REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 266 of 1996

KENYA NATIONAL EXAMINATION COUNCIL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

EX-PARTE

GEOFFREY GATHENJI NJOROGE
N S
J W
R N
G W
A W
C W
B W
S N
J B

(Appeal from the judgment of the High Court of Kenya at Nairobi (Justice Kuloba) dated 28th November 1996

IN HIGH COURT MISC. CIVIL CASE NO. 274 OF 1995)
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JUDGMENT OF THE COURT

The appellant before us is the Kenya National Examinations Council. It is body corporate with perpetual succession and a common seal. It is a creature of Section 3(1) and 3(2) of the Kenya National Examinations Council Act, Chapter 225A of the Laws of Kenya. We shall hereinafter refer to the appellant as "the Council". As a creature of statute, the council can only do that which its creator (the Act) and the rules made thereunder permit it to do. If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by parliament, it would become amenable to the supervisory jurisdiction of the High Court, which, for simplicity is now called "Judicial Review" – see order 53, of the Civil Procedure (Revised) Rules. That jurisdiction of the High Court is created, in a somewhat negative form, by the provisions of section 8 of the Law Reform Act, Chapter 26 Laws of Kenya. Part VI of that Act is headed "MANDAMUS, PROHIBITION AND CERTIORARI", and the provisions of section 8 are as follows:-

The High Court shall not, whether in the exercise of its Civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.
In any case in which the High Court in England is, by virtue of the Provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order."

These provisions appear, on their face, to be complicated and confusing, but in reality they are not. In the old days in England mandamus, prohibition and certiorari used to be called "prerogative writs". They were writs issued in the name of the King, or Queen to control inferior tribunals from exceeding their jurisdiction. But as the progress of separation of powers continued apace in England, judicial power became the preserve of the courts and apparently in 1938 the Parliament of the United Kingdom passed the Administration of Justice (Miscellaneous Provisions) Act, and by section 7 of that Act the High Court could issue orders, as opposed to prerogative writs, of mandamus, prohibition and certiorari. Section 8(1) supra, absolutely forbade out High Court to issue "orders of mandamus, prohibition and certiorari" in situations where the High Court of Justice in England would have a similar power. Until 1992, the heading for Order 53 was

"ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI."

Legal Notice No. 164 of 1992 changed that heading to "APPLICATIONS FOR JUDICIAL REVIEW" and that heading is retained in the current rules vide Legal Notice No. 5 of 1996 which restored the position to the pre-1992 meddlesome amendments which were, understandably, ruled ultra vires the provisions of the Law Reform Act. Why is it necessary for us to go into this historical explanation? one may ask. Our answer to that is that we think the time has now come for this court to set out and explain as far as is within our power, the efficacy and scope of each of the remedies, namely mandamus, prohibition and certiorari. But before we do that, how did the matter come before us?

We have already set out and explained who the appellant is. Among the functions of the Council as set out in section 10 of the Act is-

> 10(a) to conduct such academic, technical and other examinations within Kenya as it may consider desirable in the public interest……..."

That is the function upon which the dispute before us is centred. By section 14 of the Act, the Council has power to make regulations for the conduct of its business, but as far as we are aware it has not made any cash regulations. In performance of its duty set out in section 10(a) of the Act, the council conducts an academic examination called the Kenya Certificate of Primary Education (KCPE). Geoffrey Gathenji Njoroge, the first respondent, is the proprietor of a primary school called [particulars withheld]. The school is manned by a head-teacher and we suppose there are other teachers in the school. N S, J W, A W, C W, B W, S N and J B were all pupils at [particulars withheld] and in 1994 they offered themselves to be examined by the appellant. The examination for which they were to be examined was KCPE and a total of seven subjects were taken. After taking the examination, the council released to all the nine of them the results of five papers and as far as we understood Mr. Imanyara for all the respondents, the result released to them constituted a fair assessment of the candidates' respective performance. But the Council did not release to the candidates the result in respect of two papers, namely, Science and Agriculture and Art, Craft and Music. In respect of those results the Council, by its letter dated the 31st December, 1994 informed the Head-teacher of [particulars withheld] through the District Education Officer, Kiambu follows:-

> "RE: THE 1994 KCPE EXAMINATION RESULTS.
>
> "KCPE Examination results for the candidates whose index numbers are listed below have been cancelled in the subjects indicated because they have been involved in examination irregularities. Please bring this to the attention of the candidates affected……..".

