



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPL. NO. 10 OF 2004

**IN THE MATTER OF: AN APPLICATION BY JAMES KIPKONGA KANDAGOR FOR
LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF: THE CUSTOMS & EXCISE ATC, CHAPTER 472

LAWS OF KENYA

AND

**IN THE MATTER OF: AN ILLEGAL IRREGULAR EXPULSION OF JAMES
KIPKONGA KANDAGOR BY KENYA MEDICAL TRAINING COLLEGE**

AND

IN THE MATTER OF: KENYA MEDICAL TRAINING COLLEGE ACT

(CAP 261) LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT (CAP 21) LAWS

OF KENYA

REPUBLICAPPLICANT

VERSUS

KENYA MEDICAL TRAINING COLLEGERESPONDENT

EX-PARTE JAMES KIPKONG'A KANDAGOR

R U L I N G

1. The ex-parte Applicant, James Kipkonga Kandagor a student at the Kenya Medical Training College by his Notice of Motion filed on 9th January 2004 under Order 53 Rule 3(1) of the Civil Procedure Rules seeks the following orders: -

i. That the Honourable Court be pleased to grant an Order of Certiorari requiring that the proceedings of the College Disciplinary Committee of the Kenya Medical Training College held on 8th December 2003 in particular as contained in a decision communicated to the Applicant in a letter dated 9th December 2003, be brought before the court and quashed for being unfair, unjust, illegal and *ultra-vires* the said Committee's powers.

ii. That the Honourable Court be pleased to grant an Order of Certiorari requiring the purported decision to release the Applicant from the college contained in a letter dated 9th December 2003 written by the Director of the Kenya Medical Training College be

brought before the court and quashed for being procedurally and substantively unfair, unjust, illegal and *ultra vires* .

iii. That the Honourable Court be pleased to grant an Order of Mandamus directed against the Kenya Medical Training College requiring it to re-admit the Applicant unconditionally to the course he was admitted to and to grant him access and use of the hostel accommodation pending completion of his studies.

iv. That the Honourable Court be pleased to grant a Declaration that the purported decision of the Kenya Medical Training College herein is unfair, unjust, illegal and null and void for being made without capacity by the College Disciplinary Committee.

v. That the Honourable Court be pleased to grant an Order of Prohibition directed against the Kenya Medical Training College, prohibiting it or anybody else howsoever, whosoever, whatsoever acting on its behalf except for lawful course from seeking, instituting or effecting disciplinary measures against the Applicant save only in accordance with the requirements of the law and the Rules of Natural Justice.

vi. That the Honourable Court be pleased to give further Orders and directions as it may deem fit and just to grant.

vii. That the costs of this Application be provided for

2. The Application is grounded on facts set out in the Statutory Statement of Facts and the Verifying Affidavit of the Applicant sworn on 7th January 2004.

3. In short and these facts are generally agreed upon, the Applicant was admitted to the college aforesaid for in-service training in Reproductive Health. The Admission form (exhibit 'c') indicates that the training was to commence on 11th September 2002 and elsewhere it is indicated that it would end in March 2004. Apparently there was no problem until August or September 2003.

4. During that period the students at the college were supposed to be on their August recess. It was generally expected that students would vacate their rooms and return in September for a new term and probably reside in new rooms. The Applicant contends that one Dr. John Aswani verbally instructed his students not to surrender their hostel rooms as he had planned periodic research lessons during the recess. Dr. John Aswani in his Replying Affidavit has denied ever saying this but that is not the issue.

5. On 6th October 2003, the Applicant returned to college and he was asked to vacate his hostel room as the Principal, one Mrs. Emma Chesire had ordered so. It is not clear on what date exactly but at paragraph 3(x) of his Affidavit the Applicant says that "*on the following day on 16th October 2003*" he was again ordered to vacate his room and he did not. Obviously if 6th October 2003 was the day he was first informed of the matter, the following day could not have been 16th October 2003. But again that is not the issue.

6. Apparently and in any event on the second day, after returning to college the Applicant came into the city centre and on return at 6.30 p.m. he found that his room had been broken into and his belongings removed and taken away. He was allowed access to them and he sought accommodation outside the college.

7. The Applicant (and again the dates are quite unclear) says that on 28th October 2003 wrote to the Director and heaped blame on Mrs. Chesire for his predicament. I have looked at the annexures to his affidavit and the letter to the Director is dated 29th October 2003 and not 28th October 2003 as deponed at paragraph 3(xv) of the Applicant's Affidavit. In any event, that letter headed "*information*" is a narrative of the Applicant's understanding of the genesis of his problem with Mrs. Chesire. It is not necessary to go into details but the Applicant apparently had briefed the Director of the College earlier in the year regarding what he considered to be hostility from Mrs. Chesire. But again that is not the issue.

