IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: COCKAR, MULI & AKIWUMI JJ.A.)

CIVIL APPLICATION NO. 238 OF 1994 (114/94 UR)

COUNCIL OF LEGAL EDUCATION
PRINCIPAL KENYA SCHOOL OF LAW ..... APPLICANTS

AND

IN THE MATTER OF APPLICATION BY RITA BIWOTT ..... RESPONDENT

(Application for stay of execution in an Intended Appeal from the Ruling of the High Court of Kenya at Nairobi (The Hon. Mr. Justice Shah) given on 26th October, 1994

in

H.C.C.C. MISC. APPL. 1122 OF 1994)
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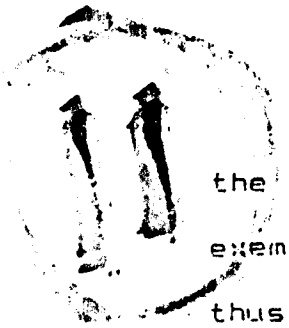
RULING OF THE COURT

In the spring of 1991, the respondent obtained a Bachelor of Arts degree from Mcgill University at Montreal, Quebec in Canada. On 17th July, 1991, she was admitted as a full time student in the Faculty of Law, University of Edinburgh, in order to pursue a course of study to qualify for the degree of LLB. It is not in dispute that the syllabus for the LLB degree at Edinburgh University is designed to be covered in a period of 3 years. The respondent, however, in view of the B.A. degree which she held from Mcgill University, was exempted from the first year's study and in consequence was able to complete the required studies to qualify for the LLB degree after a period of study spread over 2 years only. This exemption was permissible and provided for in



the relevant rules and regulations of the University. The exemption was properly and legitimately granted. The respondent thus obtained her LLB degree from Edinburgh University after completing the prescribed course of study in 2 years. The LLB degree was awarded to her on 17th July, 1993.

On 14th July, 1993, the respondent applied to the Council of Legal Education (hereafter referred to as the Council) for admission to the Kenya School of Law (hereafter referred to as the Law School) to undertake the prescribed course of legal education in preparation for the examination specified in Part IV of the Advocates (Admission) Regulations, Advocates Act. Cap 16, (hereafter referred to as the Act). At the same time she also applied to the Attorney General to be taken as a pupil in his chambers in accordance with the provisions of the Act. The Attorney General accepted her application for pupilage and, at the same time informed the Principal of the Law School to that effect. On 18th March, 1994, the Secretary of the Council informed the respondent by a letter that the Council at its meeting of 14th February, 1994, had not approved her two-year law degree from the University of Edinburgh under Section 17(1) (b) of the Act. This decision was confirmed to the respondent's advocate through the letter of 9th May, 1994. On 5th September, 1994 an application under Order 53 of the Civil Procedure Rules and other relevant Acts was filed in the Superior Court for an Order of Mandamus to issue. On the undisputed evidence before him and submissions made to him the learned judge in a considered

ruling delivered on 2nd October, 1994, granted the application for an order of mandamus to issue in terms of the prayers in the application which directed:

(a) the Secretary of the Council to issue to the respondent a Certificate of Enrolment with retrospective effect from 14th February, 1994 and

(b) the Principal of the Law School to admit the applicant to the school to pursue a course of legal education in preparation for the examinations specified in paragraph IV of the Advocates (Admission) Regulations.

An application for stay of execution of the order was rejected by the learned judge on the same day. On 28th October, 1994, a notice of appeal was lodged on behalf of the two applicants viz: the Council and the Principal of the Law School. In the meantime, in compliance with the second part of the mandamus order, the Principal of the Law School by his letter of 27th October, 1994, confirmed the respondent's admission to the Law School. In consequence of her being so admitted, the Solicitor General by his letter of 28th October, 1994, granted her pupilage facilities in the Treaties and Agreements Department of the State Law Office. Over two weeks after the respondent's admission to the Law School and after the granting of pupilage facilities to the respondent, the applicants on 14th November, 1994 filed the instant application under Rule 5 (2) (b) of the Court of Appeal Rules seeking a stay of execution of the Mandamus order pending the hearing and determination of the applicants' intended appeal. For obvious reasons, the application has been heard by us under a need of urgency.

It has been well-established by a number of decisions o this court that when dealing with an application of this natur what the court has to satisfy itself on is that the intende appeal is not frivolous or, in other words, it is an arguabl appeal. If the court is satisfied that it is not a frivolous appeal or is an arguable one - and that is not to be taken in any way as an indication by this court of the strength or chances of success of the appeal, then the next question that this court has to go into is as to whether the appeal in relation to either party will be rendered nugatory on the refusal or granting of a stay.