The first respondent Mr. Njoroge who describes himself as "Director" of [particulars withheld] was not amused by the Council's letter. So on the 14th January, 1995, he wrote a long letter to the Council and in that letter, he gave the Council an ultimatum of 24 hours to do either of two things, namely

either

> (i) release officially the results of Science and Agriculture and Art, Craft and Music for the school;
>
> or
>
> (ii) disclose to the school in writing the "examination irregularities" the candidates were alleged to have committed.

Apparently the 24-hour ultimatum was not complied with and on the 17th January, 1995 Mr. Njoroge wrote another hand-written letter to the Council asking to be given a reply to his ultimatum. On the 30th January, 1995, the Council Secretary, one A. Yussufu, wrote a long letter to the Headmistress of [particulars withheld] and in that letter he said, inter alia:

> "……As per the Council letter dated 31st December, 1994, the candidates were involved in examination irregularities in the subjects affected. The Council treated all similar cases in the same way and will not change its policies and subsequent decision on this matter.

I wish to draw your attention to Section 10 paragraph 2 of the Kenya National Examination Council's KCPE Regulations which states that:

> "If the Council is satisfied that any irregularity, misconduct or dishonesty whatever in connection with the examination have been widespread at any centre or that the circumstances in which the examination is held at any centre are unsatisfactory, the council may at its sole discretion cancel the entire examination at the centre, or any one or more papers or the results thereof, in relation to all the candidates at the centre."

The Council, therefore, has no further obligation to give detailed accounts of the nature of irregularities committed as requested. Consequently as an educator and head of an institution you were expected to communicate to the affected candidates the decision of the Council and plan to avoid cheating taking place in your school in future examinations……."

With this letter, the respondents thought they had reached the end of the road and so on the 16th March, 1995, led by Mr. Imanyara, they moved to the High Court. They did so under the provisions of Order 53 of the Civil Procedure (Revised) Rules and under the Law Reform Act. What prayers did they make to the High Court? We think we ought to quote those prayers verbatim. They asked for orders THAT: -

> An order of prohibition do issue directed to the Kenya National Examinations Council prohibiting it, its officers, agents and/or employees or otherwise howsoever from further withholding the Kenya Certificate of Primary Education 1994 results of the

following candidates in relation to the following subjects, namely Science & Agriculture and Art, Craft and Music……

(b) An order of mandamus do issue directing the Kenya National Examinations Council to forthwith release the 1994 KCPE Examination results of…….[the candidates]"

We might just as well say at this stage that these two orders really mean one and the same thing. If an order of prohibition is granted in the terms set out in prayer one, then the Council would be bound to release the results and there would be no further need for an order of mandamus as prayed in prayer (b) of the motion. Be that as it may, the motion was supported by a statement which was in turn verified by the affidavit of Mr. Njoroge. During the hearing of the motion before Kuloba, J. whose decision is the subject of the appeal before us, Mr. Njoroge gave viva voce evidence and it is clear to us, and Mr. Imanyara conceded this, that the matters deponed to in Mr. Njoroge's affidavit were all hearsay. He is the proprietor or "Director", as he prefers to call himself, of [particulars withheld], but he admitted in his evidence before the trial Judge that at no stage was he ever in the examination room where the matters he swore to are alleged to have taken place. We got no satisfactory explanation as to why the head-teacher of the school could not swear a supporting affidavit.

Once again, be that as it may, what was the dispute before the trial judge? Mr. Njoroge and the nine girl-candidates were demanding that the Council must release the results of the two papers to them. The Council position was that it had cancelled the results and there was nothing it could release to the respondents. The learned Judge, in an uncharacteristically short judgment, found for the respondents and in doing so, delivered himself as follows:-

"The Council is under a legal duty to act fairly. The fairness must be self evident. It cannot be evident unless any adverse acts leading to the conclusion and final decision and action are disclosed, stated and communication (sic). The relevant particular circumstances leading to the decision must be shown.

An examinations body must state its reasons for doing what it did. The Court, to uphold the Council, must be satisfied as to an unbiased assessment. It can only do so if nothing is shrouded in secrecy. The course of events leading to the withholding the results must be sufficiently set out, so that from looking at them the court is clear in its mind that the Council had not taken into account anything which it ought not to have considered and that it confined itself to relevant matters only, and that it took into account every relevant matter which it ought to have considered.