8. The issue is that on 5th November 2003, a memorandum was issued to the Applicant requiring him to attend a Disciplinary Meeting on 6th November 2003. It is important to set out exactly what was contained in that memorandum: -.

"Memo

From : The Head,

Department of Clinical Medicine

KMTC

NAIROBI

Thro' The Course Co -ordinator

Reproductive Health

To: JAMES KIPKONGA KANDAGOR

HD/RH/02001/421

Date: 5th November 2003

Ref: HD/RH/02201/421

RE: DISCIPLINARY MEETING

This is to inform you that you are required to appear before college Disciplinary Committee on 6th November 2003 at 10.00 a.m. in the Principals Boardroom KMTC Nairobi Campus Please keep time.

Thank You

Signed

G.O. Koyengo

Cc: The Principal

KMTC

Nairobi Campus.”

9. The Respondent immediately replied in a letter headed “*Regret to Attend Meeting*” where he said that he had lost a close relative and was not emotionally capable of attending such a meeting. He ends by saying, “*kindly register my apolo gies and I am sorry for the inconveniences caused*”. It is not clear whether the committee met or not but certainly no decision was taken on that date.

10. On 8th December 2003 another Memorandum was addressed to the Applicant to appear before the Disciplinary Committee at 2.30 p.m. on the same day. The Applicant indeed appeared but raised a preliminary question as to the membership of the committee. He sought introduction by name so he would know who were his judges. The Chairman of the meeting William Oduol confirms at paragraph 9 of this Replying Affidavit that: -

“Upon calling the meeting to order, I asked the Applicant (student) to introduce himself which he did whereupon the committee members were introduced in their capacities as the Chairman, S ecretary and members of the College Disciplinary Committee”.

11. At paragraph 10 of the said Affidavit which is in tandem with the Applicant’s own contention, it is deponed that: -

“The Applicant insisted that unless each individual in the committee was introduced by names, he would not co - operate, answer any question or engage in any form of discussion with people whom he termed as “strangers”.

The meeting then degenerated to an extent that no fruitful discussions were held and the Applicant stormed out.

12. The committee then proceeded in the absence of the Applicant to deliberate on the matter and again it would be important to look at the Minutes of that meeting. The same read as follows: -

“MINUTES OF THE MEETING OF THE COLLEGE DISCIPLINARY COMMITTEE

Present

1. Dr. Oduol - Chairman

2. Dr. Aswami - Member

3. Mr. D. K’ochumba - Member

4. Mrs. Mburu - ”

5. Rev. F. Muasya - ”

6. Ms. Olembo - ”

7. Mr. Julius - ”

8. Mr. J. Kurui - Taking minutes

Agenda:

The Chairman called the meeting to order at 2.30 p.m. and read the agenda as follows:

Disciplinary meeting called to discuss James Kipkonga Kandagor STD. No. HD/RH/02201/421.

Min. 1/12/2003: Refusal to obey the authority The above named student who is currently undergoing a one and half year higher diploma course in reproductive health had been invited to face a disciplinary committee for having refused to clear from hostel as stipulated in the college rules and regulations. Also, Kandagor had been informed verbally by the Warden, AAR and his Head of department to vacate the room but instead, he did not comply. The Head of Department (Clinical Medicine) further informed the committee that, James had problems with the Registrar (practical area - Kenyatta National Hospital), Department, and dining hall several times.

Because of his unbecoming behaviour, he was invited to face the college disciplinary committee on 5/11/2003 of which he gave an excuse that he had lost a close relative.

Kandagor was for the second time invited to face the college disciplinary meeting on 8 th December 2003 and he complied.

During the interview, Kandagor told the committee that he was not ready to continue with the discussion until the names of all the committee members were mentioned. The Chairman introduced the committee members as “the Chairman, secretary and the members ” but refused the approach insisting that names must be mentioned. “The reasons known to himself ”. He started quarrelling every member and picking any word mentioned for defense. He was therefore, asked if he was ready to co - operate with the committee and continue with the discussion but in vain.

Unfortunately, the student refused again to leave the venue, claiming that, the committee had been planned to finish him and he knew he was leaving the college. He left the room and immediately came back, peeped through the door to count the members and confirmed their faces. Conclusion

Since the student was very rude, uncooperative, not remorseful, had no respect for the committee and disobedience, the committee had no other choice but to adjourn the meeting.

Committee’s recommendations The committee deliberated on the issue and came up with the following recommendations.

1. The student be discharged to go and re - examine himself

2. A copy of the letter be given to his employer”

13. Based on the Committee’s recommendation above, the Director wrote a letter on 9th December 2003 “releasing” the Applicant from the college. The reason for so doing is stated to be that: -

“In a college Disciplinary Committee Meeting held on 8 th December and in which you also attended, it was established that you deliberately refused to clear from your room thereby disobeying college authority contrary to the college’s Rules and Regulations No.12: 1 -9 on accommodation/catering”.

