REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 150 of 2009 (UR 102/2009)

THE KENYA NATIONAL EXAMINATIONS COUNCIL …… APPLICANT

AND

REPUBLIC ……..……..RESPONDENT

EX PARTE ……...……KEMUNTO REGINA OURU

(Suing through her father and next friend James Ouru) and 128 others

(Application for stay of execution pending appeal against the judgment and orders of the

High Court of Kenya at Eldoret (Ibrahim, J) dated 20th May, 2009

in

H.C. Misc C. Appl. No.1 of 2009

****

RULING OF THE COURT

The applicant before us is the ***Kenya National Examinations Council***. It is a body corporate with perpetual succession and a common seal. It has come before us by way of a notice of motion under Rule 5(2)(b) of the Court of Appeal Rules seeking the following orders:

"**(a) A stay of Execution be issued to stay the judgment and order made in *High Court Misc Application No. 1 of 2009 at Eldoret on 20th May 2009* pending the hearing and determination of the intended appeal against the judgment.**

(b) Costs of this motion to be provided for."

The applicant is aggrieved by the judgment of the superior court, Ibrahim, J delivered on 20th May, 2009 in these terms:

1. That an order of certiorari be and is hereby issued removing into the honourable Court and quashing forthwith the decision of the *Kenya National Examinations Council* **as contained in its letter to the Head Teacher and Secretary of the 129th ex-parte applicants dated 3rd March 2009 cancelling the examination results in respect of 128 Kenya Certificate of Secondary Examination**

candidates for the year 2008 (the 1st to 128th Ex-parte applicants) on the ground of an alleged irregularity referred to as "collusion" in the chemistry 233 subject" without any evidence whatsoever to that effect and without giving the affected candidates and the school a hearing.

2. That an Order of mandamus be and is hereby issued directed at the respondent to reverse its decision to cancel the chemistry (233) examination candidates for the year 2008 within 21 days of this Order and to release forthwith the entire results to the aforesaid candidates.

3. That the respondent to bear the costs of this application."

A brief outline of the applicants' case as set out in the affidavit in support is that prior to the conduct of the 2008 Kenya Certificate of Secondary Education Examinations KCSE, the applicant had sensitized candidates and all involved in the conduct of examinations of the dangers and consequences of engaging in examination irregularity or misconduct.

A total of 305,015 candidates presented themselves for the 2008 Kenya Certificate of Secondary Education Examinations. The applicant then supervised the conduct of examinations and thereafter embarked on the marking exercise.

The outcome of the examinations according to the applicant was that, although 305,015 candidates participated, the results of 1419 candidates were cancelled due to examination irregularities. The ex-parte applicant ***Kemunto Regina Ouru*** and 127 other candidates from ***St Mary's Tachasis Girls Secondary School*** formed part of the 1419 candidates whose results were cancelled.

The applicant contends that the examination candidates have no right of hearing in law before cancellation and that the applicant was perfectly entitled to cancel the results pursuant to section 10(e) of the ***Kenya National Examinations Council Act*** and Regulation 28 of the ***Kenya National Examinations Council*** (Kenya Certificate of Secondary Education Examinations Rules 1998) and that in cancelling the results, the applicant acted in the public interest so as to safeguard the integrity of the examination process and the grades awarded. It is also contended on behalf of the applicant that what led to the cancellation of the examination results for the 128 candidates was collusion by the candidates and that before the cancellation of the results the applicant had undertaken an elaborate, detailed and fool proof analysis of the examination scripts. In an affidavit sworn by ***Paul Wasanga*** the Chief Executive of the applicant on 22nd April 2009 in reply to the application for judicial review filed in the superior court, the applicant contends that the process prior to cancellation, involved a scrutiny of the scripts by the respondent's Research Processing Team, Management Team and the Examination Security Team and all these bodies confirmed that there was collusion relating to the chemistry paper.

