IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 13A OF 2013

BETWEEN

THE CHAIRMAN (BOG)

SIGALAGALA POLYTECHNIC..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

EXPARTE

NELSON OGWERO …..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 29th May, 2013

in

JUDICIAL REVIEW APPLICATION NO. 6 OF 2013)

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JUDGMENT OF MARAGA, JA

1. In January 2012, the respondent was admitted to Sigalagala Polytechnic (the Polytechnic) to pursue a certificate course in ICT Systems Support and in due course, he was elected the Chairman of the Students Council. As he came from a poor family, a sponsor, one Christopher, shouldered the respondent's financial obligations. By his letter dated 3rd October 2012, the respondent intimated to the Polytechnic that due to financial constraints, he was unable to raise the registration and examination fees for the City and Guilds examination that was to be offered in November/December 2012 (the examination) as part fulfillment of the course he was taking. He therefore requested for deferment of that examination to June/July 2013. In the same letter, he applied to be registered for another course in the institution. He said he received no response to that letter and he did not sit for the examination.

2. It would appear that in December 2012 when the students had taken the December vacation, there was a change of guard at the Polytechnic. Joseph Sawe, the Principal of the Polytechnic, was replaced by Madam Bernadette Canute. On behalf of the students of the Polytechnic, the respondent wrote a letter dated 6th December 2012 to the Director of Technical Education protesting the transfer to the Polytechnic of Madam Bernadette Canute on the ground that as an administrator, that lady was a complete failure. The respondent alleged that she had completely grounded the institutions like Kaimosi and Karen Colleges that she had previously headed. From the Khayega Ward Representative's letter of 5th December 2013, it would appear the community around the Polytechnic shared in that view.

3. On 10th January 2013, the respondent mobilized his fellow students to stage a demonstration to protest the transfer of Madam Bernadette Canute to the Polytechnic. The following day, the Executive Board of Governors of the Polytechnic sat and resolved to expel the respondent on the grounds that having refused to sit for the examination and incited the Polytechnic students to stage an illegal demonstration, the respondent had ceased to be a student of the Polytechnic.

4. Upon receipt of the expulsion letter, the respondent sought and obtained leave of the High Court at Kakamega to apply for the judicial review orders of certiorari to quash the appellant's said decision expelling him and prohibition to prohibit the appellant from expelling him. His main complaint in that application was that the Polytechnic condemned unheard.

5. In response to that application, Madam Bernadette Canute swore a replying affidavit in which she contended that the respondent had, contrary to his claim, actually registered for the City and Guilds examination in November/December 2012 but had deliberately refused to take it. In accordance with the Polytechnic's policy that no student is allowed to proceed to another course unless he has successfully completed the one he has enrolled for, the respondent, as it were, had expelled himself from the Polytechnic by failing to sit the said examination. She also averred that the respondent caused the students to stage an illegal demonstration on 10thJanuary, 2013 hence his expulsion from the Polytechnic the following day, 11th January, 2013.

6. After hearing that application, Chitembwe J. granted the order of certiorari, quashed the Polytechnic's decision expelling the respondent and directed the Polytechnic to readmit him and even allow him to enroll for the new course he wished to pursue. This judgment is on the appeal against that decision.

7. In its memorandum of appeal, the appellant raised three salient issues that the High Court allegedly erred in: (1) finding that the respondent deferred his City and Guilds examination of November/December 2012; (2) granting the order of certiorari grounded on a fatally defective application for leave to commence judicial review proceedings; and (3) finding that contrary to the rules of natural justice, the respondent had been denied a hearing before the decision to expel him was made.

8. At the hearing before us, although served through his advocates, neither the respondent nor his representative appeared. We therefore allowed counsel for the appellant to argue the appeal ex-parte.

9. In his submissions, Mr. Ojienda, learned counsel for the appellant, reiterated the three above-mentioned points raised in his client's memorandum of appeal. In respect of the defective application, he argued that as no statement was attached to the application for leave as required by **Order 53 Rule 2(1)** of the **Civil Procedure Rules**, the entire judicial review proceedings were fatally defective and the order of certiorari consequent thereupon was a nullity. On the second ground, he argued that the examination registration list shows that the respondent had actually enrolled and paid the fees for the examination but had deliberately refused to take it. Counsel, in effect, submitted that by that refusal, the respondent expelled himself from the Polytechnic and the latter's letter of 11th January 2013 only formalized that expulsion. To make matters worse, on 10th January 2013 the respondent illegally incited the students to demonstrate against the transfer to the Polytechnic of the new principal.

10. Finally counsel referred us to Minute No. 020/13 of the Polytechnic's Executive Board of

Governors' meeting of 11th January 2013 which stated that the respondent was given an opportunity to explain why he did not sit for the said exam but he remained mum. Asked why the Minutes did not show the respondent as one of the attendees of that Executive Board of Governors' meeting, counsel said that usually the minutes of the Polytechnic Board of Governors' meetings do not list the names of students called to show cause why they should not be disciplined.

