



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW**

**MISC. APPL. NO.388 OF 2012**

**IN THE MATTER OF AN APPLICATION BY MR. RWITO JOSEPH MUNGANIA FOR  
JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI**

**AND**

**IN THE MATTER OF IMPOUNDING OF DEGREE CERTIFICATE NO. 201211500842 BY  
DTHE DEPUTY REGISTRAR AND HEAD GRADUATION AND CERTIFICATES KENYATTA  
UNIVERSITY**

**BETWEEN**

REPUBLIC .....APPLICANT

**VERSUS**

VICE CHANCELLOR, KENYATTA UNIVERSITY..... RESPONDENT

EX-PARTE APPLICANT.....MR. RWITO JOSEPH MUNGANIA

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 29<sup>th</sup> October, 2012, the applicant herein, **Rwito Joseph Mungania**, sought a judicial Review order of mandamus do issue to compel the Vice chancellor, Kenyatta University to release the ex-parte applicant's degree certificate No. 20211500842 unlawfully impounded and/or retained by the university authority.

**Ex Parte Applicant's Case**

2. The Motion was supported by a supporting affidavit sworn by the applicant on 25<sup>th</sup> October, 2012.
3. According to the applicant, upon successful completion of the his university education at Kenyatta university, he applied to be listed for graduation on 20<sup>th</sup> April, 2012 which application was considered and he was listed amongst the successful graduands whose names were classified and pinned at the university notice board. Thereupon, he started clearing from various departments and on 5<sup>th</sup> July, 2012, the Deputy Registrar and head of graduation and certificates cleared him for graduation. Thereafter he paid the requisite graduation fees of Kshs.3,500/= and was issued with a receipt therefor.

4. Subsequently on 21<sup>st</sup> June, 2012, **Mr. James G. K. Kaime**, Deputy Registrar and head graduation and certificates wrote a letter to the Dean School of Education, directing that he be issued with an academic attire to enable him graduate and on 28<sup>th</sup> June, 2012, he together with other graduands attended rehearsal and was sworn in by the Respondent as an alumni of Kenyatta University. On 29<sup>th</sup> June, 2012 he accordingly graduated with 2<sup>nd</sup> class Honours Lower Division. On 30<sup>th</sup> June, 2012, he went to the university to pick his degree certificate and was issued with degree certificate No.201211500842. However, the same was minutes later impounded by the Deputy Registrar and head graduation and certificates **Mr. James G. K. Kaime** without any explanation at all. Subsequently, on 31<sup>st</sup> July, 2012, he was served with a letter of suspension wherein he was accused of tampering with online examination data in Four (4) units. In the said letter the registrar academic directed the director ICT to update what he called a database.
5. In the Applicant's view, this action is aimed at manipulating and/or manufacturing evidence against him for purposes of suiting the allegations he was accused of. According to him, he never tampered with the examination units he was accused of or at all and that he has never tampered with the same or at all and that no complaint was ever lodged against him in any of the department in his area of specialization hence the reason he was cleared by all the concerned departments and a clearance certificate issued to that effect. To him, if any disciplinary complained and had earlier been lodged against him, he could not have been cleared, listed for graduation, admitted as an alumnae and subsequently graduated. He therefore contended that impounding his degree certificate is an afterthought, malicious and that the same is unreasonable and without any colour of justification.
6. He lamented that the continuous withdrawal of the certificate has caused him and his family mental torture and an unnecessary anxiety hence this honourable court should intervene and grant him justice and asserted that he duly sat the four papers in question and passed all of them without tampering therewith and that to his knowledge the university graduation procedure is that the board of examiners verifies examination results from various department before classifying graduands for graduation and post the classification and results to the head of the examination/academic registrar via the senate. The fact that the above procedure was followed and no complains of any nature, disciplinary or otherwise laid against him is to him a clear indication that his suspension is malicious and aimed at meting grudges if any and/or subjecting him into unnecessary torture and humiliation. Further the said suspension without being accorded an opportunity to be heard is a clear violation of the rules of natural justice while the withholding of information by the respondent as to why he was suspended is in breach of the constitution as it denies him access to the information contrary to section 34 (sic) of the constitution hence the orders sought ought to be granted.