A draft Memorandum of Appeal annexed to the application before us sets out the following intended grounds of appeal:-

1. The learned trial Judge erred in law and in fact in holding that cancellation of the examination results could not be made without first conducting investigations, enquiries or trial.

2. The learned trial Judge erred in law and in fact in holding that Regulation 28 of the Kenya National Examinations (Kenya Certificate of Secondary Examination Rules 1998) obligated the appellant to conduct investigations, inquiries and trial before cancellation of examination results.

3. The learned trial Judge erred in law and in fact in considering that the power to cancel examination results was donated to the appellant by Regulation 28 of the Kenya National Examination (Kenya Certificate of Secondary Examination) Rules 1998, instead of section 10(e) of the *Kenya National Examination Council Act.*

4. The learned trial judge erred in law and in fact in holding that regulation 28 of the Kenya National Examination (Kenya Certificate of Secondary Examination Rules 1998) obligated the appellant to conduct investigations, inquiries and trial before cancellation of examination results.

5. The learned trial Judge erred in law and in fact in further holding that the appellant "did not direct itself on the relevant law and acted unreasonably."

6. The learned trial Judge erred in law and in fact in holding that the cancellation of the examination results was arbitrary and unfair and further erred in holding that the cancellation frustrated the respondents' legitimate expectations.

7. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all the legal concepts given in the judgment could not apply to the facts before the trial court.

8. The learned trial Judge erred in law and in fact in considering that the respondents' "fundamental rights" were violated and that the appellant had "unproven" public interest notwithstanding the clear mandate donated by section 10(e) of the *Kenya National Examinations Council Act.*

9. **The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that the orders of certiorari and mandamus were not available in law and in the manner pleaded in the motion before the trial court."**

On the other hand, the respondents' case is that the applicant cancelled the respondents' results without giving them and the school an opportunity of being heard and further that the applicants in cancelling the results did so after a process that was flawed, ultra vires, unfair, irrational, unreasonable and disproportionate. The respondents have also submitted that under ***Section*** 10(e) of the ***Kenya National Examinations Council Act*** the Council has the right to withhold results only and not to cancel them.

The respondents further contentions are that the applicant ought to have conducted investigations by involving candidates, supervisors, investigators and all other participants, before cancelling the results and that Rule 28 contemplated the commencement of proceedings involving the affected candidates wherefore they are to be given an opportunity to be heard in order to establish whether or not the suspected irregularity did happen but the applicant failed to conduct any such investigations or offer a hearing opportunity to the respondents.

In the application before us, we are aware that although we have recorded the grounds and arguments presented by the parties as outlined above, we cannot adjudicate on the merits at this stage. However, it is clear to us, that the central issue for determination in the intended appeal shall be whether or not examination candidates have a prior right of hearing before the power to cancel examination results is exercised by the applicant and whether the applicant is legally obligated to undertake investigations which must include the affected candidates, supervisors, investigators and all affected parties. The learned counsel for the applicant ***Mr Ngatia*** has submitted that no such right or duty on the part of the applicant exists whereas, ***Mr Lilan***, the learned counsel for the respondent has urged that such right or duty does exist in law. At this stage, we cannot resolve the conflicting positions taken by counsel since this will be the role of the judges appointed to hear the intended appeal. In answer to the Court's querry on whether courts in this country or comparable jurisdictions had dealt with a case, raising similar facts, both counsel were quick to concede that the points raised herein and in the intended appeal were novel, and were perhaps coming up for the first time in this country. ***Mr Ngatia***, the learned counsel for the applicant was able to cite the Supreme Court of India decision of ***MAHARASHTRA STATE BOARD OF SECONDARY AND HIGHER SECONDARY EDUCATION AND ANOR v KURMARSHETH AND OTHERS [1985] CLR 1083*** which, inter alia, dealt with examination fairness requirements, proper administration of examinations, or evaluation of answers by candidates and whether this is part of fair play and finally whether the Court should defer to considered professional judgments in academic matters.