11. I have had the advantage of reading the judgment of the Honourable Mr. Justice Azangalala as well as the concurring opinion of the Honourable Mr. Justice Kantai, and I have the misfortune of dissenting.

12. I concede that **Order 53 Rule 1(2)** of the **Civil Procedure Rules** requires an application for leave to commence judicial review proceedings to *"be accompanied by a statement setting out the name and the description of the applicant, the relief sought, and the grounds on which it is sought"* but no statement was, admittedly annexed to the respondent's application for leave in this case. Instead, the details required to be stated in the statement were embodied in the affidavit in support of the application for leave. The requisite statement was subsequently annexed to the Notice of Motion filed pursuant to the leave granted.

13. In my humble view, the details required to be stated in the statement having been embodied in the affidavit in support of the application for leave, the omission to annex the statement to the application for leave was a technicality that **Article 159(2) (d)** of the Constitution speaks to. Moreover, that omission, in my view, did not occasion any prejudice to the appellant. In the circumstances, I find that the application for leave was not fatally defective.

14. On the merits of the application, it is manifest from the record that the students of the Polytechnic held a demonstration on 10th January 2012 and the very following day, the Polytechnic's Executive Board of Governors met and immediately expelled the respondent. Even if I were to accept Mr. Ojienda's assertion from the bar that the respondent was called to the Executive Board of Governors' meeting and asked to explain why he did not sit for the examination but failed, which I do not, the respondent was not given enough time to prepare his defence. In the circumstances, I concur with the learned Judge that, contrary to the rules of natural justice, the respondent was condemned unheard. The learned Judge was therefore right in quashing the appellant's decision expelling him.

15. Madam Bernadette Canute did not annex to her replying affidavit any document to show that the respondent had indeed registered and paid the examination fees for the examination. The Polytecnic did not respond to the respondent's application seeking to be allowed to defer the examination. Mr. Ojienda's contention that the Polytechnic did not receive that respondent's application is incorrect as paragraph 2 of the Polytechnic's said letter of 11th January 2013 expelling the respondent, makes reference to the contents of that application.

16. With no proof placed before the record that the respondent indeed registered and paid the examination fees for the said examination, I concur with the learned Judge that the appellant cannot now be heard to claim that it rejected the respondent's application for deferment of that examination because he had registered for it.

17. In the circumstances, I would myself dismiss this appeal and uphold the learned Judge's decision quashing the Polytechnic's decision expelling the respondent. I would, however, set aside the learned Judge's order directing the Polytechnic to enroll the respondent for another course. In accordance with the Polytechnic's policy, I find and hold that the respondent should first successfully complete the course he had enrolled for before he is enrolled for another one.

18. As the majority decision is that the application for leave to commence judicial review proceedings was fatally defective for failure to accompany it with a statement as required by **Order 53 Rule 1(2)** of the **Civil Procedure Rules**, the order of the court shall be as stated by the Hon. Justice Azangalala which is that this appeal is hereby allowed with costs

DATED and delivered at Kisumu this 5th day of February, 2015

D.K. MARAGA

….....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR

JUDGMENT OF F. AZANGALALA, JA

This appeal is brought by the **Chairman (BOG) Sigalagala Polytechnic** *(hereinafter "the appellant").* The respondent, **Nelson Ogwero** *(hereinafter "the respondent"),* had been a student at the polytechnic. The appeal arises this way. On 11th January, 2013 the appellant wrote to the respondent informing him that he was no longer a student at the polytechnic and demanded that he immediately leaves the institution. Two primary reasons were given for the appellant's action. It was first alleged, in the letter, that the respondent had deliberately refused to sit for an examination contrary to the academic policy of the institution and secondly that the respondent had, on 10th January, 2013 mobilized students to demonstrate and interfere with the institution's programs.

The respondent was aggrieved and moved to the High Court under Order 53 Rules 1(1) (2) and 4 of the Civil Procedure Rules. Relying on the provisions of that Order, he lodged a chamber summons, ex-parte, seeking leave to apply for judicial review by way of orders of certiorari and prohibition directed to the appellant and three interested parties, namely the Principal of the Institute and her deputy, the Dean of Students, the Registrar and the Head of Department. The respondent mainly prayed as follows:-

> **"(b) The appellant be granted leave to commence judicial review proceedings specifically leave to apply for orders of certiorari and prohibition against the Respondent and the Interested Parties herein to remove into this court and quash proceedings and resolutions passed by the Executive Board of Governors meeting passed on 11th January, 2013 in respect of the ex-parte Applicant's admission at the polytechnic and including the expulsion therefrom.**
>
> **(c) That the grant of leave aforesaid do operate as stay of the said decision on the ex-parte applicant's order of expulsion and consequently the ex-parte applicant be re-admitted to the polytechnic unconditionally."**

The chamber summons was heard by Chitembwe, J. on 21st January, 2013 and the learned Judge made the following order:-

> **"Leave is granted as prayed in prayer (b) of the said application. The grant of leave shall operate as a stay in terms of prayer (c) of the application. The ex-parte applicant to file his substantive application within 21 (twenty one) days hereof."**

Pursuant to that leave, the Notice of Motion itself dated 5th February, 2013 was lodged and the two orders for which leave had been sought were prayed for. The grounds for the motion were however not exactly the same as those which had been made in the chamber summons seeking leave.

