



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.182 OF 2019

IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 21, 22, 23, 24, 25, 27(1), 28, 43, 47, 48, 55, 56, 165(3), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 20(2), 21(1), 22, 23, 24, 27(1), 28, 43, 47, 48, 55, 56, 165(3), 258, 259 & 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULES, 2013)

AND

IN THE MATTER OF: SECTION 3(1) (A) AND (C), 4(1) (2) (3) & (11) OF THE FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF: KENYA SCHOOL OF LAW ACT NO. 26 OF 2012 LAWS OF KENYA

BETWEEN

- KIHARA MERCY WAIRIMU.....1ST PETITIONER**
- MWASHIGADI KEZIAH MBALA.....2ND PETITIONER**
- ABDI SAMIRA ALLY.....3RD PETITIONER**
- KANYI ALEX KARINGITHI.....4TH PETITIONER**
- SOMOW IBRAHIM HAMDIL.....5TH PETITIONER**
- KHANBHAI SARRAH MUSTANSIR.....6TH PETITIONER**
- MICHELLE WANJIKU WANYEE.....7TH PETITIONER**
- SARAH MWHIHAKI MWANGI.....8TH PETITIONER**

VERSUS

- THE KENYA SCHOOL OF LAW.....1ST RESPONDENT**
- THE COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT**

KENYA NATIONAL EXAMINATION COUNCIL.....3RD RESPONDENT

KENYA NATIONAL QUALIFICATION AUTHORITY.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The petitioners through a Notice of Motion brought pursuant to Rules 2,3 and 4 of the Constitution of Kenya (*Protection Freedoms*) Practice and Procedure Rules 2013, Article 22, 48 and 259(1) of the Constitution of Kenya; the inherent jurisdiction of the court and all other enabling provisions of the law.

2. The petitioners seek that this court be pleased to review order(s) of its judgment rendered on the 28th November, 2019 to read that:-

a) A declaration be and is HEREBY issued that the petitioners submit their international General Certificate of Secondary Education), (**IGCSE GSCE** and **GCE** certificate together with equation letters (Secondary School qualification certificate letter) from the Kenya National Qualification Authority together with LLB Degree Certificate from Riara University within 7 days from the date of this order.

b) That an order be and is Hereby issued upon the petitioners complying with order (a) hereinabove. The 1st and 2nd respondents to register and forthwith admit the petitioners herein to undertake Advocate Training Programme (ATP) at the Kenya School of Law without any other conditions.

c) In the alternative to (a) and (b) above an order be and is hereby issued compelling the 1st and 2nd respondents jointly and severally forthwith to admit the petitioners to undertake Advocate Training Programme (ATP) at the Kenya School of Law without any other conditions.

d) That the Honourable court do grant any other or further order that this Honourable court deems it fit and necessary to grant in the interests of justice.

e) That there be no order as to costs.

3. The application is supported by annexed affidavit of Mwashighadi Keziah Mbala and on the grounds on the face of the application being Nos. 1 to 10.

4. The 1st and 2nd Respondents are opposed to the application. The 1st Respondent did not file any Replying affidavit or grounds of opposition to the application. The 2nd Respondent filed grounds of opposition and skeletal arguments.

5. The 3rd, 4th and 5th Respondents appeared and stated that they were not opposed to the application.

6. The 2nd Respondent contention is that the application is for review of this court's judgment and therefore incompetent for its failure to satisfy the conditions for review as set out under order 45 of the Civil Procedure Rules; that the application is an attempt to vary the intention of the judgment of this Honourable Court and lastly the court is *functus officio*.

7. Upon consideration of the petitioner's application, affidavit in support, the 2nd Respondent statement of grounds of opposition; and the counsel rival submissions the following issues arise for consideration;

a) Whether the application is seeking Review under order 45 of Civil Procedure Rules or is seeking amendment of judgment, decree or orders under section 99 of the Civil Procedure Act?

b) Whether the application is an attempt to vary the intention of the judgment of this Honourable Court?

c) Whether the Honourable Court is *functus officio*?

A) Whether the application is seeking Review under order 45 of Civil Procedure Rules or is seeking amendment of judgment, decree or orders under section 99 of the Civil Procedure Act?

8. The 2nd Respondent's contention is that the instant application seeks review of this court's judgment which was delivered on 28th November 2019 as per paragraph (b) of the petitioner's application and paragraph 8 of the application as well as paragraph 9 of the supporting affidavit. It is therefore the 2nd Respondent's position that from the applicant's pleading, this is an application for review and not any other thing.

9. It is further urged by the 2nd Respondent that parties are bound their pleadings relying on Supreme Court decision of **Raila Amolo Odinga & another vs IEBC & others (2017) eKLR** in which the Supreme Court held thus:-

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...."

10. Further in the case of **Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings does to no issue and must be disregarded...."

....

In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

11. The application before this court is premised on Rule 2,3 and 4 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice Rules, 2013, Article 22, 48 and 259(1) of the Constitution, none of which deals with applications for Review as espouses under order 45 of Civil Procedure Rules. It is petitioners contention that the application is an invitation to this court under section 99 of the Civil Procedure Act to re-look at the judgment and make corrections to perfect the judgment so as to accord the intention of the court in its judgment.