For an application under rule 5(2)(b) to succeed, the applicant has to satisfy the court that the appeal is arguable, that is, that it is not frivolous and that if the order of stay were not granted the appeal, were it eventually to succeed would be rendered nugatory.

In determining the first requirement concerning arguability of the appeal, it is our view that the issue of whether the examination candidates or the school should have been accorded the right of hearing prior to cancellation, is arguable and we need not identify any other grounds since one ground is sufficient to satisfy the first requirement. In addition, we think that the other grounds set out in the draft memorandum cannot be said to be frivolous.

Turning to the second requirement, the learned counsel for the respondents has argued that if the cancelled results (if available or in existence) were released to the candidates and the applicants ultimately succeed in the appeal there was a right of alteration of the results pursuant to Rules 11(5) and 13 of the 1998 Kenya National Examination Regulation 1998 and therefore the success of the applicant's appeal would not be rendered nugatory, in that the users of the released results would be informed of any alterations or changes to the examination slips or certificates pursuant to Rules 11 and 13 mentioned earlier. On the same point, the learned counsel for the applicant has equally submitted that if the cancelled results were to be released, third parties would use the results upon presentation by the candidates and this would include local and international universities and colleges and that any subsequent advice by the applicant to such third parties would cause irreparable damage to the integrity and credibility of the examination system in Kenya and would be against the public interest. For this reason, the applicant's counsel further submitted that if the results were released, they could not be recalled and success of the appeal would be rendered academic and therefore nugatory.

We have on our part considered and put on the scales the conflicting claims of both sides as outlined above, and as set out in the affidavits filed on behalf of the parties. In our endevour to determine whether the second requirement for granting stay has been satisfied by the applicant, we are constrained to weigh one case against the other as set out above. For example, we think the release of the cancelled results would lead to their immediate use by the third parties and this might in turn have an adverse impact on the intake of candidates in institutions of higher learning, who are not parties to this litigation, before a determination on merit in the intended appeal. The release of the results at this stage might similarly affect the grades awarded to other candidates in the national examination in question before a determination on merit. Even without delving into the merits of the conflicting claims and interests, when we put them in the balance, we think greater harm might be done to the public interest concerns than the harm to the individual candidates and the school. In this regard, we would like to repeat this Court's observations in the case of ***RELIANCE BANK LTD v NORLAKE INVESTMENTS [2002] I EA 228*** at page 231, where the Court stated:-

"**We do not think so. The court in the** *Oraro* **and** *Rachier* **case specifically says that in considering the second limb, namely whether an appeal would be rendered nugatory if a stay is not granted, the Court is bound to consider the conflicting claims of both sides. The sentence:**

"*Ordinarily that is the principle on which this Court acts but recent rulings of this Court suggests that in dealing with this limb [that is whether the appeal would be rendered nugatory if stay of execution is granted] of the application the Court ought to weight (sic) the claims of both sides."*

makes it clear beyond any argument that the issue of "the balance of convenience" or "the claims of both sides" is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if a stay of execution or an injunction is not granted."

At page 232 of the same decision the Court rendered itself thus:

"**The point which clearly emerges from these cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case …"**

We are, therefore, of the view that failure to grant a stay would result in very serious practical problems to the examination process in this country than the individual prejudice or hardship the candidates are likely to suffer between now and the adjudication of the intended appeal which we trust, once filed, would be fast tracked due to the novelty, uniqueness and the importance of the case to the examination system in

this country. Our finding on this second requirement is that the applicant has satisfied this as well. All in all, it will be in the interest of justice to grant the orders sought.

In the result, we grant to the applicant an order staying the grant of the order of mandamus by the superior court dated 20th May, 2009 and any consequential orders until after the hearing and determination of the applicant's intended appeal. We further order that the costs of this application shall be in the intended appeal.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 19th day of June, 2009.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR