



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Judicial Review Misc. Appli. 21 of 2009

GILGIL MILIMANI ACADEMY LIMITED AND 17 OTHERSPLAINTIFFS

-VS-

KENYA NATIONAL EXAMINATION COUNCIL:.....DEFENDANTS

RULING

The application dated 14th January 2009 and filed on 15th January, 2009 seeks leave for the applicants to apply for the Judicial Orders of Certiorari and Mandamus. The order of Certiorari is being sought to remove into this court for the purpose of being quashed the 1st Respondents decision contained in 1st Respondent's letter dated 22nd December 2008 cancelling the KCPE Examination Results (Kiswahili and Science results) for 18 pupils who were enrolled at Gilgil Milimani Academy in the year 2008.

The orders of Mandamus are being sought against the 1st Respondent commanding it to release forthwith the Kiswahili and science results of the 18 pupils and also against the 2nd Respondent namely the Minister of Education to compel the Respondent to admit 18 pupils to the National, Provincial and other Secondary schools in accordance with the eligibility for admission of each of the 18 affected candidates.

The applicants have also prayed for order of leave if granted to operate as stay.

The applicants who include the proprietor of the school and parent/guardian of the pupils' rely on the statement and the verifying affidavit in support of their contentions.

I am happy to observe that the application for leave perse have been conceded by the 1st Respondents Counsel. I accordingly grant leave in terms of prayers 1, 2, 3(a)(b)(c) and (d).

However the prayers for stay in terms of prayers 4 and 5 or at all have been strongly opposed by the 1st Respondent Counsel. Although the application for leave be heard interparties was served on the 2nd Respondent, no counsel was sent to represent the Minister.

It is trite law that the court has an unfettered discretion to grant or deny the order that leave operates as stay. However the discretion must be exercised judicially. I have taken into account the applicants grounds as set out in the statement and verifying affidavit. In particular the applicant's case is founded on Rules 15(1) and (2) of the Kenya National Examinations Council (Kenya Certificate of Primary Education) Rules 1997. Rule 15(1) deals with the exercise of power by Kenya National Examination

Council as against an individual candidate, whereas Rule 15(2) deals with the exercise by Kenya National Examination Council as against a School or an Examination centre.

The Examiners have been challenged that they only have power in respect of widespread irregularity misconduct or dishonesty to cancel the entire examination at the centre, but what they have done is to select 18 out of 21 pupils of Gilgil Milimani Academy and cancelled Kiswahili and Science results contrary to the rule. The decision as per the letter of 22nd December, 2008 has been challenged as reckless malicious unreasonable and motivated by ulterior motives and that it is also an abuse of office.

The 1st Respondent Counsel has responded to the application as follows:

1) That any order for stay at this stage would give the remedy sought in the substantive application for judicial review.

2) That the stay Order, if granted would not be capable of being implemented in that the cancelled results did not exist

3) That since the results were cancelled on the ground of collusion, the matter should be canvassed on merit at the earliest opportunity and final orders granted.

After taking into account, the grounds raised in the statement, verifying Affidavit, together with oral submissions of Counsel and putting them on the scales of justice even at the threshold stage, and without making any final pronouncements on any issue, the court is of the view that the scale tilts in favour of denying the order for leave to operate as stay. Some of the considerations I have put on the scales include:

i. The results in the two subjects have been cancelled and there is need for the court to ascertain the effectiveness of its orders.

ii. The three students whose results were not cancelled, have not been joined or served. Judicial review is about fairness. Education rights are vested in individuals under the International Covenant on Economic, Social and Cultural Rights and it is necessary for the court in a full hearing to balance Rule 15 (2) with the right to education for each pupil.

iii. Any order could affect the selection rights of the other 2008 candidates before the ascertainment of the reasons for cancellation by the experts.

iv. Appreciation of the fact that whereas cancellation of examination results is drastic as against the pupils and their future – the other end of the pendulum is that examiners might be justified in imposing appropriate sentences on examination cheats.

v. There is need for the Court to receive more evidence concerning the alleged collusion on/or irregularity and cancellation.

For the above reasons, I decline to order that leave operates as stay. As the parties agree concerning the need to reach finality as early as possible, I direct the Applicants to file and serve the Notice of Motion within 7 days and that the matter be mentioned on 28th January, 2009 at 9.00 am. for the purpose of allocating a priority hearing date. Service of the Notice of Motion to be effected on or before 23rd January, 2009.

Costs to abide the outcome of the judicial review application.

It is so ordered.

Dated the 21st day of January 2009.

J. G. Nyamu

JUDGE



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