



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**J.R. MISC. APPLICATION NO. 183 OF 2013**

**IN THE MATTER OF AN APPLICATION BY IAN MWAMULI FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF DECISION BY KENYA NATIONAL EXAMINATIONS COUNCIL**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP. 26 LAWS OF  
KENYA**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**KENYA NATIONAL EXAMINATIONS COUNCIL ....RESPONDENT**

**EX PARTE: IAN MWAMULI**

**JUDGMENT**

**INTRODUCTION**

1. By his Notice of Motion dated 7<sup>th</sup> June, 2013, the *ex parte* applicant, **Ian Mwamuli**, seeks the following orders:
  1. **THAT an Order of Certiorari do issue to remove to the High Court and quash the decision of the Respondent to withhold Ex parte Applicant's 2012 KCSE Results and Certificate.**
  2. **THAT an Order of Mandamus do issue to compel the Respondent to release Ex parte Applicant's 2012 KCSE Results and Certificate.**

**Applicant's Case**

2. The Motion is supported by the Statement filed on 31<sup>st</sup> May, 2013 and a verifying affidavit sworn on 31<sup>st</sup> May, 2013 by the applicant herein.
3. According to the applicant, he registered as a candidate for KCSE in year 2012 at St. Mary Academy using his official name **Ian Mwamuli** and was given index number 20408005024 by the

Respondent and he complied with all regulations including forwarding his photographs and sat for all the papers that he had registered for. Thereafter the Respondent publicly announced and notified all candidates in the Country that KCSE results were out for year 2013 and that the same had been released to all schools and pursuant to that information. However, when he went to check and collect his results at the institution, he was informed by the Principal that the Respondent had not released to the school his results and Certificate. On seeking an explanation from the Respondent's offices, the applicant was informed that Kenya Certificate of Primary Education results showed the names **Mwai B. Mutugi**. He however explained that he sat for his standard 8 examination at Kerugoya Municipality Boarding Primary School using the said names and Index No.203423024 and that **Mwai B. Mutugi** and **Ian Mwamuli** are one and the same person. According to the applicant the discrepancies in the names arose from the act that when he was born his mother named him **Ian Mutugi Mwangi** after her father as is customary for unmarried Kikuyu women and that when his mother later was married by his biological father they decided that the applicant should use the name **Brian Mutugi Mwai**. According to the applicant, his mother separated with his biological father and went to live in Britain where she married **Mwamuli** and that is why his name had to change to include the name of his step father **Mwamuli** officially through a Deed Poll duly registered in the Registry of Documents Nairobi.

4. After this explanation the officer concerned informed the applicant that his explanation was sufficient and all that the Respondent needed from him was a copy of the Deed Poll and Gazette Notice after which Respondent would give him his KCSE results and Certificate. Subsequently on 25<sup>th</sup> March 2013 the applicant presented to the same officer, **Catheline Maina**, who was dealing with the matter the Deed Poll and the Gazette Notice but despite doing so the Respondent has not given him his KCSE results and Certificate and has not given him reasons in writing or otherwise and this position remains so despite countless visits to the offices of the Respondent.
5. It is the applicant's position that the failure to give reasons to him for not releasing his results is oppressive, unlawful and infringement of his right to education as it interferes with his entry to the university and other institutions locally and abroad. The said decision is further so unreasonable that no reasonable Public body would act in such manner and is contrary to the policy of the **Kenya National Examinations Council Act, 2012** (hereinafter referred to as the Act). To him, the Respondent's decision is irregular, unprocedural, unreasonable, invalid and contrary to section 10(1)(b) of the Act which provides that the function of the Council is to award certificates or diplomas to candidates in examinations and that such certificates shall not be withheld from the candidate by any person or institution. It is the applicant's position that Respondent's compliance with the Act is mandatory and the decision by the Respondent to inform me the reason for withholding my results and certificate is unreasonable and contrary to my legitimate expectation since he was not involved in examination irregularities or malpractices.

### **Respondent's Reaction**

6. Despite being served with the application the Respondent did not oppose the application. Accordingly the applicant's averments were uncontroverted.

### **DETERMINATIONS**

7. I have considered the application, the Statement, the verifying affidavit and submissions filed on behalf of the applicant herein.
8. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

**“....On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land ..... regardless of his motives. This is unfettered discretion. But a public authority may do none**

of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.....when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance..... From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene..... The rule of law is the cog upon which all the provisions of the Constitution turn.....I hold that the public bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case..... My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – see *Benett case (supra)*. Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law.”

15. In this case, the Respondent’s action being an administrative action would be subject to Article 47 of the Constitution which provides:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

16. Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person were to sit for examination and fail for no fault of his to know the results of his examination. Where therefore the authorities concerned for any reason are of the view that a candidate's results ought not to be released to him and a certificate issued where ordinarily a certificate would issue, the authority is under a Constitutional duty to furnish the person with written reasons for making such a decision and once those reasons are furnished, it is not for the Court in the exercise of its judicial review jurisdiction to investigate the merits of the decision since as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

17. In Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

18. On of the functions of the Respondent under section 10 of the Act is to “award certificates or diplomas to candidates in such examinations; such certificates or diplomas, shall not be withheld from the candidate by any person or institution”. In so doing the Respondent, however has the power to “withhold or cancel the results of candidates involved in examination irregularities or malpractices.” Therefore for the Respondent to withhold the results a candidate, the candidate must have been involved in examination irregularities or malpractices. As was held in **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR**:

**“If the Council refuses or neglects to mark the examinations within a reasonable time, or**

**having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be...The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). But the High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any.”**

19. In this case the Respondent has neither released to the applicant his results nor has it given any reasons why the said results are being withheld. In effect that the Respondent has failed to carry out its statutory duty under both the Constitution and the Act despite demand from the applicant.
20. It is therefore my view and I so hold that this is a case in which judicial review orders ought to issue.

### **ORDER**

21. Accordingly, the order that commends itself to me and which I hereby grant is that an order of certiorari be and is hereby issued bringing into this Court the Respondent's decision withholding the ex parte Applicant's 2012 KCSE Results and a mandamus is hereby issued compelling the Respondent to release to the Ex parte Applicant's his 2012 KCSE Results and Certificate forthwith.
22. As the application was not opposed, there will be half of the costs to the applicant to be taxed by the Taxing Officer of the Court.

**Dated and Delivered at Nairobi this 20<sup>th</sup> December 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Miss Njenga for the Respondent and Mr. Ongicho for Mr Mwasama for the applicant***