Kenya National Examination Council v Republic; Teachers Service Commission (Interested Party) (Civil Appeal E867 of 2022) [2024] KECA 1180 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1180 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E867 OF 2022

SG KAIRU, JW LESSIT & GWN MACHARIA, JJA

SEPTEMBER 20, 2024

BETWEEN

KENYA NATIONAL EXAMINATION COUNCIL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

AND

TEACHERS SERVICE COMMISSION ..... INTERESTED PARTY

(Being an appeal against the ruling of the High Court of Kenya at Nairobi (Nyamweya, J.) dated 12th July 2019 in Misc. Application No. 13 of 2019)

JUDGMENT

1. This appeal arises from the decision of P. Nyamweya, J. (as she then was), dated and delivered on 12th July 2019 in the ex-parte applicants' Notice of Motion dated 21st January 2019, filed before the High Court at Nairobi in JR Misc. Application No. 13 of 2019.

2. The ex-parte applicants sought in the interim: orders of certiorari to quash the decision by the Kenya National Examination Council (KNEC) (the appellant) in its letter dated 15th January 2019, purporting to cancel the 2018 Kenya Certificate of Secondary Education Examination (KCSE) results for several candidates in different subjects at Daadab Secondary, Tarbaj Secondary, Wagalla Memorial, Griftu Secondary, Yussuf Haji Girls Secondary, Wajir Bor Secondary, Mansa Boys Secondary, Diif Secondary, Biyamathow Mixed Secondary, Senior Chief Olge Girls Secondary, Batwaqo Mixed Day Secondary, Hulugho Boys Secondary, Sunkuri Secondary and Kutulo Girls Secondary School (hereinafter 'Secondary Schools'); an order of mandamus compelling the appellant to conduct fresh, open, fair, transparent and inclusive investigations and hearings into the allegations of irregularities in the Secondary Schools; an order of prohibition directed to the appellant and the Teachers Service Commission (interested party) from taking any further decision on the basis of the decision contained

in the letters dated 15th January 2019 against the Principals of the Secondary Schools; and any other relief the court deemed fit to grant.

3. The main grounds of the application were contained in the ex-parte applicants' statutory statement dated 21st January 2019 and the verifying affidavit dated and sworn on even date by the 1st ex-parte applicant on behalf of the ex-parte applicants. In a nutshell, the ex-parte applicants were aggrieved by the failure of the appellant to involve them and other stakeholders prior to making the decision to cancel the 2018 KCSE results of the various Secondary Schools. It was the legitimate expectations of the ex-parte applicants that they would have been granted an opportunity to present their case before the appellant reached its decision.

4. The appellant opposed the application by way of a replying affidavit sworn and dated on 1st February 2019 by Andrew Francis Otieno, the appellant's Deputy Director of Research and Quality Assurance Division. It was deposed that under rule 15 of the Kenya National Examinations Council (Handling of Examination Irregularities) Rules, 2015, the appellant has the powers to withhold results pending investigations; that once the appellant was satisfied that there were examination irregularities, it has the powers to withdraw or cancel results; and that it is not obliged to interview teachers, candidates or parents when conducting its investigations and making its final decision.

5. Further to its replying affidavit, the appellant filed a Notice of Preliminary Objection dated 8th February 2019 challenging the High Court's jurisdiction to hear and determine the Judicial Review application before it on grounds that it violates section 9 of the Fair Administrative Action Act, rules 26 and 27 of the Kenya National Examinations Council (Marking of Examination, Release of Results and Certification) Rules, 2015, rule 15 of the Kenya National Examinations Council (Handling of Examination Irregularities) Rules, 2015 and Part (IV) (A) of the Kenya National Examinations Council Act.

6. In her ruling dated 12th July 2019, P. Nyamweya, J. (as she then was), dismissed the appellant's preliminary objection by making a finding that there are exceptional circumstances under which courts may find that the doctrine of exhaustion of alternative remedies would not serve the purpose and values enshrined in the Constitution or other written law. It was her view that, a party can approach the court as the first port of call in circumstances where other dispute resolution mechanism established under an Act is not competent to resolve the issues raised in the petition, or where it is (dispute resolution mechanism) not available or accessible to the parties for various reasons.

7. The learned Judge went on to further hold that the impugned process undertaken by the appellant does not address the merits of the decision to cancel the examination results; that the jurisdiction of the National Examinations Appeals Tribunal is limited to reviewing decisions made by the appellant's cancellation of examination results of a candidate; that the Tribunal could not effectively remedy the ex-parte applicants; that the issue before the court does not fall within the Tribunal's jurisdiction; and that the exception set out in section 9 (4) of the Fair Administrative Action Act applied.

8. It was that decision that the appellant is aggrieved with and seeks to overturn. The appellant invoked this Court's jurisdiction by lodging a Notice of Appeal dated 23rd July 2019 and a Memorandum of Appeal dated 14th December 2023 by which it raised 3 grounds of appeal. The grounds therein basically challenge the findings of the High Court: that the National Examinations Appeals Tribunal does not have jurisdiction to determine the dispute; and that the circumstances of the application before the High Court was exceptional so as to permit departure from the procedure prescribed under sections 40 (H) and (J) of the Kenya National Examinations Council Act.

9. During the hearing of this appeal on 9th April 2024, learned counsel Mr. Obura appeared for the appellant while learned counsel Mr. Nura Hassan appeared for the ex-parte applicants. The appellant filed written submissions dated 4th April 2024 while those of the ex-parte applicants are dated 8th April 2024. Both counsel adopted their respective written submissions and did not wish to highlight them. We have accordingly considered those submissions and we shall therefore not rehash them save to refer to them where and when necessary in our findings. We have equally considered the record of appeal and the applicable law.