In his submissions, Mr. Okwach for the applicants drew attention to various issues the main ones of which we have attempted to summarize below and which, in his view, involved substantial matters of law and fact.

To start with by ordering the Secretary of the Council to issue a certificate of enrolment to the respondent with effect from 16th September, 1994, the learned judge had purported to invest the Council with a power which it did not have under the Act. We would point out here that Mr. Oyatsi conceded this point. This affects the 1st part only of the order. With regard to the second part of the order which in fact is the substantial order, and which directs the Principal of the Law School to admit the respondent, Mr. Okwach's submission was that the point to be argued during the appeal was as to whether the superior court during an application for Mandamus has any jurisdiction to give

an order except that of quashing the inferior Tribunal's decision and then directing it to re-hear the matter before it after taking cognisance of errors committed earlier by it and to ensure that the Tribunal makes its decision in accordance with the law and procedure. The superior court, he contended, did not have any jurisdiction to command the inferior Tribunal to carry out its duty in question in a certain way. Nor does it have, in such an application, the jurisdiction to grant the right or remedy which is the statutory function of the inferior Tribunal only that is to grant or not to grant.

A thorough scrutiny and interpretation of section 13(1) (b) of the Act by the Court of Appeal as a future guidance on the question of Universities approved by the Council was also to be canvassed during the appeal.

Mr. Oyatsi, for the respondent, in support of his contention that the appeal was frivolous, submitted that the order for stay prayed for in this application was not capable of enforcement. How could the court now stay the respondent's admission to the Law School when the same was granted and the respondent was admitted into pupilage at the Attorney General's Chambers on 27th and 28th October, 1994, respectively - that is over two weeks before the filing of the application and almost a month before the application came up for hearing before this Court? With regard to the jurisdiction of the superior court to give an order of the nature that it did, he referred to section 13 (1) (b) of the Act and submitted that it was clear from the wording of the

sub-sub-section that the powers given to the Council were merel to approve a University which awarded the requisite Law degree Once it had done so, it was obliged to accept the degree issue by that University. The Council then had no power to go behin the degree and enquire into the standard of that degree. The Council had gone outside the scope of its jurisdiction given it by the sub-sub-section when it distinguished between the degree awarded by an attendance of three years and one awarded after an attendance of two years despite the assurance by the Universi that as far as the University was concerned there was no difference between the academic quality of the qualifications attained by these two degrees.

As we stated earlier that at this stage we have only to decide whether the intended appeal is a frivolous one or not. Keeping in mind the issues intended to be raised in the appeal we feel that there is an arguable appeal. The next issue which in fact had occupied more of both the learned advocates' attention, is whether the appeal would be rendered nugatory if no stay is granted. Mr. Okwach stressed that in the event of the stay being refused the respondent, who had been admitted in the Law School as well as accepted in pupilage by the Attorney General's Chambers, would be able to qualify as an advocate as defined under the Act long before the intended appeal came up for hearing which may not be earlier than perhaps even two years. The Council in the event of the intended appeal being successful, will then be powerless to take any steps to restore the status

quo between the respondent and the Council. Mr. Oyatsi's response was that the respondent had already lost one year. If a stay was granted, then in the event of the intended appeal being unsuccessful, she would have lost about another 2 years before she would get an admission. In all the total number of years lost would be about 4 years. The loss and prejudice that would be caused thereby to the respondent would be immeasurable and irreplaceable whereas the Council, if the intended appeal is successful, could always take the necessary steps to disqualify the respondent as an advocate. By way of an obiter dictum obersavation we would merely mention that prior to the recent repeal of the second schedule to the Act, the University of Edinburgh was one of the approved universities listed therein.

We have very carefully considered this aspect of the application. We have no hesitation in concluding that the loss that would be suffered by the respondent would be immeasurable and irreplaceable. Loss of about 3 to 4 years in the career of a young woman cannot be replaced by anything tangible. We, therefore, dismiss this application for stay with costs awarded to the respondent against the applicants.

Dated and delivered at Nairobi this 8th day of December, 1994.

