Republic v Kenya School of Law & another; Abdi (Exparte) (Judicial Review Miscellaneous Application E088 of 2022) [2023] KEHC 17633 (KLR) (Judicial Review) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E088 OF 2022

JM CHIGITI, J

MAY 11, 2023

BETWEEN

REPUBLIC .... APPLICANT

AND

KENYA SCHOOL OF LAW .... 1ST RESPONDENT

KENYA NATIONAL QUALIFICATIONS AUTHORITY .... 2ND RESPONDENT

AND

SAMIRA ALLY ABDI .... EXPARTE

RULING

Brief background

1. The ex-parte Applicant herein is a graduate of Riara University having graduated on 14th March 2019 with a Bachelor's Degree in Law, 2nd Class Honors Upper Division.

2. Upon graduation, the ex-parte Applicant sought for admission from the 1st Respondent's Advocates Training Programme which admission was denied on grounds that the ex-parte Applicant lacked an equation letter from the 2nd Respondent equating her O-level qualification.

3. This then prompted the Respondent to file Constitutional Petition 182 of 2019 *Kihara Mercy Wairimu & Others -vs- Kenya School of Law & Others* seeking declaratory orders of infringement of her constitutional rights. The Applicant was a party to that suit.

4. Vide judgment delivered on 28th November 2019, the Court held that the acts of the Respondents of rejecting and/or non-admitting the ex-parte Applicant to the Training Programme, despite having

obtained the requisite qualifications, contravened the ex-parte Applicants fundamental rights and freedoms guaranteed under *the Constitution*.

5. The 1st Respondent thereafter issued The Applicant with an admission letter and she paid the requisite tuition fees for the academic year.

6. The Ex-Parte Applicant in the substantive motion seeks for an order of certiorari to remove into this Honourable Court and quash the 2nd Respondents decision of 3rd June 2020 of refusing to equate the Applicants qualifications. Applicant's IGCSE academic qualifications rendered on 3/6/2020 as set out in annexure SAA6.

7. The ex parte Applicant seeks orders compelling the 2nd Respondent to re-equate her IGCSE academic qualifications.

8. When the matter was pending hearing and determination and just before the court could render its judgment, the 2nd Respondent/Applicants' filed an Application dated 25th January 2023 seeking the following orders:

   i. (spent)

   ii. That the honorable court varies and or reviews the orders issued on 5/7/2022 by enlarging time for the 2nd Respondent to file and file a response a written submissions to the Chamber Summons dated 4/7/2022 and the Notice of Motion dated 13/7/2022.

   iii. That the ex-parte Applicant be granted leave to file any further responses, if necessary, upon the filing of the response and or submissions by the 2nd Respondent.

   iv. That the court considers varying and or vacating the judgment / ruling date scheduled for on 9/2/2023 to such other date as may be appropriate.

   v. Costs of this application be provided for.

9. The Application is supported by the affidavit of Dr. Alice Conde and the grounds on the face of the application.

10. The Application is opposed by the Ex-Parte Applicant by way of a Replying Affidavit deponed by on 5th February 2023.

The 2nd Respondent/Applicant's case:

11. The ex-parte Applicant sued the 2nd Respondent/Applicant as a result of her non admission to pursue a post graduate diploma in Law under the Advocates Training Programme (ATP) that is offered by the 1st Respondent.

12. The 2nd Respondent came to know of the existence of this case on 16/1/2023 when a notice of preliminary objection was served upon the 2nd Respondent's legal department. Upon enquiry from the former counsel, the CEO stated that she had been notified of the case by her colleague Ms. Sharon Muthuri, who resigned sometimes last year.

13. The 2nd Respondent further indicates that it came to learn that the affidavit of service filed by the ex-parte Applicant indicated an unknown email for service of court processes being knqa.go.ke@gmail.com.

14. The 2nd Respondent states that it has numerous emails for its departments and staff and currently none has the domain name gmail.com. That although the said Gmail address was appearing on its website however it was deactivated due to existence of other official emails.

15. According to the CEO, the court would render an informed decision if the 2nd Respondent is granted room to be heard and allowed to respond to the ex-parte Applicant given that the ExParte Applicant is seeking adverse orders against it.

