



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

AT NAIROBI

MILIMANI LAW COURTS

MISC. CIVIL CASE 1400 OF 1995

AMIRJI SINGH PLAINTIFF

VERSUS

IN THE MATTER OF THE BOARD OF POST

GRADUATE STUDIES KENYATTA UNIVERSITY DEFENDANT

RULING

The applicant herein was a lecturer at Nairobi University in the Faculty of Science. He decided to go for further studies and must have taken study leave from his employer to register for postgraduate studies in the Department of Mathematics at Kenyatta University for a course leading to the award of the Degree of Doctor of Philosophy (Ph.D).

The applicant was duly registered as a student in 1992 and proceeded with his studies and in 1994 he wrote write and submitted his thesis for consideration by the examiners.

That though he subsequently appeared before the examiners and orally defended his thesis, he was not awarded the degree for which he had studied.

He sought legal counsel and was advised to and did file an application to this court by way of judicial review on 22nd December 1995 in form of a Notice of Motion to seek the following orders:-

- (1)An order of mandamus directed to the Board of Post graduate studies directing it to constitute a Board of Examiners of the applicants Ph.D. Thesis,
- (2)An order of mandamus directed to the said Board directing it to award to the applicant his degree of Doctor of Philosophy subject to defence of his thesis
- (3)An order that the costs of these proceedings be paid by the respondent.

The application was supported by a statement which gave grounds upon which the same was based. According to these grounds, though the applicant had submitted his initial thesis to the examiners and, sought an opportunity to orally defend it, no response had been received from them as such oral defence had been suspended due to allegations that the applicant had attempted to influence the examination officers and/or the process or that he had submitted a premature thesis and/or that he had failed to comply with the full requirements of the Ph.D course - hence the application.

However, in the supplementary affidavit filed in the court on 8th June, 1999, the applicant acknowledged that after he had been reinstated as a postgraduate student, he was invited on 19th March, 1996 to orally defend his thesis whereupon it was recommended that the applicant do revise the same and effects some specific changes which he immediately did and resubmitted the revised thesis to the respondent on 10/7/1996. After this, the respondent arranged for the applicant's oral defence of this thesis, thus effectively complying with his first prayer of the application subject to this ruling. This then leaves in contention prayer 2 of the said application.

Nevertheless, in regard to prayer 2, the applicant states in the supplementary affidavit that the respondent took inordinately long to arrange for the oral defence of the resubmitted thesis and failed to comply with the regulations by including in the panel of examiners members who had not been part of the group which had recommended changes to the initial thesis.

That the re-constituted panel (Board) of examiners recommended a non-award of the degree of Doctors of Philosophy to the applicant for failure to satisfy all the requirements. That the applicant was aggrieved by the decision of the Board of examiners and he appealed to the vice chancellor of the respondent on 7th July, 1997. That though the Registrar/academic had written to the applicant a letter dated 4/8/97 advising that the vice - chancellor had appointed an appeals committee which was considering his appeal his said appeal had never been heard. That in view of this conduct on the part of the respondent, the applicant had refused to award him the degree of Doctors of Philosophy out of malice and in bad faith, and so on and so forth. Counsel for both parties appeared before this court on 16/1/2001 to urge or oppose the application. Counsel for the applicant went through the application, statement and affidavit in support of it and urged the court to grant the application sought.

The respondent was represented by Muriithi who submitted that the applicant did not merit the award of the degree of Doctor of philosophy (PhD) as he did not successfully defend his thesis before the Board of examiners.

This counsel particularly referred to the communication by the respondent to the applicant dated 14/9/99 which upheld the non-award decision of the board of examiners. Counsel for the applicant did not refer to this communication. May be he was not given it by his client for obvious reasons or that though he was aware of it, he did not find it appropriate to refer. But it is there and it upheld the non-award decision of the board of examiners which declined to grant the applicant the defence of Doctor of Philosophy in Mathematics because he had not satisfied all the requirements for the award of such degree. The senate therefore approved non-award of the same. Prayer 2 of the application dated 19th December, 1995 was mainly for the award to the applicant of the degree of Doctor of Philosophy subject to defence of his thesis - emphasis mine.

Paragraphs 10 to 18 of the supplementary affidavit give the applicants' grievances over the conduct of the respondents and the Constitution of the Board to conduct his oral defence of the thesis.

This gives the impression that the applicant's problems resulting in the non-award decision by the board of examiners centre on his oral examination, (See also the applicant's appeal to the vice-chancellor which reinforces this view). If this be the case, then paragraphs 22 and 23 of the said affidavit are inconsequential to the final decision. Moreover, the applicant's appeal to the vice-chancellor dated 7th July, 1997 did not at all raise any of the issues he raises in paragraphs 10 to 16 of the supplementary affidavit yet these should have formed the basis of such appeal. It would also appear the applicant appealed mainly because of contents of paragraphs 21 and 22 of his supplementary affidavit. But these were not the sole criteria of awarding him or not the degree being sought in this application.