A. M. COCKAR

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JUDGE OF APPEAL

M. G. MULI

.....
JUDGE OF APPEAL

A. M. AKIWUMI

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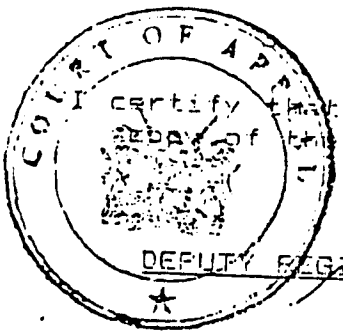
JUDGE OF APPEAL



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

DEPUTY REGISTRAR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APP. 157 OF 1996

M. C. SUBA & 11 OTHERS.....PLAINTIFF

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

RULING

By a Notice of Motion dated 1st March, 1996 and filed in Court on 4th March, 1996, the applicants herein sought the following orders:

1 That an order of certiorari do issue to bring to the High Court and quash the decision of the Egerton University Disciplinary Committee dated 8th February, 1996 purporting to suspend the subjects herein;

2 That an order of prohibition do issue directed to the Egerton University prohibiting it from acting on the said decision of 8th February, 1996;

2 That costs of this application be paid by the Respondent.

This application was brought under Order 53 Rule 3 of the Civil Procedure Rules. Prior to the filing of the same, the

applicants applied for and obtained leave of the court as required of them under Order 53 Rules 1 and 2 of the Civil Procedure Rules. The present application is therefore properly before the court.

The Respondent's Students' Disciplinary Committee is established under Schedule IV clause 4 of Cap 214 Laws of Kenya and its Terms of Reference are to deal with any matters referred to it by the Vice Chancellor and the University authority or other Committee and make recommendations to the Senate.

The letters of suspension dated 8th February, 1996 followed the decision of the senate and at the end of the hearing of this application it was clear that, that was the decision the applicants seek to be quashed. The learned counsel for the applicants attributes the mistake in prayer 1 to a typing error which can be corrected.

I believe the Respondent knows that it is only the senate that makes the decisions of whether or not to suspend and all along it was known what case was to be faced. In any case I see no prejudice that will be occasioned to the Respondent if the first prayer is amended to read "senate" in place of "Egerton University Disciplinary Committee".

Brief facts of this case leading to the present application are necessary. The applicants herein are members of the students organization in the Defendant - a University established by Cap 214 Laws of Kenya.

On 4th February, 1996 there was a riot at the Respondent University during which the security office was set on fire by unknown people. On the following day, that is 5th February,

1996, the Dean of Students summoned eleven (11) students who included applicants Nos 1,2,3,4,5,8 and 10 to appear before the disciplinary Committee two (2) hours later, that is at 3.00 p.m. The Summons which took a form of general notice was posted on the Notice Board and read in part as follows:

"RE: APPEARANCE BEFORE DISCIPLINARY COMMITTEE

"Can the following students appear before the Disciplinary Committee at the old Board Room today at 3.00 p.m. without fail.

Failure to attend judgment will be made in your absence".

On 6th February, 1996 a similar notice signed by the Dean of Students was posted on the Notice Board. It included applicants Nos. 6,7 and 11 who were to appear before the Disciplinary Committee at 11.30A.M. Applicant No.9 was never summoned at all as his name does not appear in the two notices. His name is S.G. Kamau.

Applicant No 1 M.C. Suba was in Police custody when the said notices were issued. He had been arrested before the riot on 4th February, 1996. As he was arrested at the instance of the Respondent, when he was summoned it must have been clear to the Respondent that he could not appear.

Applicant No. 8. P. Oriaro does not appear in the two

notices. He is said to have been summoned by word of mouth through another student and appeared before the Disciplinary Committee when it was in session. All the foregoing facts appear in the affidavit in support of the application and are not in serious dispute.

On 8th February, 1996 each applicant hereon received letters of suspensions which read as follows:

> "You recall that you were summoned to appear before the student Disciplinary Committee on 5th and 6th February, 1996, having been identified as a key player in the students' disturbances which occurred on 4th February, 1996.
>
> The Committee deliberated on your case and found you guilty of masterminding and participating in the events that led the students to burn the security office on the night of 4th February, 1996. The Committee recommendations were tabled in the senate on 7th February, 1996 for further consideration. Accordingly, the senate has decided to suspend you indefinitely from the University. Any further information on the matter will be communicated to you through your home address. You are, therefore, required to vacate the University with immediate effect."

The letters of suspension were signed by the Deputy Registrar - Academic. It is that decision to suspend the

applicants that led to the filing these proceedings.

The grounds upon which the decision by the senate is challenged are:

1 It was in breach of Natural justice particularly the right to a fair hearing including the right to know in advance the allegations against them and a fair opportunity to defend themselves;

2 The notices did not disclose that the named students were suspects in a disciplinary case and was intentionally vague and extremely prejudicial to the applicants;

3 The time given for the applicants to prepare themselves was extremely short and unreasonable so as to render the hearing before the Committee a travesty of fairness.

4 The reason for suspension was a criminal case of arson and if the applicants were accused of such of conduct the matter should have been handed over to the police for trial under criminal law.

