise. They never attended the interview by the disciplinary committee. It means that they were not given a chance to defend themselves at all. Right to be heard is a cardinal principle of Natural Justice and I find that failure to hear them amounted to breach of the rules of natural justice.

Bias was also alleged on the part of the Director as against the 1st applicant. Though the 1st applicant was alleged to have abused the director, the director still sat on the Board meeting that made the decision to expel the 1st applicant. I do agree that since such allegation was made, the director was likely to be biased and should have disqualified himself from the interviews. It was unlikely that the applicant could get a fair hearing since the director knew that he had been called a fool. It was a breach of the “Memo

judex rule” which means no man should be a judge in his own case.

It was also the applicants contention that the body that made the decision to expel or suspend the applicants acted ultra vires Section 10 (f) of the KMTC Act because it is only the Board of Management which should have heard the cases. It was stated by the respondent that the fact that the Board transformed itself into a disciplinary committee does not alter anything. They were the same people on the management Board save that they called themselves a committee. They did not act in excess of their jurisdiction except the Director who should have not taken part in the disciplinary committee

Having considered all the submissions, authorities cited the affidavits and annexures filed, I find that though the respondent complied with the law in expelling or suspending the applicants, yet the rules of natural justice were breached and had the application been properly before this court, it would have fallen under the purview of Judicial Review and the order expelling or suspending the applicants would have been quashed. Due to the irregularity and the fact that the application is declared a nullity, the order of certiorari cannot be granted and the Notice of Motion dated 2nd February 2006 stands struck out.

Each party bears its own costs

Dated and delivered this 17th day of May, 2006.

R.P.V. WENDO

JUDGE