The appellant filed a replying affidavit through ***Bernadette Canute*** the Principal of the institution in which it was deponed in paragraphs 20 and 21 as follows:-

"20. That I have been further informed by our advocate, which information I verily believe to be true that the statement of the applicant and the verifying affidavit, both dated 5th February, 2013, …… (sic) on which the notice of motion is premised offends the provisions of Orders (sic) 53 rules 1 and 4 which are couched in mandatory terms.

21. That I have been advised by our advocate on record, which advise I verily believe to be true, that the grounds, relief and affidavit upon which leave was sought substantially differs (sic) with the grounds, relief and affidavit in the said notice of motion. This is contrary to Order 53 rule 4 of the Civil Procedure rules"

At the hearing of the Notice of Motion before Chitembwe, J., Mr. Ojienda, learned counsel who appeared for the appellant and the Interested Parties submitted, among other things, that there was no Judicial Review application before the learned Judge. Learned counsel made that submission because, in his view, when leave to seek judicial review orders was sought, the chamber summons was not accompanied with a statement of facts or an affidavit verifying those facts in breach of the provisions of Order 53 rule 4 of the Civil Procedure Rules. Learned counsel further submitted that even the grounds relied upon in the Notice of Motion were expanded contrary to the same provisions of the law.

The record of this appeal does not have any affidavit filed by the respondent denying the averments in the appellant's replying affidavit that the chamber summons seeking leave to commence judicial review proceedings was incompetent and at the hearing before the High Court Ms. Osodo, learned counsel who appeared for the respondent, in response to submissions challenging the competence of the proceedings merely relied upon Article 159 of the Constitution which, according to learned counsel, *"empowers the court not to rely on undue technicalities."* Learned counsel further contended that the appellant and the Interested Parties had not demonstrated that they had been prejudiced by the failure to comply with the provisions of Order 53 of the Civil Procedure Rules. There was therefore an unequivocal admission that the respondent had not strictly complied with Order 53 when he sought and obtained leave to apply for judicial review orders.

I have anxiously considered the Judgment of the learned Judge and with all due respect to him find no mention or reference at all to the above complaint of the appellant. The same complaint was urged before us by Mr. Ojienda, learned counsel who represented the appellant, as he did before the High Court. That was of course in addition to other complaints made on the merits of the proceedings before the High Court.

Before us however, the respondent neither attended at the hearing nor was he represented by counsel but as we were satisfied that he had been served with a hearing notice through counsel, we had no basis to adjourn the hearing especially as counsel for the appellant was ready to prosecute the appeal. The appeal was therefore heard in the absence of the respondent.

I have identified for consideration the appellant's complaint regarding the competence of the Judicial Review Proceedings as, in my humble view, this appeal can be determined on that complaint alone.

Order 53 of the Civil Procedure Rules is an offshoot of ***Section 8(2)*** of the Law Reform Act *(Cap 26 Laws of Kenya)* which reads:-

"8(2) 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 (1 and 2, Geo. 6, C. 63) 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."

The procedure for seeking those orders springs from ***Section 9(1)*** of the same Act which reads:-

"9. Rules of court.

1. **Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court –**

a. **prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus prohibition or, certiorari is sought**

b. **requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order,**

c. **requiring that, where the leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.'**

(Emphasis Ours)

On the basis of the above provisions of the Law Reform Act, the Rules Committee promulgated Order 53 which provides in rule 1 as follows:

"1(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. [This is exactly what Section 9(1) (b) of the Law Reform Act stipulates]

(2) An Application for such leave as aforesaid shall be made ex-parte to a Judge in Chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."

And with regard to the substantive application, rule 4(1) of Order 53 provides as follows:-

"4(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavit accompanying the application for leave shall besupplied on demand and no grounds shall, subject as hereinafter in this rule provided be relied upon or any relief sought at the hearing of the motion except the grounds and reliefs set out e said statement. (Emphasis ours).

[This is again clearly referable to Section 9(1) of the Law Reform Act].