5 Applicants Nos.9 and 1 were never heard.

On the other hand it is the Respondent's case that the requirements of natural justice depend on the circumstances of the case, nature of inquiry, rules under which the tribunal is

acting, the subject matter etc. The notice was not an ambush in any way and,that it did not spell out the facts,was not prejudicial to the applicants.

Subjects were informed of what investigations had revealed in respect of each one of them and asked to defend themselves. None complained of lack of opportunity to defend himself or herself before the Committee. They were also offered clear opportunity to be heard and were heard by the Disciplinary Committee

Both learned counsel appearing have made able submissions in presenting their respective cases. Several authorities were also cited. I have gone through all of them but do not deem it necessary to make reference to each one of them. That however,should not be deemed to be wanting in substance. On the contrary,they have been of great assistance to the court in reaching the finding that I shall set out shortly hereinbelow.

Before I go any further in his matter I deem it expedient to echo the words of Nyarangi J.A. IN C.A. NO 90 of 1989 Daniel Nyongesa and others -v- Egerton University College, in relation to these types of cases vis a vis the Courts' point of view. The learned Judge had this to say-

> ".....Courts are very loth to interfere with decisions of domestic bodies and Tribunals including college bodies.Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere

to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for anyone to question or criticize the particular posture of courts. It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate Jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character:" (Emphasis mine). See also CIVIL APPN. NO. NAI 107 OF 1991 Daniel Tanui and others -vs- The Diocesan Chancellor,Mr. Paul Birech & Others

The notices issued on behalf of the Respondent herein summoning the applicants did not indicate the nature of the complaint which the applicants were to face in the disciplinary committee. They have also avered that even when they appeared before the Committee they were not told of any allegations against each one of them. The said notices did not even

disclose the applicants were suspects in a disciplinary case.

The learned counsel for the Respondent referred the court to Administrative Law 2nd Edn. by P.P. Craig P.218 to justify the proposition that;

> "the Board did not have to quote "chapter and verse" nor did it have to disclose the source of its information if it would be contrary to the public interest, nor did the reasons for the refusal have to be given".

But in Kanda v Government of Malaya (1962) A.C. 322 at 337 Lord Denning said:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him".

The applicants had bearely two hours between the issuance of the notice and the time they were required to appear before the Disciplinary Committee. The right to notice extends also to giving the individual a reasonable amount of time in which to prepare his case. (See R -vs- Thames Magistrates' Court (1974) W.L.R. 1371 1375. Also in the case of Charles Mbembe Oloo -vs- Kenya Posts & Telecommunications Corporation. (1992-88) 1KAR 655 Madam J.A. (as be then was) said

> "The fair and reasonable

> opportunity to meet a prejudicial demand must be afforded in clear terms without having to be gleaned from or read into correspondence which itself is silent on the subject."

The thrust of the Respondent's case is a general denial of the applicants' allegation and assertions that all requirements of the rules of natural justice were complied with. With respect, in view of what I have observed above, it is clear there was blatant breach of the rules of natural justice. This was prejudicial to the applicants whose suspensions were indefinite.

There is part of the said notice that is disturbing. This is where it reads:

> "Failure to attend, judgment will be made in your absence"

The impression I got is that the applicants were being summoned to her a verdict in a hearing they did not take part in. I note that it is not a requirement of the rules that the copies of the proceedings be availed. However, the fact that the Respondent has elected not to avail the same in the light of heavy censure by the applicants leads to an inevitable conclusion: that they are adverse to the Respondent and favourable to the applicants, but worse still, that they do not exist.

Having found that the rules of natural justice were not complied with, I do not consider it necessary to belabour on

the other points canvassed during the hearing. It is however important to point out that the Respondent cannot be heard to say that some of the applicants were not students in this institution. If that be the case why summon someone who is not your subject? That argument cannot stand.

In the end I must find, as I hereby do, that the applicants application succeeds. The decision of the senate of the Respondent dated 8th February 1996 is hereby quashed. Having said so, prayer number 2 does not arise as the Respondent cannot act on a decision that does not now exist. Re-admission of the applicants shall follow forthwith after service of this order upon the Respondent.

I wish to place it on record that this court abhors lawlessness and violence in our institutions of learning and any subject identified with such evils should be dealt with squarely under the relevant provisions.

However, in so doing, fairplay must not only be seen to be applied but must actually be executed.

The applicants shall have the costs of this application.

It is so ordered.

Dated and Delivered at Nairobi this 17th day of July, 1996.

A. MBOGHOLI MSAGHA

JUDGE