A court shall not permit the Kenya National Examinations Council or any other public body or official to be an enclave of undue secretiveness and arbitrariness. The acts which amounted to engaging in examinations irregularities must be stated and proved. The Council wishes us never to lift its veil of secrecy and that Kenyans must take only what the Council may deem fit to disclose. We cannot place the lives of our young children at the hazards of anybody's whim and unchecked discretion.
The Council has erred. The reliefs sought are granted. The Council shall release the results in the relevant in the relevant subjects; and if the Council is unable to do so and comply with this order, there will be an inquiry as to damages on arguments if not agreed. I so order."

The Council was aggrievated by these orders and has appealed to us. Mr Ngatia who led for the Council argued his appeal on two fronts. First he attacked the last order regarding inquiry as to damages. We earlier on set out the two prayers which the respondents had made before the trial Court. There was none for holding an inquiry as to damages. We do not know why the learned Judge thought his orders might not be enforceable. Mr. Imanyara for the respondents did not himself support the alternative order regarding inquiry as to damages. For the benefit of the learned Judge, we will repeat what this court said in the case of PROVINCIAL INSURANCE COMPANY OF EAST AFRICA LTD V MORDEKAI MWANGA NANDWA, Civil Appeal No. 179 of 1995 (unreported) which also arose from the judgment of the same Judge. There the court said:-

"In the present case the question of nullity was neither raised nor canvassed by any of the parties. Nor was it amongst he agreed issues. With respect, it was not open to the learned judge in the circumstances of this case to deal with this issue."

In the present appeal, the issue of inquiry as to damages was never pleaded and as far as we can see none of the parties raised it before the learned Judge. Mr. Imanyara is quite right in not seeking to take an advantage of an order which he at no stage asked the Judge to make. It is obvious that part of the judgment cannot be allowed to stand.
Mr. Ngatia's other ground of objection to the judgment of the High Court was that in the circumstances of this case, the orders sought namely, prohibition and mandamus were not available to the respondents. The Council had told the respondents that their results in two papers could not be released to them because the results had been cancelled. As far as we ourselves can gather from the record which was before the learned Judge and which is now before us the respondents did not allege that the Council had not cancelled the results. All the respondents wanted was that the results be released to them, despite the Council's assertion that it could not do so because it had cancelled the results. The learned Judge did not himself find that the Council's assertion that it (Council) had cancelled the results was a lie. On the material before him the learned Judge could not possibly come to the conclusion that the Council was lying on that point. What then is to "Cancel"? The Concise Oxford Dictionary of Current English, were to declare in advance that it was going to cancel particular results because the candidates involved were not supporters of the government of the day or some such like irrelevant reason, there cannot be any doubt but that the High Court, on application by the candidates so threatened, would issue an order prohibiting the Council from acting either in excess of its jurisdiction or contrary to the laws of the land. In such an event, it would be idle for the Council to contend that it has its own statute and the High Court ought not to intervene; the High Court would be entitled, indeed duty-bound, to intervene. That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. That was why Mr. Stanley Munga Githunguri was able to get an order prohibiting the Chief Magistrate of Nairobi from trying him when such a trial would amount to an abuse of the process of the Chief Magistrate's court – See STANLEY MUNGA GITHUNGURI V REPUBLIC, Criminal Application No. 271 of 1985 (unreported). But if Mr. Githunguri had allowed the Chief Magistrate to try him and a conviction had been recorded, an order 7th Edition defines the word "cancel" as

"obliterate, cross-out; annul, make void, abolish, countermand, revoke order or arrangement for……."

The Council told the respondents that it had obliterated, crossed-out, annulled, made void, abolished etc……" their results, yet despite that averment, which as we have said was never challenged, the respondents were still insisting that the results be released to them. Could the orders sought namely prohibition and mandamus, deal with that situation? That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.
The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-
"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
At paragraph 90 headed "the mandate" it is stated:

> "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. We can do no better than give examples. The Liquor Licensing Act, Chapter 121 Laws of Kenya, by section 4(1) creates a licensing court for every licensing area and provides that the licensing court, chaired by the District Commissioner of each area, is to consider and determine applications for and the cancellation of liquor licences. Section 8 of the Act provides the manner and procedure to be followed by those who desire to acquire liquor licences. The duty imposed on the licensing court is "to consider and determine applications and the cancellation of licences"-section 4(1)
Now, if a party applies for a licence under section 8 and the licensing court simply refuses or neglects to consider and determine the application such a party would be entitled to come and ask the High Court for a mandamus, and if the High Court is satisfied that the licensing court has simply refused or neglected to consider and determine the "application" the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling, through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the Liquor Licensing Act, and the public duty imposed by that section is the consideration and determination of the application for a licence. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence. In fact the Act provides for appeals to the High Court by persons whose licences the licensing court has refused to renew or whose licences have been cancelled.

