



The application seeks for an order that a writ of mandamus doth issue directing the Secretary Law Council (2<sup>nd</sup> respondent) to grant the applicant a duplicate copy of his answer sheet in which the applicant sat under registration number P.E 651/2012; to produce the applicant's answer sheet for verification by a party without interest / or an external examiner and costs of the application. It is supported by an affidavit deponed by the applicant himself giving the circumstances from which this application arose as already stated.

The respondents filed an affidavit in reply deponed by MARGARET APINY, the Ag. Secretary to the 2<sup>nd</sup> respondent wherein she denied ever having any conversation with the applicant as alleged in paragraphs 8 and 9 of the affidavit in support of the motion. She also averred that the applicant's failure and the subsequent withdrawal of financial assistance from the applicant cannot be attributed to the respondents.

The applicant did not file any rejoinder.

Parties agreed to file written submissions which they eventually adopted as their final address to the court. Learned counsel for the respondent, Mr. Bafirawala raised an objection. He argued that under rule 5 (1) of S. I. 11/2009, an application for judicial review should be made in a period of **three** months from the time when the decision was made. According to him, the impugned decision was made on 12<sup>th</sup>/09/2012, but the application was only filed in court on 20<sup>th</sup>/12/2012; so the application is out of time.

Rule 5 (1) of The Judicature Judicial Review Rules, S.I No. 11 2009 provides:

***“(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made.”***

From the pleadings, paragraphs 8 and 9 of the affidavits in support, the applicant immediately orally informed the law council of his rejection of the score sheet that was ‘unsigned, unsealed, hurting to someone sacrificing to pay fees and un confirmatory of the plaintiff's marks’ and that he ‘orally asked the 2<sup>nd</sup> respondent to remark his paper or furnish him with a duplicate copy of his answer sheet but his concerns were not addressed.’ He allegedly informed the Secretary Law Council to prepare for the full force of the law which would be employed to have his concerns redressed.

If this allegation is true; it is absurd that from this point, the applicant did not even pursue the said ‘*full force of the law*’ until 20<sup>th</sup> December 2012, clearly a period beyond the three months statutory period. Under Rule 5(1) there is allowance for court to exercise discretion in favour of an applicant, where court considers that there is good reason for extending the period within which the application shall be made but in this case I do not see any good reason advanced by

the applicant that would warrant the extension of time. In the result, the application is time barred and the objection is upheld.

The applicant would however have an option of making an application to extend the time within which to bring the application; for avoidance of multiplicity of suits I will delve into the merits of the application. I will also make a comment or two on the subject of Judicial Review.

Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions, or who are engaged in the performance of public acts and duties. Those functions/duties/acts may affect the rights or liberties of the citizens. Judicial review is a matter within the ambit of Administrative Law. It is different from the ordinary judicial review of the court of its own decisions, revision or appeal in the sense that in the case of ordinary review, revision or appeal, the court's concerns are whether the decisions are right or wrong based on the laws and facts whereas the remedy of judicial review, as provided in the orders of mandamus, certiorari and prohibition, the court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made. The court is not, therefore, entitled on an application for judicial review, to consider whether the decision was fair and reasonable.

Lord Hailsham of St. Marylebone L.C set the tone as regards the purpose of judicial review in the following terms:

***“Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the court.”***

See: **Chief Constable of North Wales Police Vs Evans [1982] 3 All E.R. 141 (at p. 143h – 144a).**

It is trite to say that judicial review is concerned not with the decision per se, but with the decision making process. Essentially judicial review involves an assessment of the manner in

which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. For this reason each case must be determined on its own merits.

I agree with the above legal principles. I will accordingly proceed to the determination of the merits of the application.

My perusal of the motion indicates that the applicant's lead prayer is for an order of mandamus against the respondents. Mandamus is a prerogative writ to some person or body to compel the performance of a public duty. From the authorities, before the remedy can be given, the applicant must show a clear, legal right to have the thing sought by it done, and done in a manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus must be actually due and incumbent upon that person or body at the time of seeking the relief. That duty must be purely statutory in nature, plainly incumbent upon the person or body by operation of law or by virtue of that person or body's office, and concerning which he/she possesses no discretionary powers. Moreover, there must be a demand and refusal to perform the act which it is sought to coerce by judicial review. **See M/S Semwo Construction Company V Rukungiri District Local Government MC 30 of 2010**

In the instant case, the applicant has not demonstrated to this court that the issuance of the marks by the 2<sup>nd</sup> respondent and the failure to have his answer sheet verified is a statutory obligation incumbent on any of the Respondents to perform.

Much as the applicant alleged to have requested the 2<sup>nd</sup> respondent to remark his answer sheet or furnish the applicant with a duplicate copy of the same; this averment was denied by the respondent in their affidavit in reply and no rejoinder was made by the applicant to rebut the denial.

It is settled law that where facts are sworn in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted; see **Massa v Achen (1978) HCB 297**. In the instant case failure by the applicant to deny or rebut the respondents' averment that a demand for a remark was never made; makes the said averment an accepted fact in the affidavit. Conclusively no demand for performance of a right, if any, was made to the respondent which is an element of grant of mandamus that is not satisfied by this application.

In the absence of a clear legal right in issue or a demand for performance of a right, I have not found this case a proper one in which court should exercise its discretion in favour of granting any of the reliefs sought. This court cannot, under the guise of judicial review, assume the day to day management and operation of LDC and the Law Council. It cannot inquire into the propriety of the scheme of the respondents. Such matters are in my view not within the ambit of the supervisory jurisdiction of the court. I would therefore uphold the submission of learned counsel for the respondent that this application lacks merit and it is dismissed.

**Eldad Mwangusya**

**J U D G E**

**14.06.2013**

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