REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

JUDICIAL REVIEW APPLICATION NO. 4 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT SECTIONS 8

AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION BY KENYA NATIONAL EXAMINATION COUNCIL TO CANCEL RESULTS OF 162 CANDIDATES OF [PARTICULARS WITHHELD] SECONDARY SCHOOL – CHEPARARIA

AND

IN THE MATTER OF SECTION 32 OF THE KENYA NATIONAL EXAMINATION COUNCIL ACT , 2012

AND

IN THE MATTER OF ARTICLE 10, 22, 23, 43 (F) 47 AND 48 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL

THE CHIEF EXECUTIVE OFFICER.....1ST RESPONDENT

COUNCIL SECRETARY, THE KENYA NATIONAL EXAMINATION

COUNCIL.....2ND RESPONDENT

EX-PARTE

C S & 16 OTHERS (Suing through Next Friends R C C, W S, J A O, M L. N AND E M)

AND

THE BOARD OF MANAGEMENT [PARTICULARS WITHHELD] SECONDARY SCHOOL – CHEPARARIA

J U D G M E N T

1. By a consent order dated 13/4/2018, the parties did compromise the Notice of Motion dated 9/2/2018. The terms of the consent were that:-

(1) That the judgment entered for the exparte applicant of an order of certiorari brings into this Honourable court for the purpose of being quashed and quashing the decision of the 1st Respondent as contained in its letter to the head teacher of [particulars withheld] secondary school Chepararia dated 16th January 2018 canceling the examination results of all the 162 KCSE Candidates for the year 2017 on the grounds of an alleged irregularity referred to as "collusion" in English (101), Physics (232) subjects.

(2) That an order that unless the 1st Respondent initiates a lawful process of canceling of the applicants results within the next 14 days from the date of this consent an order of mandamus is hereby issued compelling the 1st Respondent to certify that the KCSE results released to the candidates, to the school, the parents and the entire Country on the 20th December 2017 as the valid final results of KCSE for 162 students of [particulars withheld] Secondary school Chepararia"

2. The parties subsequently proceeded to carry on the terms of consent and by a letter dated 26/4/2014 the 1st Respondent reached the following findings inter alia.

a) The Council in its meeting held on the 23rd of April 2018 passed a resolution being resolution No. 3/EMC/23rd April 2018 /1 (1) (2) and (3), that the allegations of examination irregularities against all the 2017 KCSE examination candidates of [particulars withheld] Secondary school, Chepararia had been sufficiently proved and that it was clear that there was massive and wide spread examination irregularities at [particulars withheld] Secondary school – Chepararia during the KCSE examination."

3. The 1st Respondent then proceeded to cancel the enumerated results. This is what has aggrieved the applicant and have since filed the current application dated 30/4/2018 praying that:

1) That this Honourable court may be pleased to issue and order of certiorari to remove into the High Court for the purposes of it being quashed forthwith the decision of Kenya National Examination Council as contained in its letter dated 26/4/2018 cancelling the examination results in respect of all the 162 Kenya certificate of Secondary examination candidates for the year 2017 for [particulars withheld] secondary school Chepararia on the ground of an alleged irregularity referred to as "collusion" in English (101), and Physics (232) subjects; without any evidence whatsoever to that effect and without giving the affected candidates and the school a hearing.

2) That this Honourable court may be pleased to issue an order of Mandamus directed at the Kenya National Examination Council to compel the Kenya National Examination Council to certify the KCSE results released to the candidates, the school the parents, and the entire Country on the 20th December 2017 as the valid final results of the 2017 KCSE for 162 students of [particulars withheld] Secondary school Chepararia.

4. The same is supported by the affidavit of Stephen Wanyonyi Masinde sworn on 30/4/2018 together with the relevant annextures.

5. Principally he has deponed that the Respondents indeed conducted a meeting on 19/4/2018 and communicated its decision on 26/4/2018 in which it cancelled the impugned results. His argument is that the 1st Respondent failed to comply with the consent order which had ordered that it carries out fresh investigations. Further, that during the hearing, they were not granted a chance to tell their story or at worst granting the applicants opportunity to be heard.

6. The Respondents on their part through one Imelda Anyanga Barasa filed an affidavit sworn on 11/5/2018 in reply. She said that she was a Director of Examination Administration and that indeed they complied with the consent order.

7. She has attached several annextures which includes the proceedings of 20/4/2018 as well as the outcome of the decisions nullifying the results.

8. The parties equally filed their written submissions which I have had occasion to peruse as well as their supporting authorities.

9. The issues raised by the parties are twofold, namely a) whether this court has jurisdiction to entertain this application and (b) whether the 1st Respondent complied with the consent order.

10. On the first ground, the 1st Respondent has argued that this application is defective in substance as the applicants ought to have sought fresh leave of the court. They argue that once the consent was adopted, on 13/4/2018, the same became *"functus"* and that the applicant should have sought a fresh leave of the court.

11. They argue that the leave which was granted earlier was in respect to the motion dated 9/2/2108. The totality of the 1st Respondent argument is that the applicant ought to have sought fresh leave and not to rely on the old which was compromised by the consent .

12. The applicants have countered this line of argument by stating that there was no need to seek fresh leave as this was a continuation of the judicial review application pursuant to the consent order of 13/4/2018. That the leave granted on 5/2/2018 was sufficient and the 13th April 2018 consent order compromised the same.

14. The 1st limb of the consent order quashed in my view the contents of the letter cancelling the results dated 16/1/2018. Even if one was to stop there it meant that the next logical thing was to reverse the decision reached in respect to English paper (101) and Physics paper (232).

15. The position would have been as though the results were not cancelled.

16. The parties however moved to the 2nd limb of the consent which stated that;

> **"unless the 1st Respondent initiates a lawful process within the next 14 days from the date of this consent, an order of mandamus is hereby issued compelling the 1st Respondent to certify the KCSE results released to the candidates, to the school, the parents and the entire Country on the 20th December 2017, as the valid final results of KCSE 2017 for the 162 candidates of [particulars withheld] secondary school Chepararia."**

17. The 1st Respondent then as per the annextures herein proceeded to have a meeting with the Applicants and arrived at a similar decision namely cancelling the results. This has thus aggrieved the applicants hence this application.

18. The operative word in my view of the 2nd limb of the consent is **"unless the 1st Respondent initiate a lawful process within the next 14 days from the date of this consent."**

19. By initiating a new process what does it potent for the old decision? The old decision of 16/1/2018 was rendered absolete and of no consequence. It would have been consequential if the 1st Respondent had not initiated the fresh process. Infact the mandamus orders contemplated in the consent would have kicked in automatically .

20. With due respect to the applicant, contrary to their submissions, I find that the decision of 26th April 2018 was fresh and that is the reason why they impugned it. Their argument was that there was no investigations done and that they were not afforded any opportunity to be heard. In other words the students who were affected were not granted a chance to be heard.

21. The reasons for the earlier application may have been the same. In my view, they technically "won" in the first application when they recorded the consent. That consent settled the first application and this second application was premised on new and fresh evidence in particular the proceedings of 20th April 2018.

22. Having found so, did they need to seek fresh leave of the court as submitted by the Respondents? That answer is found in the provisions of Section 8 and 9 of the Law Reform Act and order 53 Rule (1) and (2) of the Civil Procedure Rules, the latter stating that:

> ***" (1) (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.***
>
> ***2) An application for such leave as aforesaid shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavits verifying the facts relied on."***

23. The application herein dated 30/4/2018 relates to the 1st Respondent's decision as per its letter dated 26/4/2018.

24. The earlier application dated 9/2/2018 related to the 1st Respondents letter dated 16/1/2018. Clearly those are two different decisions.

25. As earlier stated, had the 1st Respondent not complied with the terms of the consent order, then the orders of mandamus would have kicked in automatically. However now that it complied , the challenge at hand is to do with the letter of 26/4/2018 and not that of 16/1/2018. This means that in complying with the provisions of order 53 of the Civil procedure Rules, the applicants ought to have sought fresh leave of the court.

26. I do appreciate the arguments by the applicant that the provisions of Article 47 and 159 of the Constitution are so wide and powerful that one need not necessarily rely on the provisions of Order 53 above alone. However, one cannot use the provisions of the Constitution as a panacea to simply oust the provisions of a statute where they require compliance.

27. Its appreciated that the provisions of Order 53 of the Civil Procedure are suigeneris. I do not however see how the provisions of the constitution can stop a party to comply with a statutory procedure, namely seeking leave of the court. How, for instance shall the court know whether its the order of 16/1/2018 or 26/4/2018 to be quashed? To rely on the two provisions of the Constitution to saluage a clear breach of the procedure in my view is untenable. This was not a technicality, but a clear provision of the law which requires leave to be sought.

28. In ***Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*.** The court stated that;

> ***"In our view, it is a misconception to claim as it has in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). The procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extension of this principle -----"***

29. In the absence of leave therefore the notice of motion is so to speak lame. Order 53(4) (1) of the Civil Procedure Rules states that

> ***"Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided , be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."***

30. ***Odunga J in Nyabira Oguta Diran Onkangi Vs Council of Legal Education (2016) eKLR*** on this score stated that;

> ***" it must be emphasised that the Statement referred to in the above rule is required to be filed with the application for leave. Where therefore the relief intended to be sought is not set out in the statement, the applicant cannot in his subsequent motion seek the same. In my view, once leave is granted, save for an amendment, the applicant cannot go back to the application for leave and seek orders which he did not seek in the first instance . Similarly, the applicant cannot purport to substitute an application for leave and seek to replace with orders which were granted at leave stage by way of a subsequent application. In other words once permission to commence judicial review proceedings is granted the applicant must proceed to institute the motion in accordance with the leave granted save for the limited avenue of amendment. Where the applicant feels that the permission granted no longer covers what he seeks and that an amendment may not cure the defect as the applicant contends herein, the only option is to go back to the drawing board and commence the process denovo vide a fresh application."***

31. I would not agree more with my brother. The failure to institute fresh application for leave was critical. The prayers sought in the motion even if one was to be magnanimous enough to allow it as they are, are at variance with the prayers for leave. More fundamentally, the same is not accompanied by the relevant statements as envisaged under order 53(4) (1) above.

32. For the foregoing reasons I think it will not be necessary for now to discuss whether the 1st Respondent in arriving at its decision dated 26/4/2018 acted ultra vires or did not follow the rules of natural justice. Suffice to state that the application before me is defective. The proper recourse in my view was for the applicants to start afresh.

33. The application dated 30/4/2018 is hereby dismissed with no orders as to costs.

Delivered, signed and dated at Kitale this 17th day of July, 2018.

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H.K. CHEMITEI

JUDGE

17/7/18

<u>In the presence of;</u>

Arunga for the Applicants

No appearance for the Respondents

Kirong – Court Assistant

Judgment read in open court