16. The 2nd Respondent did not file any response or submissions to the ex parte Applicant's case in the circumstances.

17. The 2nd Respondent relies on the provisions enumerated on the face of its application. Order 50 Rule 6 of the *Civil Procedure Rules* provides that: -

> " Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

18. Reliance is placed on the case of *Pithon Waweru Maina v Thuku Mugirisa* KLR where the court held that discretionary power should be exercised judicially and in selective and discriminatory manner not arbitrarily and idiosyncratically. In this case the 2nd respondent has pleaded that it desires to be heard.

19. In the case of *Nation Media Group Limited v Attorney General* [2007]1EA461 the court held that it is to be guided by the principles of fairness. It pronounced itself as follows: "This is a court of justice wields the sworn of justice in a manner that delivers justice to the parties before it."

20. In *Shah V Mbogo* [1967] E.A 116 and 123B Judge Harris, as he then was, had this to say –

> " The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

21. In *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* 120181 eKLR the court considered the question of discretion and Judge Mativo held that "Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. Discretion must be exercised in accordance with sound and reasonable judicial principles." The King's Bench in Rookey's Case stated as follows:-

> " Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by *the constitution* entrusted with."

22. The 2nd Respondent submitted that Article 159(2) (d) of *the Constitution* calls upon courts not to pay undue regard to procedural technicalities but to pay due regard to delivering substantive justice in matters before them.

23. The right to be heard is protected under Article 50 of *the Constitution* it is an inalienable right. It is a cardinal principle that is protected under Article 25 of *the Constitution*. In *MWN v JDK* eKLR the court had occasion to consider the question of the right to be heard. It pronounced itself that the interests of justice lead a court to exercise discretion.

24. In *Andrew Nthiwa Muthuku v Court of Appeal & 3 others* [20211eKLR court considered the question of the right to be heard holding that it should not be taken away lightly since it is a basic natural justice concept. In this case the acts complained about relate to a public body hence the need to hear what its position is; on the issues raised.

ExParte Applicant's case

25. According to the Ex-Parte Applicant the Application is a non-starter, unfounded, frivolous, vexatious and a waste of this Honourable Court's time.

26. The Ex-Parte Applicant takes issue with the 2nd Respondent's argument that they were never served with the substantive motion or any proceedings in the instant matter.

27. She takes issue with the 2nd Respondent submission instance that the email knqa.go.ke@gmail.com is not their email address and that none of their email addresses has the domain@gmail.com". Upon receipt of the Ex-Parte Applicant's Replying Affidavit, the 2nd Respondent changed their position and indicated that the said email is no longer functional yet they had disowned it in the first place.

28. The Ex-Parte Applicant argues that the instant Application is just a ploy to delay the determination of the matter noting that the Ex-Parte Applicant is at the risk of missing out of the 1st Respondent's Advocate's Training Programme for a record 4th year.

29. The Ex-parte Applicant insisted that she served the Respondents with the Substantive Motion dated 13th July 2022 electronically via an email dated 4th July 2022 which is marked as Annexure JD-I.

30. The Ex-Parte Applicant submits that there was no failed delivery notification from neither of the Respondents' emails which is prima facie evidence that the Respondents were served with the Motion.

31. The Ex-Parte Applicant submits that the knqa.go.ke@gmail.com belongs to the 2nd Respondent and indeed it is the address found on the 2nd Respondent's letter of 3rd June 2020 which is marked as annexure DJ-2.

32. The Exparte Applicant submits that this Court has unfettered discretion to set aside or stay the delivery of judgment. However, such discretion must not be exercised in at the expense of an innocent litigant.

33. The ExParte Applicant relied on the case of *Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal* (2014) eKLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> "To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

34. According to the Ex-Parte Applicant, the Court's Orders of 5th July 2022 were not issued by mistake. There hasn't been a discovery of new evidence nor has the 2nd Respondent given a sufficient reason why the said orders ought to be reviewed.

35. The Ex parte Applicant contends that the 2nd Respondent will not suffer any prejudice should judgment be delivered in the Ex-Parte Applicant's favour.

