



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 529 OF 2016

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

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES 19, 20, 22, 23, 24, 35, 47,48,50(1), 159AND 165

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNCIL OF LEGAL EDUCATION.....RESPONDENT

EX PARTE: EDWARD ONWONG’A NYAKERIGA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th November, 2016, the ex parte applicant herein, **Edward Onwong’a Nyakeriga**, seeks the following orders:

1. That this Honourable Court be pleased to issue AN ORDER OF CERTIORARI directed at the Council Of Legal Education, the Respondent herein to bring to this Honourable Court the decision made vide the Respondent’s letter to the Applicant Ref: CLE/ST&EXAMS/01VOL1/(56) and dated 11th October, 2016 and have the said decision quashed forthwith .

2. That this Honourable Court be pleased to issue an order of mandamus directed at the Respondent herein compelling them to allow the Applicant herein to re-sit the ATP Examination offered by the Council of Legal Education which commences on the 28th November, 2016 to 8th December, 2016.

3. That this Honourable Court be pleased to issue an order of mandamus directed at the Respondent herein compelling them to produce the Applicant's November, 2015 ATP 101-Criminal Litigation answer booklet/script specifically identified as CLE No 20131030 together with the relevant Examination Marking Scheme for inspection and verification thereof.

4. That the leave so granted does operate as a stay of the decisions of the Respondent.

5. Costs be in the cause.

Applicant's Case

2. According to the applicant, he joined the Kenya School of Law during the 2013 academic year and undertook the Advocates Training Programme "the ATP" at the institution. He then sat for the requisite Council of Legal Education examinations in the succeeding year and that after his examination by the Respondent passed in one unit but failed in the rest.

3. The Applicant averred that his options were: remark, re-sit or both. Upon declaration by the Respondent, he chose the remark as well as a re-sit which alternatives were legitimate and open for him. The applicant averred that at their discretion, the Respondent declared an extension of time for both application for remark of the November, 2015 ATP Exams as well as application for registration to re-sit the July, 2016 ones. The applicant then applied to remark and re-sit, all the units. However after the remark of his results of my November, 2015 ATP Examination, he had a pass in one unit and therefore only two were available for re-sit during the July 2016 out of the three that he had paid for vide receipt No.3393, dated 5th May, 2016 in the sum of Kshs 75,000/= made up of Kshs 45,000/= for the November, 2015 Council of Legal Education examination and Kshs 30,000/= for the re-sit of the July 2016 Bar Examinations.

4. The applicant averred that he later made a formal application for refund of the Kshs 10,000/= being the balance of the amount which he paid for the examination but had not been utilized in any way either for preparation, assessment or evaluation of his answer booklet. However, there was no response from the Respondent.

5. According to the applicant, since the Kshs 10,000/= is an equivalent of one Council of Legal Education Examination unit's cost he opted to apply the same towards the re-sit of the ATP November, 2016 Bar Examination when the Respondent notified interested candidates to apply for the said November/December, 2016 Examination Registration dates as an alternative to the refund request earlier made on the unutilized amount which the Respondent owed him.

6. It was the applicant's case that the Respondent's move purporting to bar his candidacy for the November/December, 2016 ATP Examination was in complete disregard of his Constitutional Rights and the same was made, my right to be heard, notwithstanding and without justifiable reason or legal basis but merely on assumptions injurious to him. To the applicant, to disallow the Applicant's candidature for the November, 2016 ATP Examinations deprived the Applicant the benefit or advantage which he legitimately expected if results for remarking of the November 2015 ATP Examination were declared earlier and an opportunity to apply for re-sit communicated.

7. The applicant averred that the Respondent's decision is flawed, ultra vires and unfair, irrational, unreasonable and disproportionate; grounded on failure to consider the legitimate expectation of the Applicant and in total disregard of the fact that the Applicant had instructively responded to the direction of the Respondent to, without alternatives, pay for re-sit of three Examination units one of which was however not available.

8. The Applicant further disclosed that the Respondent has on the other hand declared remark result with varying percentages from the ATP101-Criminal Litigation, in which he had scored 48% in the November/December, 2015 Examination and the Applicant had made requisite payments to remark. On

the one hand the Respondent issued the Applicant a Transcript showing that he had scored 0% and on the other they issued one in which the Applicant had scored 48%; both from a single remark process. In the applicant's view, the two varying results from a single remark clearly demonstrate negligence, recklessness and the complete disregard of my Constitutional Rights.

9. It was averred that when the Applicant went to the Respondent's offices to pick his transcript; which he did but he noted that he had still failed the ATP101-Criminal Litigation and upon close scrutiny, realized that 0% had been awarded as his ATP101-Criminal Litigation score. When he made inquiries from the Respondent's Office the Respondent acknowledged the error but failed to correct the same.

10. The applicant therefore prayed for the orders sought herein.

Respondents' Case

11. The Petition was opposed by the Respondent.

12. According to the Respondent, the ex parte Applicant was admitted to the Advocates Training Programme in the 2013 and sat the Bar examinations then administered by the Kenya School of Law in November 2013 and passed some papers but failed in ATP 100 Civil Litigation, ATP 101 Criminal Litigation, ATP 102 Probate and Administration and ATP 107 Conveyancing. In 2015, when the ***Legal Education Act, 2012*** was amended by inclusion of section 8(1)(f) to mandate the Council of Legal Education to administer the Bar exam, the Ex parte Applicant applied for the November 2015 Bar examination series for ATP 100 Civil Litigation, ATP 101 Criminal Litigation, ATP 102 Probate and Administration and ATP 107 Conveyancing and passed ATP 102 Probate and Administration. He however failed ATP 100 Civil Litigation, ATP 101 Criminal Litigation and ATP 107 Conveyancing.

13. It was averred that by General Notice No. 11 of 2016 dated 29th March 2016, the Council invited applicants for registration of the Bar examinations to be offered in July 2016 with the deadline for the application being 29th April 2016. Further, by General Notice No. 12 of 2016 dated 29th March 2016, Council also invited for applications for remarks of Bar examinations for candidates who had been unsuccessful in the November 2015 Bar examinations series with the same date as the deadline, that is 29th April 2016.

14. According to the Respondent, the Bar examinations are controlled examinations, offered on scheduled time tables and offered only to students who apply in advance, as is usually indicated by publications of the Council and that the same discipline superintends the remarking of the Bar examinations. Applications for remarks are invited for and remarks are organized only for applied scripts. Upon extension of the registration period for re-sits and remarks of the Bar examinations series for July 2016, necessitated by the judgment of the High Court of May 20th 2016, in ***Judicial Review application No. 377 and 392 of 2015, consolidated with Petitions No. 472 and 480 of 2015***, the Ex parte Applicant applied on 30th May 2016 for re-sit of ATP 100 Civil Litigation, ATP 101 Criminal Litigation and ATP 107 Conveyancing, in accordance with Council's General Notice No. 22 of 2016 and simultaneously applied for remarks of the said exams, ATP 100 Civil Litigation, ATP 101 Criminal Litigation and ATP 107 Conveyancing which is a common occurrence among candidates so that in the event that the remarks avail, then they do not re-sit the paper. Should the remark on the other hand fail, then the candidate still secures the chance to re-sit the paper, as scheduled. The situation above was a device by candidates following the advice at paragraph 5 of the Council's General Notice No. 12 of 2016.

15. The Respondent averred that payments for the Bar examinations and re-sits thereof are non-refundable since the payments are received well in advance within the given periods of registration, and the monies received per candidate and per paper are used to organize the examinations. The sums are budgeted and expended on setting the exams, printing, booking the venues for exams, payment of the invigilators, payment of the markers of the exams and incidental costs for offering a credible exam. Once paid therefore, and applied on organization of the exam as above, these funds are never available for refund, in the event the candidate fails to re-sit the exam or even misses it.