It is therefore plain beyond peradventure from the above provisions that an application for leave must be accompanied by a statutory statement of facts and an affidavit or affidavit verifying those facts. The two documents contain the basis or the pith and marrow of the application for leave. They are the documents which the learned Judge at the ex-parte stage of the application considers before granting or refusing leave. The requirement for those documents is couched in mandatory terms both under the Law Reform Act and under Order 53 promulgated thereunder. In my view, a chamber summons for leave to apply for Judicial Review orders which is not accompanied by a statutory statement of facts and an affidavit verifying those facts would be incompetent. It is not easy to appreciate how the learned Judge of the High Court could have entertained the respondent's application for leave which application was not accompanied with a statutory statement of facts and an affidavit verifying those facts. The chamber summons was placed before him on 21st January, 2013. The record reflects that he certified it as urgent and granted the leave prayed for which leave was to operate as a stay of execution. The learned Judge made no reference to any statutory statement or verifying affidavit. He did not expressly state whether, on a consideration of the material availed before him, he was satisfied that the respondent had demonstrated an arguable case. A Judge dealing with such an application, ex-parte, does not grant the leave sought as a matter of course. The granting of leave is a judicial determination made on the basis of well settled principles after a consideration of material availed to a Judge. Such determination need not be detailed but the material must be sufficient to demonstrate an arguable case. In the case of **Njuguna &**

Others -V- Minister for Agriculture [2000] 1EA (CAK), this Court stated as follows:-

> **"It cannot be denied that leave should be granted on the material available, the court considers, without going into the matters in depth, that there is an arguable case for granting leave."**

As I have already observed, my perusal of the record of this appeal does not, with respect to the learned Judge of the High Court, demonstrate that the learned Judge paid any attention to the provisions of the Law Reform Act or Order 53 rule 1 of the Civil Procedure Rules. He granted the leave sought as if he was required to do so as a matter of course. In my view, there was no basis for granting the leave in the absence of a statutory statement and an affidavit verifying those facts. The affidavit which accompanied the chamber summons was not a verifying affidavit as there were no facts in a statement which could be verified.

I turn now to the substantive application which the same Judge granted. Under the provisions of the Law Reform Act and Order 53 referred to above, the respondent could not rely upon grounds other than those he relied upon when he made the application for leave except with the leave of the court. Rule 4(1) of Order 53 is very explicit that only copies of the statutory statement accompanying the application for leave should be served with the notice of motion. The same rule is also explicit that any affidavit accompanying the application for leave shall be supplied on demand. As already quoted above:

> **"no grounds shall, subject as hereinafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and reliefs set out in the said statement."**

It is undisputed that the application for leave was not accompanied by a statutory statement of facts. There is no evidence that the respondent sought and/or obtained leave to file a statutory statement with the notice of motion. Indeed I doubt whether the court would have jurisdiction to allow the filing of a statutory statement of facts which was not in existence at the time leave was sought. I say so, because under Order 53 rule 4(2), the court has jurisdiction to allow an amendment to an existing statutory statement, on application.

In those premises, the filing of the statutory statement of facts to accompany the notice of motion was in breach of both the cited provisions of the Law Reform Act and Order 53(4) of the Civil Produce Rules. The filing of a new verifying affidavit without the leave of the court which did not accompany the application for leave contravened the same provisions. The appellant, through its counsel, was consistent in its complaint on the competence of the proceedings giving rise to the orders being challenged in this appeal which complaint was not even acknowledged by the learned Judge without assigning any reason for not doing so. In my view, the learned Judge was duty bound to pronounce himself on the appellant's complaint. He did not even allege that he did not consider that complaint pursuant to provisions of Article 159 of the Constitution. He did not also invoke the doctrines of Equity.

In my respectful view, even if those considerations were made, the respondent's chamber summons and subsequent notice of motion could not be saved. As has been stated many times before, Article 159 of the Constitution is not a panacea for every procedural lapse.

The Supreme Court of Kenya in **Raila Odinga & 5 Others -V- IEBC & Others [Supreme Court Petition No. 3 of 2013] (UR),** on the purport of Article 159 of the Constitution, had this to say:-

> **"Our attention has repeatedly been drawn to the provisions of Article 159(2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the courts of law ….. (emphasis supplied)."**

I am also of the respectful view that the respondent herein not only infringed the provisions of procedure but also plainly contravened the provisions of the Law Reform Act. Breach of an Act of Parliament cannot be condoned by invoking doctrines of Equity and/or provisions of Article 159 of the Constitution.

Having found for the appellant on the issue of the incompetence of both the chamber summons and the notice of motion, I need not consider the other complaints made by the appellant. I would allow the appeal, set aside the judgment and decree of Chitembwe, J. and substitute therefor an order striking out the appellant's notice of motion with costs to the appellant. The appellant shall also have the costs of the struck out notice of motion. As Kantai, JA agrees thus shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF FEBRUARY, 2015

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a

true of the original

DEPUTY REGISTRAR