### **Respondent's Case**

7. In response to the application the Respondent filed a replying affidavit sworn by **Daniel Muindi**, the Respondent's action Registrar (Administration) on 24<sup>th</sup> January, 2013.
8. According to him, on June 29, 2012 the Applicant graduated with a Bachelor of Education (Arts), Second Class Lower Division and on 30<sup>th</sup> July 2012, the he herein applied to the university to be issued his degree certificate. However, his original file could not be traced at the time and therefore his degree certificate was issued by the university on the basis of a temporary file, as the original was being sought. During this period it was realized that his name was on a list from the University's Senate Affairs Section that contained names of students who had pending disciplinary cases relating to tampering with online examination date. This was as a result of a Student Audit Trail carried out which showed irregularities in the Applicant's results. Consequently the Applicant was requested by the Head of the Transcripts and Graduation Section to surrender the degree certificate that had been issued to him, and informed that his academic transcript would not be issued until the disciplinary case was dispensed with.
9. On July 31, 2012 the Applicant, who was now being treated as a student of Kenyatta University was suspended from the University with immediate effect pending appearance before the Students Disciplinary Committee vide a letter sent to the address he had provided to the University on admission in line with the university's disciplinary procedures. He was accordingly, included in

the list of students to appear before the Students Disciplinary Committee that was to take place on November, 29<sup>th</sup> 2012 to answer charges of influencing tampering of his online examination marks to his benefit. However, on November 28, 2012 the university received a letter from the Applicant's Advocate stating that they had lodged the application before this Honourable Court and had advised the Applicant not to attend the disciplinary hearing in consequence of which the matter did not proceed as scheduled.

10. According to the deponent, the effect of the orders sought, if granted would be to award a degree whose authenticity is still in doubt; usurp the process and powers of the Students Disciplinary Committee which are conferred upon it by law; and to undermine the integrity of the examination process at the University.
11. In his view, the Application is frivolous and an abuse Court process on grounds that this is not the proper avenue for the Applicant to ventilate his frustrations as he has not exhausted the normal procedures available to him hence the applicant's Application ought to be dismissed with costs.

### **Applicant's Rejoinder**

12. In a rejoinder the Applicant filed a further affidavit sworn on 6<sup>th</sup> February, 2013.
13. In the said affidavit he admitted that he graduated on 29<sup>th</sup> June, 2012 and a degree Certificate for Bachelors of Education (Arts), Second Class lower Division was issued to him after sitting and passing the Examination required under his then degree programme. He however denied that he was ever informed of the pending disciplinary case and averred that the Respondent has not demonstrated why he was cleared to graduate and subsequently issued with a degree Certificate if indeed he had any disciplinary case as alleged. According to him, the respondent has not demonstrated how he could be allowed to graduate and be issued with a degree Certificate if indeed it is true as alleged that his name was in the Senate affairs section that contained names of students who had pending disciplinary cases relating to tampering with the online examination date.
14. According to him, by the time my suspension was effected he had already graduated and was no longer a student hence the purported appearance before Student Disciplinary Committee is misplaced. He wondered how it was possible for him to access the University Passwords as alleged and whether indeed unauthorized Passwords could in any even open up examination system and/or database. To him, if indeed he interfered with the Examination results as alleged, then nothing could have been easier than the respondent annexing the marked Examination papers indicating his initial score. He contended that the Respondent initiated a student disciplinary case against him after being served with suit papers challenging the Respondent's decision of withholding his degree Certificate and testimonials without offering him an opportunity to be heard. To him therefore, the said student disciplinary proceedings were meant to be prejudicial to the instant application since the same were aimed at pre-empting the judicial review application herein and that the student disciplinary proceedings against him is misplaced, and the same is an afterthought having been cleared, signed an alumni pledge of alliance Certificate and having graduated hence it is not true that he was still a student as alleged.
15. In his view, this application is properly before this Honourable Court and hence the allegation that he never exhausted all avenues is misplaced and misguided since there were no avenues to be considered having legally cleared, graduated and subsequently issued with a degree certificate.

### **Applicant's Submissions**

16. On behalf of the Applicant, it was submitted that the applicant upon completion of his University Education, was cleared, admitted as alumni, graduated and his degree certificate issued albeit briefly before being confiscated without a reasonable cause. By subjecting the applicant to the rigorous process of clearance, created in favour of the applicant a protected interest that he was entitled to a degree certificate which ought not to be taken away at the Respondent's whim. It was submitted that legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of regular practice which the claimant expects to continue. In this case it was submitted that the Respondent's action is amenable to judicial review.
17. According to the applicant the Respondent was duty bound to give reasons for its action since the

- applicant had graduated since there is an implied duty of fairness attached to all administrative acts. According to him, the failure by a public officer or public body to give reasons for a decision may be a proper ground for challenging the decision. In support of this submission the applicant relied on **CC SU vs. The Minister for Civil Service, Doody vs. The Home Secretary**.
18. It was further submitted that the Respondent's action of withholding the applicant's degree certificate after graduation was unreasonable and was based on irrelevant consideration and support was sought from **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation CA [1948]**.

### **Respondent's Submissions**

19. On behalf of the Respondent, it was submitted that the Respondent owes a duty to its members and the society to ensure the authenticity of all degrees conferred by it, as well as to maintain the integrity of its examination process and that under clause 6 of the Kenyatta University Statute, the Senate is empowered to withdraw any degree or other distinction conferred upon a person and revoke the same. It was therefore submitted that once the degree certificate was withdrawn the status of the applicant reverted to that of a student and by requesting the surrender of the degree certificate, the Applicant had been disqualified and was thereby treated as a student.
20. According to the Respondent, it acted fairly and that for the Court to allow the application would amount to usurpation of the Respondent's authority since the Respondent has not been able to conclude the issue as the same is still pending before the Students Disciplinary Committee hence these proceedings are pre-emptive.
21. In support of the submissions the Respondent relied on the aforesaid **Wednesbury** decision, **De Souza vs. Tanga Town Council [1961] EA 377, Chief Constable of North Wales Police vs. Evans [1982] All ER 141, 143**.

### **Determination**

22. I have considered the foregoing.
23. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:
- “Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**
24. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.
25. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at

479 and held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

26. In this case, if I understand the Applicant’s case correctly, the Applicant has not contended that the Respondent acted in excess of its powers by impounding the degree certificate which had been issued to him. To the contrary what the Applicant contends is that the Respondent ought not to have done so without affording him an opportunity of being heard. The question for determination by this Court is therefore whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

27. In this case, it is not in dispute that the Applicant’s degree certificate was recalled or impounded after his graduation and after the same had been issued to him albeit shortly thereafter. Nevertheless, as at the time of the recall of the same the Applicant was to all intents and purposes a graduate from the Respondent University. Whereas the Respondent may well have been justified in withdrawing the said degree certificate, the same could only be withdrawn after the due process of the law had been followed and not arbitrarily.

28. In as much as the Court agrees that the Respondent owes a duty to its members and the public at large to ensure the authenticity of all degrees conferred, it must carry out its mandate in accordance with the law and in particular Article 47 of the Constitution.

29. It is therefore my view that the Respondent’s contention that the University had probable cause to request the Applicant to surrender the degree certificate once the results of the investigations carried out by the University were concluded pending the determination of the disciplinary case amounted to placing the cart before the horse. In my view, it was incumbent upon the Respondent to inform the Applicant of the intention to recall the degree certificate and afford him an opportunity of being heard on the issue before the same was recalled since the Applicant was to all intents and purposes no longer a student of the Respondent having been cleared and graduated therefrom. He could only be deemed to be a student after the determination of the disciplinary proceedings and a finding to the effect that he had not properly graduated from the University. Before that finding and determination, in my view the Applicant was no longer a student.

30. Whereas it is not for this Court to make a finding that the allegations made against the Applicant were unmeritorious, this Court is satisfied that the process of withdrawal of the degree certificate from the Applicant by the Respondent was tainted with procedural irregularity.

31. In **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the

Court held:

**“I would at this stage adopt the observations made in the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best.....; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”**

32.It is therefore my view that the Respondent was in breach of the rules of natural justice in recalling the degree certificate after the same had been issued and after the Applicant had been cleared by the University and had graduated without affording him an opportunity of being heard. The opportunity of being heard ought to have preceded the recall or the impounding of the certificate and not vice versa.

### **Order**

2. In the result I find merit in the Notice of Motion dated 29<sup>th</sup> October, 2012, and I grant an order of mandamus compelling the Respondent to release the ex-parte applicant’s degree certificate No. 20211500842 unlawfully impounded and/or retained by the university authority.

33.As the applicant did not seek an order as to costs, there will be no order as to costs.

**Dated at Nairobi this day 4<sup>th</sup> June, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Amati for the Applicant***

***Mr Mogere for the Respondent***

**Cc Kevin**