16. It was however averred that candidates have the chance to defer the exam, in which case they have to formally apply to the Council for such noting and planning and that the right to defer examinations is normally advised to the candidates parole, and is also carried on the registration forms for Bar exams and re-sits thereof. If deferment is applied for, then the candidate is formally allowed to postpone the paper and would now re-sit it in future without payment for the registration fees. To the Respondent, the formality of deferment is crucial, it helps in planning; Council gets to know the number of candidates actually writing the exams and plans for administration of the exams to those applicants.

17. It was averred that in the Ex parte Applicant's application for re-sit of the Bar examinations for July 2016, there was no application for deferment as prescribed or at all. The consequence is, the Council prepared for the Ex parte Applicant to write the exams for ATP 100 Civil Litigation, ATP 101 Criminal Litigation and ATP 107 Conveyancing, as applied. Accordingly, the Ex parte Applicant paid Kshs. 75,000.00 on application, apportioned as follows: Kshs. 45,000.00 for remarks at the rate of Kshs. 15,000.00 a paper and Kshs. 30,000.00 for re-sits at the rate of Kshs. 10,000.00 a paper. Consequently, upon the application and payment as prescribed, the Council prepared for remarks and re-sits, as scheduled.

18. The Respondent disclosed that it transpired that the Ex parte Applicant was successful in the remarks in one paper, ATP 100 Civil Litigation but was however confirmed to have failed in ATP 101 Criminal Litigation and ATP 107 Conveyancing. Having passed ATP 100 Civil Litigation, the Ex parte Applicant did not re-sit for the exam, even though the exam was prepared for him in July 2016 Bar examinations series and thus re-sat ATP 101 Criminal Litigation and ATP 107 Conveyancing. On marking the Ex parte Applicant passed ATP 107 Conveyancing but failed ATP 101 Criminal Litigation.

19. It was stated that on 19th July 2016 the Ex parte Applicant applied for a refund of Kshs. 10,000.00 for the re-sit exam for ATP 100 Civil Litigation arguing that he did not re-sit the paper. On the same day, the Finance department of the Council advised the Ex parte Applicant that examination fees are not refundable and the Respondent further vide a letter dated 19th August 2016 formally advised that the Kshs. 10,000.00 paid for re-sit of ATP 100 Civil Litigation were unavailable for refund, the exam paper having been applied for and readied, without deferment.

20. It was disclosed that by General Notice No. 31 of 2016 dated 19th August 2016, the Council invited eligible candidates to register for the Bar examination series for November 2016 and that the registration periods were 5th to 30th September 2016. At the close of the registration for the November 2016 Bar examinations, the Ex parte Applicant had not applied for re-sitting ATP 101 Criminal Litigation hence the Council did not prepare such exam for the Applicant in the November 2016 Bar examinations series. To the Respondent, the Ex parte Applicant cannot sit for an exam that he never registered for, and which is unavailable for him.

21. The Respondent asserted that to maintain the integrity of the Bar exams, the number of scripts and sitting stations correspond to the number of the candidates that registered for the exam, each paper is uniquely bar coded to the candidate, basing on the examinations card. As such a person who never registered for the exams within the planning timelines, will not have an exam card and will certainly not have an exam paper. It was however averred that the Ex parte Applicant, by letter dated 6th October 2016 applied for the November 2016 Bar exams and by letter dated 11th October 2016, the Council advised the Ex parte Applicant, firstly, that the deadline for registration for the November 2016 Bar examinations had passed on 30th September 2016. Secondly, the Ex parte Applicant was advised that the Kshs. 10,000.00 paid for the July 2016 re-sit of the Bar exams, ATP 100 Civil Litigation, had been expended in preparation of that exam, accordingly these funds were unavailable for refund. Lastly the Ex parte Applicant was advised to apply for re-sit of the Bar exams when next offered in 2017. It was disclosed that the said Bar examinations having begun on 28th November 2016 were planned to run until 8th December 2016.