Another example is to be found in the Kenya National Examinations Council Act itself. Section 10(1) of that Act provides that:

> "The Council shall have, for the furtherance of its objects and purposes, the following powers and duties.
> (a) to conduct such academic, technical and other examinations as it may consider desirable in the public interest;
> (b) to award certificates or diplomas to successful candidates in such examination;
> (c) ……;
> (d) ……;
> (e) ……;

Paragraph (a) above imposes on the Council a general duty to conduct academic, technical and other examinations as it may consider desirable.
It is public knowledge that the council conducts academic examination known as Kenya Certificate of Primary Education, which is the subject of the dispute before us, and the Kenya Certificate of Secondary Education. It is also public knowledge that these examinations are conducted towards the end of each year. If the Council were to refuse to conduct any of these examinations and there were candidates ready and desiring to take the examinations, we have no doubt the High Court would be perfectly entitled to compel it by mandamus to conduct the examinations as its failure to do so would constitute a failure to perform its statutory duty under section 10(a) of the Act. But the section does not specify when or how often the examinations are to be held in any one year and a candidate who is ready to take his examinations at a time when the Council is not conducting any would not be entitled to an order compelling the Council to conduct an examination for him alone. The times and frequency of the examinations are left to the discretion of the Council and it cannot be forced by mandamus to hold an examination at any particular time in the year.

Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results

as the case may be. The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). But the High Court would not be entitled to order the Council, when carrying our the process of marking the examination papers, to award any particular mark to any particular candidate. That duty or function lies wholly within the province of the Council and no court has any right to interfere. To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.
How do these principles which we have endeavoured to set out apply to this appeal? We have already stated that the Council's position in the matter was that it had cancelled the results of the respondents in the two papers and that having done so, it had no results which it could release to the respondents. We have already set out the Council's letter of 31st December, 1994 to the head teacher of [particulars withheld] and in that letter the Council informed the institution that the results in respect of the two papers had been cancelled and that the affected candidates should be so informed. In the said letter the reason given for the cancellation of the results was "examination irregularities". Then there was the Council's more detailed letter of 30th January, 1995, and which was written in response to Mr. Njoroge's letters of 14th and 17th January, 1995. In that letter, the Council, while reiterating that it had cancelled the results, advised the head-mistress that she should

"plan to avoid cheating taking place in your school in future examinations."

This letter could leave no doubt in the mind of any reasonable person that the "examination irregularities" which led to the cancellation of the results was in fact cheating in the examinations. Again, as we said earlier, the respondents did not allege that the Council was lying in asserting that it had cancelled the disputed results. In those circumstances, one would have though that if the respondents were contending that the cancellation was wrong because it was done contrary to the rules of natural justice, the obvious thing for them to do was first to apply to the High Court for an order of certiorari to quash the cancellation and thereafter for an order of mandamus to compel the release of results. But instead, the respondents simply asked for an order of prohibition and an order of prohibition and an order of mandamus to compel the Council to release the cancelled results. The learned Judge, obviously without appreciating what he was asked to do, granted an order that the results be released while the unchallenged evidence before him was that the results had been cancelled. It is no wonder the learned Judge himself thought the Council might be unable to comply with his order for the release of the results and added the unasked for order for inquiry as to damages. But even assuming it was possible for the Council to release the cancelled results, what would be the use of such results to the respondents? Mr Imanyara told us that once the cancelled results are released to them, it would be for the respondents to decide their next course of action, and that they might once again come to the High Court for an order of certiorari. The obvious answer to that kind of contention is first that courts do not, or ought not to act in vain by making futile orders and secondly that it has always been a policy of the law to prevent a multiplicity of suits on one issue.