36. She submits that the 2nd Respondent will not suffer any harm should they be ordered to equate the Ex-Parte Applicant's qualification and in any event the 2nd Respondent will be at liberty to either apply to set aside the decision or Appeal the ruling that would emanate from this instant Application.

Analysis & determination

Issues for determination

a. Whether the 2nd Respondent was served with the substantive Motion dated 13th July 2022?

b. Whether the Ex-Parte Applicant stands prejudiced should the proceedings be reopened?

c. Who bears the costs of this Application?

Whether the 2nd Respondent was served with the substantive Motion dated 13th July 2022?

37. I have looked at the Affidavit of service dated 3.10.22 marked Exhibit 1 and I am satisfied that the gmail.com address and domain that was used by the ExParte Applicant to effect service of the Chamber Summons and the Notice of Motion upon the 2nd Respondent/Applicant belongs to the 2nd Respondent/Applicant.

38. This can be gleaned from the fact that the address that reflects at the foot of the 2nd Respondent/ Applicant letter dated 3rd June 2020 and marked as Exhibit DJ-2 is the same address that was used to communicate with the ex parte Applicant.

39. Further as pointed out by the ExParte Applicant, this court believes that indeed the email sent to the 2nd Respondent/Applicant reached its intended destination being the 2nd Respondent/Applicant without any delivery failures or bounced notifications.

40. In addition, the 2nd Respondent/Applicant did not tender any evidence to prove that it had changed its email address.

41. Away from the foregoing, this court is persuaded that the 2nd Respondent/Applicant is inspired and driven into moving the court via this Application because it has an identifiable interest in the outcome.

42. In exercising discretion, I have also taken judicial notice of the fact that although the matter has advance, judgment is yet to be delivered.

43. In the case of *Multiple Hauliers v Enock Bilindi Musundi & 2 others* [2021] EKLR referenced the decision in *Tana and Athi Rivers Development Authority v Jeremiah Kilnigho Mwakio & 3 Others* [2015] eKLR wherein the Court opined that:

> " In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted,

we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit ....”

44. This court is further guided by the principles as settled in the case of *Shah v Mbogo & another* [1967] E.A. where the Court held that:

> “ The court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused."

45. This Court was moved by way of a Chamber Summons filed on 4.7.22. The Application was served upon the 2nd Respondent on 14.7.22. The 2nd Respondent in the Supporting Affidavit sworn on 25.1.23 indicates that they became aware of the existence of the suit on or around 16.1.23. Thereafter it moved the court on 1.2.23 being two weeks from the time it got to know of the existence of the suit.

46. This delay is not inordinate at all in my assessment. The delay has been satisfactorily explained by the 2nd Respondent/Applicant.

47. In determining the 1st issue, it is this court’s finding that the 2nd Respondent/Applicant was duly served with the Applications through its Gmail account as set out in the Affidavit of Service.

48. The court is minded of granting the 2nd Applicant an opportunity to participate in the proceedings so as to enable the court to ultimately determine the case on merit in the spirit of promoting the right to fair hearing as guaranteed under Article 50 of *The Constitution*.

49. Section 4 of the *Fair Administrative Actions Act*. No. 4 of 2015 provides that: -

    i. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

    ii. Every person has the right to be given written reasons for any administrative action that is taken against him.

    iii. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

        a. prior and adequate notice of the nature and reasons for the proposed administrative action;

        b. an opportunity to be heard and to make representations in that regard.

50. In Civil Appeal 52 of 2014 *Judicial Service Commission vs. Mbalu Mutava & Another* (2015) eKLR Court of Appeal addressed itself on the above. The Court held that: -

> “ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of

constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

51. The 2nd Respondent/Applicant is entitled to an opportunity to be heard and to make representations before the judgment can be rendered in this matter and I so hold. This can only be achieved if the Application is allowed and not otherwise.

Whether the Ex-Parte Applicant stands prejudiced should the proceedings be reopened?

52. The second issue for determination is whether the ex parte Applicant will suffer prejudice should the orders sought be granted. It is this court's view the ex parte Applicant will not suffer any prejudice, given that the court is yet to determine the matter.