10. As a first appellate court, an appeal is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, re-evaluate it and draw its own conclusions. See Gitobu Imanyara & 2 others vs. Attorney General (2016) eKLR.

11. We have deduced that the issues arising for determination are: firstly, whether the High Court had jurisdiction to determine the ex-parte applicants' grievances. If the answer is in the negative, whether the dispute ought to have been canvassed before the National Examinations Appeals Tribunal; and secondly, whether the petition ought to have been struck out.

12. The crux of this appeal is challenging the High Court's decision to arrogate itself jurisdiction over the ex-parte applicants' application. It is premised on the decision the court made arising from the preliminary objection raised by the appellant challenging the High Court's jurisdiction to hear and determine the judicial review application before it on grounds that it violates section 9 of the Fair Administrative Action Act, rules 26 and 27 of the Kenya National Examinations Council (Marking of Examination, Release of Results and Certification) Rules, 2015, rule 15 of the Kenya National Examinations Council (Handling of Examination Irregularities) Rules, 2015 and Part (IV) (A) of the Kenya National Examinations Council Act.

13. The law on what constitutes a preliminary objection was enunciated in the case of Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Ltd (1969) EA 696 as one which raises a pure point of law, which arises by clear implication on the assumption that all facts are pleaded correctly. An example of what would constitute a preliminary objection is the issue of jurisdiction.

14. Jurisdiction is basically the extent of the power to make decisions. Jurisdiction is the lifeline of a court, tribunal or any competent dispute resolution fora. Jurisdiction is everything and without it, a court is obliged to down its tools and cease from acting for any decision arising therefrom amounts to a nullity. This principle was well enunciated in the case of The Owners of the Motor Vessel "Lilian S" vs. Caltex (Kenya) Limited [1989] eKLR as follows:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

15. The ex-parte applicants' application sought writs of judicial review pending the determination of the main petition. The dispute as a whole before the High Court was hinged on the decision of the appellant to cancel examination results of students in the various Secondary Schools in the 2018 KCSE Examination. The appellant submitted that it has the mandate to investigate all manner of examination malpractices and proceed to cancel and/or nullify the results under section 45 of the

Kenya National Examinations Act. It is indeed not disputed that the examination results of the 2018 KCSE Examination of the Secondary Schools were cancelled.

16. The Kenya National Examinations Act establishes the National Examination Appeals Tribunal under section 40B. The jurisdiction of the Examination Appeals Tribunal is specified under section 40H to be: consider appeals made against the decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council. Rule 15 of The Kenya National Examinations Council (Handling of Examination Results Irregularities) Rules, 2015 explicitly provides on the procedure an aggrieved candidate whose examination results have been cancelled should use to address his/her grievances as follows:

    1. A candidate whose examination results have been cancelled may apply to the Council within thirty days after release of the results for a review of the Council's decision.

    2. An application for a review of cancelled results shall be made in writing and shall indicate clearly the grounds for requesting the review.

    3. The Council shall upon receiving an application, consider the application and respond in writing, to the applicant within thirty days.

    4. Whereas the Council declines an application for review, the Council shall specify the reasons for declining the application for review of cancelled results.

17. Upon dissatisfaction by the decision of the Examination Appeals Tribunal, a candidate still has an opportunity to appeal against the findings to the High Court under section 40 (0) of The Kenya National Examinations Act. Therefore, the first port of call for an aggrieved candidate whose national examination result(s) have been withheld, cancelled and/or nullified is before the Examinations Appeals Tribunal. This Court in Geoffrey Muthinja & another vs. Samuel Muguna Henry & 1756 others (2015) eKLR, while expressing itself on the doctrine of exhaustion, stated thus:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call...exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

18. Similarly, in Speaker of the National Assembly vs. James Njenga Karume (1992) eKLR, this Court held that:

> " ... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions. "

19. In other words, where there is appropriate legislative- mandated institutions and mechanisms that should be followed by an aggrieved party before approaching the seat of justice, courts should shy away from taking reins of the dispute, and instead exercise judicial restraint.

20. Whereas we appreciate that section 9(4) of the Fair Administrative Action Act provides that the High Court or any subordinate court, on an application by a party, may issue exemptions from the obligation to exhaust any remedy, the same should be done only in exceptional circumstances.

21. In Republic vs. National Environment Management Authority Ex-parte Sound Equipment Ltd (2011) eKLR, this Court addressing itself on the circumstances where the exception may be granted, rendered itself as follows:

> " ..it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."

22. In our view, rule 15 of The Kenya National Examinations Council (Handling of Examination Results Irregularities) Rules, 2015 already provides an appropriate and suitable statutory procedure for initiating redress for candidates aggrieved by the decision to cancel and/or nullify their national examination results. The ex-parte applicants did not demonstrate that the appeal process provided for under rule 15 (supra) was insufficient to address their grievances.

23. In the premises, we find that this appeal is for allowing. The ruling and order emanating from the High Court dated and delivered on 12th July 2019 in Misc. Application No. 13 of 2019 is hereby set aside. We substitute there for an order upholding the Preliminary Objection dated 8th February 2019. The consequence thereof is that the petition dated 21st January 2019 filed by the ex-parte applicants is hereby struck out.

24. On the issue of costs, it is a principle that costs follow the event, but again, it is at the discretion of the court. In this instance, we note that the persons to bear the consequences would be the parents of the candidates who were affected by the cancellation of 2018 KCSE results. They were just doing what any concerned parent would do to safeguard the best interest of their children. We do not think that an order for costs would be appropriate in the circumstances.

25. Our final orders are that we find that the appeal dated 14th December 2022 is merited. The same is allowed as prayed with no orders as to costs.

26. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.