22. The Respondent's position was therefore that prayers 1 and 2 in the Notice of Motion dated 16th November 2016, aside from absence of merit, were incapable of being performed since there was no

exam prepared for the Ex parte Applicant, for want of registration in time as prescribed. Even if the Ex parte Applicant were to be allowed in to the examinations room, he would not be able to sit the exam, for the reasons aforesaid, specifically that because he did not register, he has no exam card and consequently no exam script was printed for him. Even if he took any script and sat the exam, the system cannot recognize him. Besides, offering the Bar examinations to a party that never registered for it shall be grossly discriminatory; there are other applicants who have not sat for the Bar examinations for want of registration in time or at all.

23. With respect to the allegation of negligence in marking and remarking of the Ex parte Applicant's paper for ATP 101 Criminal Litigation, the Respondent clarified that the setting, administration, marking, moderation and even remarking of the Bar examinations is done in a strict and controlled environment, to ensure credibility of these examinations. Before the examinations are released, time is taken to check and cross check to ensure that released results are accurate and correct and that this is the standard that is applied to all candidates, without discrimination. This is the standard that was applied to all the Bar examination papers of the Ex parte Applicant including the papers that the Ex parte Applicant has not complained about. Accordingly, the allegations of inaccuracy in marking and remarking the Ex parte Applicant's exams for ATP 101 Criminal Litigation were spurious, and an unfair indictment in ignorance, to a process that is controlled and strictly regulated for the achievement of credibility. It was disclosed that the transcript indicated that the Ex parte applicant scored 60% in ATP 102 Probate and Administration in original marking; 48% after the remark of ATP 101 Criminal Litigation; scored 60% after remark of ATP 100 Civil Litigation; scored 33% after remark of Conveyancing. However, the Provisional result produced as annexure in the Supporting Affidavit of the Ex parte Applicant bearing 0% as the result for ATP 101 Criminal Litigation was due to system's non reflection of ATP 101 Criminal Litigation marks for all candidates whose exams had been remarked but who have not passed: whilst the marks had been fed in the system, at the time of printing the transcripts the marks for ATP 101 Criminal Litigation for all candidates having remarks who had not passed reflected as 0%. This was however not because the marks were not present or inaccurately recorded, it was a technical failure of reflection on the system, and affected the printing of marks for all candidates in the remark category who had not passed. Accordingly the allegations of negligence and errors in marking and or remarking of the exam paper in ATP 101 Criminal Litigation were denied.

24. The Respondent disclosed that the Council had no objection in producing a copy of the script in Criminal Litigation for this applicant CLE20131030 as sought. Council however clarified that when a candidate applies for a remark, the Council undertakes certain primary steps to ensure the integrity of the Bar examinations; firstly, the remark is done by a different marker/quality assurer from the marker who originally marked the exam, secondly, to ensure objectivity in the remark and so as not to influence the new marker/quality assurer with any subsisting opinions on the exam script, Council having recorded the initial marks, deletes the entered marks indicated by the original marker/quality assurer.

25. It was averred that the Ex parte Applicant scored 29 out of a maximum of 60 marks while the remaining marks which comprise 40 marks to complete 100% are aggregated from projects, presentations and moot courts. The projects component comprising the 40 marks was undertaken by the Ex parte Applicant at the Kenya School of Law.

26. It was the Respondent's case that for the context of the present suit, the marks entered as scored by the Ex parte Applicant in ATP 101 Criminal Litigation, both in the initial marking and remark are accurate and reflect the true position of the Ex parte Applicant's ability in the exam. It averred that the Council had already indicated to the Ex parte Applicant vide its letter dated 11th October 2016, that he had the liberty to apply and sit for the Bar examinations in the next series. I however the Ex parte Applicant is enjoined to comply with the rules of the examinations, including applying in the relevant format and paying the requisite fees.

27. The Respondent therefore prayed that the Notice of Motion dated 16th November 2016 be dismissed with costs.

Determinations

28. I have considered the application, the supporting affidavit, the replying affidavit, the submissions filed and authorities cited in support thereof.

29. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

30. Therefore Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

31. In this case, the gist of the applicant's case is that he was barred from sitting for examination which he had paid for. In his view, the decision not to remark his papers as well to bar him from re-sitting the examination was arrived at without observing the principles of natural justice.

32. On the part of the Respondent, it was contended that though the applicant paid the requisite fees for remarking and resitting of the examinations in question, the said fees are not refundable notwithstanding the fact that the applicant may not have availed himself for the said resit. This, according to the Respondent, is due to the fact that once an application for resit is made, preparation for the same is done with the particular applicant in mind and his position thereat is therefore reserved. His failure to re-sit the same therefore does not cut down on the expenses undertaken in preparing the same unless an application for deferral is received in good time, the payment is expended in preparation for the same.

33. According to the Respondent this has been its policy and to treat the applicant differently from the other students would amount to an unjustified differential treatment of the applicant.

34. In my view, whereas the said policy may be wrong, taking into consideration the Respondent's explanation for not refunding to the applicant the amount paid by the applicant, I am not prepared to elevate it to irrationality in order to justify its being quashed. Dealing with unreasonableness as a ground for judicial review it was held by **Lord Greene** stated at page 229 in **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223** that:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it

lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

35. In my view the Respondent’s explanation cannot in the circumstances of this case be termed as being so absurd that no reasonable authority, addressing itself to the facts and the law before it, would have arrived at it or that the decision was in defiance of logic and acceptable moral standards.

36. Apart from that the applicant in these proceedings is attacking the decision made vide the Respondent’s letter to the Applicant Ref: CLE/ST&EXAMS/01VOL1/(56) and dated 11th October, 2016. That decision was clearly made pursuant to a policy formulated by the Respondent. In making the said decision, the Respondent was in effect implementing a policy. In Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL it was held that:

“It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.”

37. This was a reflection of the position taken in Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC in which it was held:

“so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair.”

38. In this case I am not satisfied that the policy whose implementation provoked the decision being challenged is irrational.

39. It is also clear that the applicant is not in these proceedings challenging the policy but rather its implementation. To quash the decision without dealing with the policy itself would amount to issuing orders in vain and this Court in the exercise of its judicial review jurisdiction does not issue its undoubted discretionary relief in vain.

40. Prayer 2 of the motion, framed as it is, is no longer efficacious. With respect to prayer 3 the applicant is seeking an order of *mandamus* directed at the Respondent compelling them to produce the Applicant’s November, 2015 ATP 101-Criminal Litigation answer booklet/script specifically identified as CLE No 20131030 together with the relevant Examination Marking Scheme for inspection and verification thereof. However, *mandamus* is an order compelling a person to perform a duty imposed on him which duty he has refused to perform to the detriment of the applicant. Accordingly, an applicant must bring himself within the holding in the case of Prabhul Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano; Civil Appeal No.24 of 1985 where the Court of Appeal stated:-

“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

41. As was held in Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543:

“...it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual... The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature.”

42. In this case the applicant has failed to satisfy the Court that there is a duty imposed upon the Respondent by common law or by statute by which the Respondent is obliged to produce “*the Applicant’s November, 2015 ATP 101-Criminal Litigation answer booklet/script specifically identified as CLE No 20131030 together with the relevant Examination Marking Scheme for inspection and verification*”.

43. In the premises I find no merit in Notice of Motion dated 16th November, 2016.

Order

44. Consequently, the same fails and is dismissed but with no order as to costs.

45. It is so ordered.

Dated at Nairobi this 14th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyakeriga, the applicant in person

CA Mwangi