53. The reasons that have been fronted by the Exparte Applicant in support of the argument that they will suffer prejudice if the orders sought are granted cannot outshine the rules of natural justice that no one should be condemned unheard. *The Constitution* guarantees the Applicant the right to fair hearing under Article 50.

54. The rule of law will be promoted if parties are allowed to ventilate their cases on merit. This will go a long way in upholding, and promoting the national values and principles of governance is as post in Article 10 of our constitution. This court has a duty to protect and fulfill the rights of parties who come to them to seek justice which duty it cannot abdicate.

55. It is the 2nd Respondents'/Applicant who in exercise of its powers decided that the Exparte Applicants' marks were not equivalent to the eligibility standards. Turning the 2nd Respondent/Applicant away from the altar of justice would leave the court without the much-needed evidence.

56. Ultimately, this court will not be able administer justice to the litigants unless it fully appreciates the role that the 2nd Respondent/Applicant played in assessing the eligibility of the Exparte Applicant.

57. The 2nd Respondent/Applicant plays a pivotal degree equation assessment function. The long journey that Kenyan law graduates undergo as they transition into the noble profession of lawyers takes them through the 2nd Respondents have to take hands. The lawyers in their status as the members of the Kenyan bar are at the heart of the promotion of the right to access to justice as guaranteed under Article 48 of *the Constitution*.

58. Section 13 of The *Advocates Act* provides that a person shall be duly qualified to be admitted as an advocate if—

    a. having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of, a degree in law of that university; or

    b. having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve; and thereafter both—

        i. He has attended as a pupil and received from an advocate of such class as may be prescribed, instruction in the proper business, practice and employment of an advocate, and has attended such course or tuition as may be prescribed for a period which in the aggregate including such instruction, does not exceed eighteen months; and

ii. He has passed such examinations as the Council of Legal Education may prescribe.

59. The question of the eligibility of the ex parte Applicant to undertake a post graduate diploma in law is an issue of great public interest. The diploma is one of the most fundamental tool that determines whether one is going to be admitted as an advocate of the High Court of Kenya or not.

60. For an aspiring advocate, a post graduate diploma in law goes a long way towards the realization of the right to education as guaranteed under Article 43 of *the Constitution*. This right cannot be taken away unless that is done within the tight threshold as set out in Article 24 of *The Constitution*.

61. Allowing the application offers a less restrictive and or a more proportional approach of promoting 2nd Respondent/Applicant's right to education.

62. Failing to allow or grant the prayers sought by the 2nd Respondent/Applicants will have the ripple effect of violating the Exparte Applicant the right to education.

63. The 2nd Respondent/Applicant is the custodian of important evidence which can only be accessed by the court if the applicant is allowed to ventilate its case.

64. The upshot of the foregoing is that the ExParte Applicant has not proven she will suffer prejudice if the Application is allowed.

Who bears the costs of this Application?

65. According to the ExParte Applicant, the issue of costs is provided for under Section 27 of the Civil Procedure Rules.

66. The basic rule on attribution of costs is that costs follow the event. This must not be used as a tool to penalize the losing party. It is intended to be a form of compensation for the successful party for the trouble taken in prosecuting or defending the case.

67. As analysed above, it is not in doubt that The 2nd Respondent/Applicant has slowed down the Exparte Applicants case.

68. The court has the discretion under Section 27 of the *Civil Procedure Act* when it comes to the issue of costs.

69. Even though the 2nd Respondent/Applicant was successful in prosecuting the application, it must bear the costs owing to the fact it occasioned the delay in the finalization of this suit.

Orders

The Application dated 25th January 2023 is allowed in the following terms:-

1. The 2nd Respondent/Applicant is hereby granted 7 days leave to file and serve its response and submissions to the Ex Parte Applicant dated 13.7.22.

2. The Ex Parte Applicant is granted 7 days leave to thereafter file supplementary Affidavit and Supplementary Submissions within 7 days of service.

3. The 2nd Respondent shall shoulder the Costs of the Application.

4. The matter shall be mentioned on 19th June 2023 to report compliance and to secure a judgment date.

5. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023.

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J. CHIGITI (SC)

JUDGE