If the applicant agrees that he appealed to the vice chancellor, and was informed by the Registrar (academics) that the said vice chancellor had appointed an appeals committee which was considering the said appeal, then he is not telling this court the whole truth when he says since then the respondent had refused to hear and determine his said appeal when during submissions before the court counsel for the said respondent produced a letter dated 14th September, 1999 addressed to him, the said applicant, confirming that the appeals' committee had upheld the non-award decision of the Board of examiners.

The applicant must remember that in prayer 2 of the application he sought an order of mandamus directed to the Board of Post Graduate studies directing it to award him his degree of Doctor of Philosophy subject to defence of his thesis and his complaint in paragraphs 16 to 19 of the supplementary affidavit. This is the crux of this dispute.

In my view, much as the applicant's examiners recommended the applicant for the award of the degree after perusing his resubmitted thesis, he did not impress or successfully defend his thesis when he appeared before the Board of examiners on 19th March, 1997 and this is why he complained bitterly in his appeal to the vice - chancellor about the composition and mood or conduct of that Board.

However, this is beside the point. The applicant had sought two orders of mandamus, one directed at the Board of Post Graduate Studies of Kenyatta University directing it to constitute a Board of Examiners for his Ph.D thesis. The applicant concedes that this aspect was dealt with when the board was constituted on 19th March, 1997 to hear him defend his thesis.

Nevertheless, the second limb of the order which requires the Board to be compelled to award the applicant his degree of Doctor of Philosophy subject to defence of his thesis is what is in dispute herein.

The question I ask myself on this issue is this? What is the scope and efficacy of an order of mandamus: Perhaps if I turn to Halbury's Laws of England 4th Edition Vol. 1 at page 111 from paragraph 89, light could be shed on the answer. It says:-

"The order of mandamus is of a most extensive remedial nature; and is in form of a command issuing from the High Court of Justice directed to any person corporation or 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 it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, mandamus cannot command the duty in question to be carried out in a specific way".

These principles simply mean mandamus will compel the performance of a public duty which is imposed on a person or body of persons 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.

For instance, District Commissioners in Kenya Chair Licensing courts created under the Liquor Licensing Act Chapter 121 Laws of Kenya in their respective districts to consider and determine applications for and cancellation of liquor licences.

If a party applies for a licence under Section 8 of the act and the Licensing Court simply refuses or neglects to consider and determine such application, such a party would be entitled to come to the High Court to ask it for an order of mandamus, and if the court is satisfied that the Licensing Court has simply refused or neglected to consider and determine the application it would be entitled to issue an order of mandamus to compel the licensing court to consider and determine the application as it is bound to do by law. How does this example compare with our present case? The applicant was registered as a student of the respondent where he prepared his thesis for the degree of Doctor of Philosophy in Mathematics.

He appeared before the first panel of examiners who recommended certain alterations or corrections to his thesis. The applicant complied with the recommendations and made the requisite changes. Then he

resubmitted his thesis and was invited before the Board of Examiners where he unsuccessfully defended his thesis and the Board recommended a non-award for him which the senate approved.

The applicant was given a right of appeal to the vicechancellor which he utilized and the vice-chancellor appointed an appeals committee which considered the former's appeal and upheld the non-award decision of the Board of Examiners.

The applicant clearly says in his application that he is dissatisfied with the decision, though not in so many words.

But an application by way of judicial review before the High Court is not intended to it (this court) into an appellate one to deal with the merits of the issue before the inferior tribunal.

If the inferior tribunal exceeded its power or acted without the requisite jurisdiction in any matter the best remedy for the applicant would be for the issue of an order of prohibition and/or certiorari; but the applicant sought none of these remedies.

In any case, an order of prohibition would not lie in the present case where an act has already been performed. This remedy is intended to forbid an anticipated breach and not after it has already been committed.

The dispute subject to this application would, in my view, squarely fall into the category of private and domestic matter between the applicant and the respondent. Even then the respondent would be expected to observe rules of natural, justice and to deal with the applicant in a fair manner.

In this application the applicant was given an opportunity to defence his thesis by the board of examiners who made a non-award decision which was upheld by the Appeals Committee appointed by the vice chancellor.

In my view this was a fair treatment of the applicant by the respondent and if the former felt the latter performed any act without or in excess of its jurisdiction then this application is not the proper forum for the remedy he would wish to seek.

In my view an action of this nature relate to a dispute between the applicant and the respondent and was successfully dealt with by the latters stipulated regulations and this court would be causing interference, and confusion in this otherwise purely internal and/or domestic dispute. This court cannot act as an appellate court in an application before it by way of judicial review.

The application is dismissed with costs.

Delivered this 29th day of January, 2001.

D. K. S. AGANYANYA

JUDGE