



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL JUDICIAL REVIEW NO.2 OF 2018

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL HUMAN RIGHTS UNDER ARTICLES 27, 28, 29, 40 & 47 (1)
& (2) OF THE CONSTITUTION**

AND

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 2, 10,19,20,21, 22 & 23, 24, 25 32, 36, 38, 48, 50, 159, 165,
258, 259 & 260 OF THE CONSTITUTION (2010)**

AND

**IN THE MATTER OF THE BASIC EDUCATION ACT NO.14 OF 2013 AND THE FAIR ADMINISTRATION ACTIONS
ACT, 2015**

BETWEEN

1 CHRISTINE KERUBO BOSIRE

2 JUMA SHAILLA HASSAN

3 HESBON MAUTI NYABUTO

4 UMOJA ACHIENG BERIE

5 NYAMWEYA EUNICE MOKEIRA

6 ODONGO OCHIENG COLLINS

7 OGEA N. ELIZABETH

8 ADIEMA MARGARET

9 KEMUNTO JOAN

10 MASWAGE G. NAOMI

11 MOCHOGE DOROTHY KEMUNTO

12 OSIKO HILARY MAJELA

13 PAULINE ACHIENG NYANDIKO

14 JEMIMA NYADEGE OINO

15 NANCY KEMUNTO MOSE

16 RACHAEL SEVERIO.....APPLICANTS

VERSUS

MINISTRY OF EDUCATION.....1ST RESPONDENT

KENYA NATIONAL EXAMINATION COUNCIL....2ND RESPONDENT

JUDGMENT

1. On the 29th of June 2018 the applicant filed a certificate of urgency and a chamber summons, a statutory statement of facts, Authority under Order 4 Rule 2 (a), a verifying affidavit and a petition and an affidavit of Hesbon Mauti Nyabuto in support of the petition. After the applicants were granted leave to file their Notice of Motion they did so on the 25th of July 2018. Simultaneously the applicants filed a petition by petitioners and an affidavit of Pius Mandere Ogari in support of the petition.

2. By a notice of motion brought under Order 53 Rules 1,2 and 3 of the Civil Procedure Rules, Section 3A,3,1a and 1b of the Civil Procedure Act, Sections 8 and 9 Law Reform Act Chapter 26 Laws of Kenya was filed by the applicants on the 25th July 2018 after the court granted them leave to apply for judicial review orders of certiorari to remove and quash the decision of the 2nd Respondent through a letter dated 31st of January 2018 communicating to the applicants its decision vide minutes KNEC/CONF/R & QA/PSE/TEC/IRR/2018/04 to cancel the applicant results and barring them from sitting any KNRC Examination in the next 3 years. The applicant also sought that the court grants a judicial review order of prohibition, prohibiting the continuing cancellation and barring the applicants from sitting any KNRC Examination in the next 3 years. The applicants also sought a judicial review order of mandamus to remove and compel the 2nd Respondent to release the results of the applicants' results and or allow them sit KNRC Examination immediately and that costs be provided.

3. *Order 53 provides as follows;*

3. (1) *When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.*

(2) *The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.*

(3) *An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.*

(4) *If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court*

may direct.

4. [Order 53, rule 4] Statements and affidavits.

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

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies

4. The applicants upon obtaining leave from the court should have filed a Notice of Motion and a Statement of Facts and affidavit as provided under Order 53 Rule 4. This was not done. The provisions of order 53 (4) are in mandatory terms. The applicants filed a notice of motion and a petition and a supporting affidavit of Pius Mandere Ogari in support of the petition yet the deponent of the affidavit Hesbon Mauti Nyabuto the 3rd Petitioner. Their application as it is on record is unprocedural and incompetent, and cannot be cured by the provisions of Article 159 (2) (b). The notice of motion is thus not supported by any evidence as required under Order 53 (4). The application is struck out with no order as to costs.

Dated and delivered at KISII this 30th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Nduhukire h/b Mr. Ogari For the Petitioners

Respondents Absent

Rael Court clerk



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