14. I should set out the said Regulation No. 12: 1-9 so that I can put matters into their proper perspective. It states as follows: -

“12. ACCOMODATION/CATERING

12.1 The Kenya Medical Training College will guarantee accommodation to all students it admits. However, all students provided with accommodation must strictly adhere to hostel rules.

12.2 Students are expected to clean their own rooms and keep them tidy.

12.3 Any refuse/waster (sic) should be disposed in the refuse receptacles provide. KEEP YOUR COLLEGE CLEAN.

12.4 ROOMS: the allocation of rooms is carried out by the warden or housekeeper on INSTRUCTIONS OF THE PRINCIPAL in collaboration with representative of represented FACULTIES IN THE INSTITUTION. Sanitation committee should be involved also.

12.5 Any student who decides to allocate himself/herself a room without authority from the concerned or changes rooms without permission or who adds to the door his/her personal locks or removes/interferes with the available locks, will be guilty of any offence and will be suspended for three months from college.

12.6 The hostels have no room for students’ properties other than their personal effects.

12.7 On admissions to the hostel rooms, every student eligible for accommodation will be required to fill an inventory form to be signed by the respective student and counter -signed by the warden.

12.8 On vacating the room, all articles as prescribed in the inventory should be returned in a reasonable condition and a clearance

form completed.

12.9 Any missing item/fittings in the room as reflected by the inventory will be surcharged on the student(s) concerned by either replacing the items or fully paying the cost involved. Damaged items must be repaired before clearance is done.”

15. Obviously, in the particular circumstances of the Applicant, only Regulations 12.4 and 12.5 apply. I shall return to the point shortly.

16. In submissions before me, both on the facts and the law, counsel quite elegantly argued their respective positions rotating around these facts. However, not out of disrespect, I shall narrow down the matter to this singular issue viz. Did the Respondent have good cause to “release” the Applicant? In answering the question I shall again narrow down the matters to the Disciplinary Committee proceedings, the College Regulations and the final act that led the parties here. 17. Firstly, I have no doubt that the Disciplinary committee meeting did not meet the requirements of law. It is both law and practice that when a meeting is called, there are certain elements to it;

- i) the business must be clearly stated
- ii) the date, time and place are indicated
- iii) notice is issued to every person entitled to attend and receive it.
- iv) notice be given in a prescribed manner

18. Ordinarily also and as a rider to (ii) above, sufficient time is given between the issuance of notice and the meeting itself. This is what is called due notice. The effect of not giving due notice is neatly captured in the statement of A. Harding Boulton in the Law and Practice of Meetings, 6th edition at page 32 where he says that “any resolutions passed without due notice will be invalid” . Due notice has been used here in the wider sense to include both the time aspect specifically and the general elements of notice.

19. In the present case, the Applicant got notice on the 8th November 2003 to attend a meeting on the same day at 2.30 p.m. It does not help matters that the earlier meeting had been called 48 hours before with notice of less than 12 hours. That surely cannot be due notice!

20. Regarding the business to be transacted, the Memorandum at page 6 paragraph 8 of this Ruling speaks for itself. It is a summons without an agenda. It is as if one is being summoned to court without notice of the charges one is bound to face. That is not what the Rules of Natural Justice ever intended.

21. On the membership of the Committee itself, the Applicant in my view was entitled to know who were his accusers and/or judges. It is bad enough that he did not know the charges, if at all, facing him but that he did not know who were laying the charges, is itself catastrophic. It is clear from the Minutes of the meeting (paragraph 12 page 8,9,10 & 11 above) that contrary to submissions by counsel and also the Director’s letters of release, the offence was not just with regard to accommodation. It is said that “*the head of department (Clinical Medicine) informed the committee that, James had problems with registrar (practical area –Kenyatta National Hospital) department, and dining hall several times*”. These matters were discussed and must have had a bearing on the final decision taken. Yet the Applicant had no knowledge prior to the meeting and even subsequent to it that they were part of the charges facing him. 22. A person being tried is entitled to disclosure of the charges and the evidence against him. Days when secrecy of such matters was the norm are long gone. This duty on the part of those laying charges is continuous and applies both at the pretrial stage and continues during the trial (see R. vs. Ward {1993} 1 WLR 617, at t 619 and R. vs. Keane {1994} 1 WLR 746 at 752 as quoted in a Report to the House of Lords in Regina vs. H. {2004} VKHL 3.

23. I am also of the firm view that when a member of a committee such as the one that tried the Applicant has a prior knowledge of matters adverse to the Applicant; he ought to have disqualified himself. In this regard I am focusing on one Dr. John Aswani who was in the Disciplinary Committee meeting and yet he confesses to have formed an opinion regarding the applicant’s indiscipline long before the meeting. He depones at paragraph 3 of his Replying Affidavit that: -

“*The Applicant’s problems of indiscipline caught my attention when I was informed that he had developed a disagreement with a registrar in a ward whereupon I wrote a memo dated 11 th July 2003 asking him to give a detailed account of what transpired*”.

He adds for good measure at paragraph 6 thereof; -

“That upon hearing the two students, I found out that the Applicant herein (John Kandagor) was very arrogant and dis respectful.”

24. It is no wonder then that he also in an earlier report characterized the Applicant as “*a forceful know -it-all character*” with habits “*bordering on arrogance.*” (Internal memo dated 26th March 2003 and annexure “JA3”)

25. It cannot be expected that the said Dr. John Aswani would be an impartial arbiter in the matter involving the Applicant. He had already accused him and now he was sitting in judgment. That is not expected of an independent, impartial tribunal in the nature of the Disciplinary Committee in this matter.

26. The tribunal’s outcome in such circumstances would not be said to be fair. Whereas fairness is a relative term, I am certain that no fairness would come out of a meeting of the nature held by the Disciplinary Committee in this matter. I am reminded of Hawkins, J’s comment in his “Memoirs” Chapter V when he told of an 1840 trial at the old Bailey; it was one where the accused was charged with theft. It lasted 2 minutes 53 seconds. The judge in his direction to the jury said; “*Gentlemen, I suppose you have no doubt? I have none*”. Dr. Aswani put himself in the exact position of the judge and the outcome was the rather obvious “*release*” of the Applicant.

27. In summary, the committee was not open; it was not fair and certainly not impartial.

28. Turning now to the College Regulations, assuming that the Applicant had violated Regulations 12.4 and 12.5 as I said earlier, there is a clear sanction imposed by the Regulations. It says that the student should be suspended for three (3) months. It does not say that the student should be “*discharged to go and re - examine himself*”. Neither does it say that he should “be released”. I was left in a state of discomfiture with this choice of words by the Disciplinary Committee and the Director respectively because the said words are not used in the Regulations at all. In fact the severest sanction in the Regulations is “expulsion” for example if a male student impregnates a female student (Reg. 14.11.4). Others are “discontinuation” if a female student practices prostitution (Ref. 14.11.4) or “dismissal” if a student solicits funds from a patient during practicals (Reg. 14.16) or “*suspension*” if students gather without permission. The sentence for the latter is six months suspension, which is more severe than offences relating to accommodation under Regulation 12.

29. To my understanding therefore, and this is tied to my last issue, the sanction imposed by both the Disciplinary Committee and the Director do not have the sanction of the law and are clearly invalid. Once I have so ruled, then I must now return to the prayers that the Applicant seeks. Before I do so however, I must say something about the Applicant’s own conduct.

30. It may well be that the Applicant is a “*know -it-all*”, “arrogant”, “indisciplined” and a troubleshooter. Certainly, that he seems to rub people the wrong way cannot be bad luck or sheer coincidence. That he seems to attract terms such as “rude”, “uncooperative” and “disobedient” and the others that I have quoted above cannot be because he happens to be attractive to those terms! It says something about him. I shall say no more. However, as regards the matters before me, they far outweigh his personality and the way he does things. He has made out a case for grant of certain orders that I shall now make here below: -

i. All the declaratory orders as prayed in prayer 4 of the Application are contained in the body of this Ruling and I see no reason to specifically make orders with regard thereto.

ii. Consequently I specifically grant orders of certiorari in terms of prayers 1 and 2 of the Notice of Motion dated 9.1.2004. I further grant orders of Mandamus in terms of prayer 3 of the said Application and orders of prohibition in terms of prayer 5 thereof.

iii. The nature of this matter, the relationship between the parties and the fact that the Applicant’s course is coming to an end once he sits examinations in March 2004 necessitates that the matter should come to a finality by this Ruling and I therefore make no order as to costs. I am of the view that to pursue costs would only enhance the already existing bad blood between the parties and I seek that counsel advise their clients to let the matter rest and parties go their separate ways.

31. This of course does not restrict the right of Appeal by either party neither does it stop the Applicant from challenging my Ruling on costs.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of February 2004

I. LENAOLA

Ag. JUDGE

18.2.04

Before Lenaola Ag. J.

Amos CC

Mr. Kemba for the Applicant

Mr. Otieno for the Respondent

Court:

I decided to issue notices to parties to attend the delivery of the Ruling/Judgment today instead of 26.2.2004 in view of the sentiments expressed by counsel for the Applicant regarding the Urgency of the matter. Having concluded the matter and reached the conclusion that I shall shortly enumerate, I thought it fit not to delay the matter any longer.

I apologize for the inconvenience caused but justice delayed is justice denied. And so I shall deliver my Ruling.

I. LENAOLA

Ag. JUDGE