



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E001 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

EX-PARTE:

ELIJAH KAMAU MWANGI

JUDGMENT

The Application

1. Elijah Kamau Mwangi, the *ex parte* Applicant herein, was admitted by the Jomo Kenyatta University of Agriculture and Technology, the Respondent herein, for a PHD in project management course, and states that he has successfully completed his course work and examination. The *ex parte* Applicant has accordingly moved this Court in an application brought by way of Notice of Motion dated 20th July 2020, wherein he is seeking an order of mandamus wherein he is seeking an order of mandamus to compel the Jomo Kenyatta University of Agriculture and Technology to accept his intent to submit PHD Thesis for examination.

2. The said application is supported by a statutory statement dated 23rd June 2020, and a verifying affidavit sworn on the same date and on 20th July 2020 by the *ex parte* Applicant. The main ground for the application is that the *ex parte* Applicant submitted an intent to submit the PHD thesis for examination which was rejected on the unreasonable demand that he submits letters appointing his supervisors, copy of research proposal and school's Board of Post Graduate Studies committee meeting minutes that approved the same.

3. The *ex parte* Applicant gave a detailed background of his proposal development and thesis defense, and deponed that he prepared a two hundred and five (205) page thesis and with the approval of his supervisors, he wrote a letter of intent to submit thesis for examination to the Board of Post Graduate Studies (BPD) of the Respondent. However, that on 7th March 2019, he received a letter rejecting his intent to submit his PhD thesis for examinations marked, and that on 18th March 2019, he resubmitted copies of the proposal that was alleged to be missing. Further, that instead of submitting the same to the Board of Post Graduate Studies, the School of Entrepreneurship and Procurement and Management (SEPM) on 29th July 2019, advised him to change his supervisor, and further to that his proposal was deferred. The *ex parte* Applicant annexed copies of the cited letters.

4. According to the *ex parte* Applicant, the supervision work was complete and there was no need to change the supervisors at that stage, which would entail repeating the whole study carried out since 2014 at a great loss of time, resources and opportunities. He concluded that he was not given notice to make representation or offer any explanation and the Respondent's decision was unjustifiable, unfair and unlawful.

5. The Respondent did not file any response or participate in the hearing, despite being given opportunity and directions to do so.

The Determination

6. The *ex parte* Applicant filed submissions dated 8th February 2021, wherein reference was made to Article 57 of the Constitution, section 4 of the Fair Administrative Act, 2015 and the decision in **Republic vs Kenyatta University; Ex parte Wellington Kihato Wambugu, Misc. Appl. No. JR 101 of 2016** for the position that the decision to reject his intent to submit his thesis for examination was made without being afforded an opportunity to be heard. Secondly, that the letter dated 7th March 2019 was not a notice to show cause why his application for intent to submit the thesis should be rejected but a final decision and he was also not given any prior or adequate notice on the nature and reason for the intended administrative action.

7. He submitted that he should have been advised within a stipulated time to provide; the letters appointing his supervisors; a copy of his research proposal and copies of BPD committee meeting if at all he was the custodian of the same (he was not). He was neither afforded an opportunity of seeking a review or appeal of the decision nor an opportunity to attend the proceedings in person or otherwise where the decision was made. He concluded that the actions by the Respondent were unfair, unjustified and would occasion him immense loss in terms of time and resources as he would be compelled to start the process afresh.

8. It is notable that the *ex parte* Applicant has sought an orders of mandamus against the Respondent to compel them to accept his intent to submit his PHD Thesis for examination. The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court's supervision. See in this regard the decision in **Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.**

9. It was further been held in **Republic vs The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012** that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has "a public element" which may take any forms.

10. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the applicable principles for an order of mandamus to issue as follows:

"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....”

11. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

12. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

13. I have reproduced all the above authorities to illustrate that the present case is not one where an order of mandamus can issue for two reasons. Firstly, it is necessary to point out at the outset that the order sought will require this Court to undertake a merit review beyond the remit of this Court as a judicial review Court for various reasons. Firstly, it will require this Court to make a value and qualitative judgment as regards the fitness of the *ex parte* Applicant’s PHD thesis for examination, which is a merit review that will be beyond the standards set in judicial review as set out in the Fair Administrative Action Act. An examination as to whether the *ex parte* Applicant’s PHD thesis is fit for examination is a fact-finding and fact resolution exercise that is normally suitable in the first instance for the normal civil process in a court or a body with statutory authority to undertake such an exercise such as Respondent.

14. The standards of merit review set out in section 7 (2) of the Act are as follows:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the

legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power

15. It was noted by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that even though *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator.

16. Therefore, in granting an order of mandamus in the manner sought, this Court will also be usurping the roles of other public bodies that regulate academic programmes, which is a forbidden in judicial review. The *ex parte* Applicant in this respect cited various decisions including **Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) (2020) eKLR** and **Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) (2020) eKLR** where the court held that, it is the Commission for Higher Education that is tasked with ensuring that there exists uniform standards in the learning, accreditation, licencing and qualifications in the provision of university education in Kenya.

17. Secondly, the *ex parte* Applicant has not pointed this Court to the statutory provisions or laws that impose the duty on the part of the Respondent to accept his intent to submit his PHD Thesis for examination, and the conditions and procedures that apply in this respect, for this Court to be able to make a determination that such a duty does exist, and that it was breached by the Respondent in the circumstances of this case. It is noteworthy that the grounds and laws relied upon by the *ex parte* Applicant are illustrative of a lack of fairness in the decision making process, for which the appropriate remedy is an order to quash the impugned decision, but not mandamus.

The Disposition

18. I accordingly find that the *ex parte* Applicant's Notice of Motion dated 20th July 2020 is not merited for the foregoing reasons, and the said Notice of Motion is dismissed with no order as to costs.

19. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2021

A. NDUNG'U

JUDGE



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