12. The petitioners in this application seek to invoke the inherent jurisdiction of the court in order to give effect of the judgment. It is contended on perusal of the judgment, it is clear the court view was that the petitioners were qualified to admission to ATP programme's. The courts intention was to have them admitted to ATP. The petitioners relies on paragraph 59,60,86,91 and 92 of the court's judgment which clearly point out the intention of the court was to have the petitioners admitted to ATP programme; upon consideration of the qualification they possess as under paragraph 60 of the judgment. It is petitioners contention that they are satisfied with court's judgment, but that there is accidental slip in the judgment by court under order (a) in ordering the petitioners submit their A level certificates instead of the qualification mentioned under paragraph 60 of the judgment being **IGCSE; GSCE and GCE.**

13. The petitioners are seeking removal of "A" level qualification and have the same changed urging that any paragraph of judgment should not be read separately and paragraph 59 of the judgment should not be allowed to destroy the whole judgment. It should be borne in mind that in the judgment this court did not specifically say the only qualification to join undergraduate programme in law is for one to have "A" level.

14. In the case of **Bishop John Nduati vs IEBC & 4 others 2018) eKLR** (the High Court stated:-

"As a general Rule, every court (and an Election court will not be excluded) has power to recall its decision to correct an error or slip so as to give effect to the manifested intention of its decision. The slip Rule was explained as follows by Sir Charles Newbold P. in *Lakhmishi Brothers Limited vs R. Raja & Sons* [1966] E.A 313 at page 314.

"Indeed there has been a multitude of decisions by this Court on what is known generally as the slip rule, in which the inherent jurisdiction of the Court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the mater not inadvertently been omitted. I would here refer to the words of this court given in the *Raniga case (2) [1965] E.A at P. 703* as follows;

"A court will, of course, only apply to slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a mater which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention."

These are the circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter."

15. In the instant application the petitioners position is that this is not an application for Review as contended by the 2nd Respondent. The petitioners in this application are in agreement with the judgment and are not contending that there is an error or mistake that they have discovered. Looking at the application it is clear that it is not premised on the provisions of order 45 of Civil Procedure Rules but it is an application under **Section 99 of the Civil Procedure Act** which provides:-

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

16. The petitioners urge what is before this court is not pleadings but is an application. **Section 2 of the Civil Procedure Act** defines pleadings as follows:-

“Pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

17. From the definition under **section 2 of Civil Procedure Act** it is clear that an application is not a pleading and therefore what is before this court is simply an application. This is a constitutional matter which under **Rule 3(1)(2)(3)(4) of the Mutunga Rules** provides the scope and objections as follows:-

"3. (1) These rules shall apply to all proceedings made under Article 22 of the Constitution.

(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

(3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realising the—

(a) rights and fundamental freedoms enshrined in the Bill of Rights; and

(b) values and principles in the Constitution.

(4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.”

18. I have considered the application, and paragraphs 60,61,86,91 and 92 of the judgment and I am satisfied there is no mention of "A" level qualification in the said paragraph's and have equally noted order (c) of the judgment and I am satisfied there is an accidental slip in the judgment which requires to be corrected under **section 99 of the Civil Procedure Act**. Paragraph 59 of the judgment should be read together with paragraph 5 of the judgment in which the 1st respondent rejected the petitioners application for admission into **ATD** for failure to attach "A" level certificates. The said paragraph should be considered in light of other court's paragraphs the judgment and more so paragraph 60, 61,70,71,73,74,75,77,83,85,86,88,89,90,91 and 92.

19. The petitioners application is for correction or perfection of the judgment and not a Review. The **Black Law Dictionary** 10th Edition at page 1514 defines "**Review**" as follows:-

"Consideration, inspection, or reexamination of a subject or thing. (2) Plenary power to direct and instruct an agent or subordinate, including the right to remand, modify, or vacate any action by the agent or subordinate."

20. From the above the essence of review under **order 45 of Civil Procedure Rules** is where one is aggrieved by judgment and seeks to have the judgment reviewed on the grounds set out under the aforesaid order. In the instant application under the ground in support of the application, the petitioners state categorically that they are satisfied with this court's judgment dated 28/11/2019 but the only difficulty, is the creating uncertainty is order (a) of the judgment requiring the petitioners to submit their "A" level certificates, together with an equation letters and urges, what ought to be equated are certificates under **IGSE, GSCE and GCE**. I therefore agree with the petitioners this application is for amendment of judgment to correct the accidental slip as to what certificate requires to be equated; thus **IGCSE, GSE and GCE** and not "A" level certificates. I find the petitioners are not seeking review of the judgment as argued by the 2nd Respondent as they are not challenging the court's judgment, but seek correction of the accidental slip on the grounds set out so as to perfect the judgment, under the court's jurisdiction under **section 99 of Civil Procedure Act**.

B) Whether the application is an attempt to vary the intention of the judgment of this Honourable Court?

21. The 2nd Respondent avers that the intention of this court's judgment with respect to the "A" level qualifications is to be found under paragraph 59 of the judgment as reflected in the first part of the order (a) of the judgment which reads as follows:-

"A declaration be and is HEREBY issued that the petitioners submit their A-Level certificates together with an equation letters (Secondary School qualification clearance letter) from the Kenya National Qualification Authority together with LL.B degree certificate from Riara University within 21 days from the date of this judgment"

22. The courts judgment should be read as whole considering each and every paragraph of the judgment rather than relying only on one paragraph. Paragraph 59 of the judgment read together with other paragraphs clearly demonstrates the courts intention was not to declare "A" Level as the only requirement or qualification to qualify to join undergraduate programme in law as specifically spelt out under Regulation 5(1) of the Third Schedule to the Legal Education (*Accreditation and quality Assurance*) Regulation 2016 or Regulation 18 read together with Regulation 2 of the Second Schedule to the Council of Legal Education Act (*Accreditation of Legal Education Institutions Regulations 2009*). Paragraph 59 should therefore not be considered in isolation of all other relevant paragraphs in the judgment. Order (a) is clear that equation letter is required for "*Secondary school qualifications*" which include any examination taken at secondary level such as what the petitioners took in their **IGCSE, GSCE and/or GCE** system.

23. I therefore find the petitioners in their application have demonstrated there is a clerical or accidental slip or omission in the judgment requiring the correction under **section 99 of the Civil Procedure Act**. The issues for consideration in the petition were not solely on

question of "A" level qualification as urged. There were other relevant issues on qualification which were raised and considered. The intention of the court's judgment is clear as pointed out by the petitioners and as such I find the application as drawn and filed and urged before this court is not an attempt to vary the intention of the judgment of the court but to correct the accidental slip in the judgment. The petitioners are therefore not seeking review of the court's judgment as submitted by the 2nd Respondent.

C) Whether the Honourable Court is *functus officio*?

24. The 2nd Respondent avers the orders sought by the Petitioners/Applicants have the effect of the re-opening of this case in view of the fact that:-

i) Prayer (a) of the applicants' application seeks to do away with the court's dictate with respect to the applicants supplying A-level qualification and further seeks to reduce the compliance timelines from 21 days as ordered by the court to 7 days.

ii) Prayer (d) of the applicants' application gives an alternative to two orders contrary to the judgment of the court which gives an alternative to only one order.

25. The 2nd Respondent is of the view that to grant the above prayers it would have to re-open the case which it has already heard and determined and as such it is the 2nd Respondents position this court is *functus officio* and the only avenue left for the applicant will be to appeal the decision and not to re-open the case.

26. The 2nd Respondent in support of the above proposition relies in the case of **Raila Amolo Odinga & another vs IEBC & 2 others (2017) eKLR**, in which Supreme Court cited with approval an excerpt from an article by Daniel Malan Properties entitled, "*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*" (2005) 122 SALJ 832 in which the learned author stated:-

"...The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The principle is that once such a decision has been given, it is (subject to any right of appeal to superior body or function) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

27. The issue that needs to be resolved in this application is whether this Honourable Court in determining the present application is *functus officio*. When is it that the court is said to be *functus officio*?

In **Kwale International Sugar Company Ltd vs Kenya Board of Standards and 5 others (2019) eKLR** the court states thus:-

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are final concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

28. On perusal of the petitioner's application, it comes out clearly that what is being sought is not a review but correction of the judgment to make effect of the intention of the court. The court is not *functus officio* as submitted as it has not performed all its duties. The doctrine of *functus officio* is clear. It does not prevent the court from correcting clerical errors nor judicial change of mind even after the court's decision has been communicated to the parties as the proceedings are only fully concluded and court becomes *functus officio*; when its judgment or order has been perfected as the purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision. That any challenge thereafter can only be referred to a higher court if the right is available. In the instant application what is being sought is perfection of the court's judgment or amend of the judgment to correct an accidental slip or error in the judgment and not a review. In view of the above, I am satisfied the authorities relied upon by the 2nd Respondent are not relevant to this application. I find the application is proper and the court is not *functus officio* as contended by the 2nd Respondent.

29. In view of the above, I find that the petitioners application dated 10th December is meritorious. I proceed to make the following orders:-

a) The court's order (a) of the judgment rendered on 28th November 2019 be and is hereby amended/corrected under the provision of section 99 of the Civil Procedure Act to read that:-

i) A declaration be and is HEREBY issued that the petitioners do submit their International General Certificate of Secondary Education (IGCSE, GSCE and GCE certificates together with equation letters (Secondary School qualification clearance letter) from Kenya National Qualification Authority together with LL.B degree certificate from Riara University within 7 days, from the date of this order.

ii) The petitioners upon complying with (i) above and upon meeting the qualifications the 1st and 2nd Respondents do register and forthwith admit the petitioners herein to undertake the Advocate Training Programme (ATP) at the Kenya School of Law without any other conditions.

b) No orders as to costs.

Dated, signed and delivered at Nairobi this 13th day of February, 2020.

.....

J .A. MAKAU

JUDGE