We recognise that cancelling results of an examination is not the same thing as failing or passing an examination. A candidate may well have passed in the cancelled results and it is obvious to us and to anyone else that in cancelling a result, considerations other than merit of the performance of the candidate must inevitably come in. As Mr. Ngatia for the Council contended, rightly in our view, had the respondents sought an order of certiorari to quash the cancellation, the Council might well have been required to justify to the court the reason(s) why it thought the respondents had cheated. Of course, we know that and even Mr. Imanyara did not challenge this, that the marking of examinations must retain confidential, as opposed to being secretive. In this respect, no amount of liberalization, transparency or accountability would ever convince the courts that the marking of examinations should be conducted at the Moi International Sports Centre, Kasarani, so that the candidates and anybody else who feels inclined to do so can attend and see that the marking is fair and open. In life, there are certain things which must be taken on trust. When an examiner decides that a particular candidate has failed there cannot be any doubt but that the examiner is deciding on a matter touching on the very future of the candidate. And yet, no one in his proper senses would contend that before such a candidate is declared to have failed, the examiner ought to give him hearing. We however, suspect that when it comes to dealing with question of whether or not the Council is justified in cancelling particular results, different considerations may well apply. That was not the question which Mr. Justice Kuloba was asked to deal with in this matter and his condemnation of the Council as an enclave secretiveness and arbitrariness was wholly unjustified by the material before him. The question of whether the Council is in law bound to hear a candidate before it cancels the result must remain for considerations on another occasion, though if we were forced to decide it in this matter, we would ourselves be inclined to take the view that it might place an unnecessarily heavy burden on the shoulders of the Council to insist on a hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to marking of examinations. But because of the mode of pleadings adopted by the respondents, these issues were not directly raised before us and they must await a conclusive determination on another occasion. Various authorities were cited to us during the arguments, but as this judgement is already too long, we shall deal with only two cited to us by Mr Imanyara. These were DAVID OLOO ONYANGO V ATTORNEY GENERAL, Civil Appeal No. 152 of 1986 (unreported) and DANIEL NYONGESA & OTHERS V EGERTON UNIVERSITY COLLEGE, Civil Appeal No. 90 of 1989. There is no doubt in our mind that these are important decisions of this court and they correctly state the position that obtains in our law.

In ONYANGO's case the Commissioner of Prisons purposed to deprive him of remission to which he was entitled under the Prisons Act, Chapter 90 Laws of Kenya. Before purporting to deprive Onyango of his statutorily earned remission, the Commissioner of Prisons did not hear him. That was such an obvious violation of the rules of natural justice that we do not see how else any one could justify it.

In NYONGESA's case, the university college had allowed the students to sit for examinations and the university subsequently declined to release the results because the affected students had been expelled from the institution. Once again it is obvious that the reason given for withholding the results was totally irrelevant to the merits of the results themselves, unless the college could prove that the expulsion was due to cheating in the examinations. Again in latter case, the College did not contend that it had cancelled the results. It simply refused to release the results because the students had been sent down. In those circumstances, the court correctly issued an order of mandamus to compel the college to release the results. In the present appeal if we compare the situation with that which arose in ONYANGO's case, can it be said that depriving a prisoner of remission earned under an Act of Parliament, and without hearing that prisoner is the same thing as cancelling the results of an examination paper? We do not know. We have already gone into the question of whether a candidate ought to be heard at all before cancellation. We do not wish to say more on the matter. It must be clear from our analysis of the facts and the law that we are of the clear view that in the particular circumstances of this case he remedies of prohibition and mandamus were not in the appropriate ones to

grant. They could not quash the Council's decision already made cancelling the results. It is futile for the respondents to insist that they must get cancelled results. Such results would be of no use to them or anyone else. In any case, the Council having cancelled the results, there were no results which the Council could be prohibited from withholding or which it could be compelled by mandamus to release. Accordingly, the appeal must succeed. We allow the same, set aside all the orders made by the learned Judge and substitute them with an order dismissing with costs, the notice of motion dated the 18th April, 1995 and lodged in the High Court on the same day. We also award to the Council the costs of the appeal. The costs in the High Court and in this Court shall be paid only by the first respondent, Mr. Geoffrey Gathenji Njoroge. It is clear to us he was the chief actor in this litigation. Those shall be our orders.

Dated and delivered at Nairobi this 21st day of March, 1997.

R. S. C. OMOLO
…….
JUDGE OF APPEAL

P. K. TUNOI
……..
JUDGE OF APPEAL

A.B. SHAH
……..
JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR