



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CAUSE NUMBER 111 OF 2015

BETWEEN:

THE STATE

AND

COUNCIL OF THE UNIVERSITY OF MALAWI

RESPONDENT

EX PARTE

LETON MAUYA MSUKU

APPLICANT

CORAM: JUSTICE M.A. TEMBO

Msuku, Counsel for the Applicant

Chijere, Counsel for the Respondent

Kakhobwe, Official Court Interpreter

ORDER

This is an order of this Court on the applicant's application for an order for leave to apply for judicial review of the respondent's decision withdrawing the applicant from a Master of Laws (Commercial Law) program offered by the respondent. The respondent's decision is being challenged by the applicant for being unreasonable in that in the circumstances the respondent treated the applicant as a student due to finalize and submit his thesis but suddenly and without a warning as to the due date for finalizing the thesis withdrew him. Further, that the respondent withdrew the

applicant on the basis of evidence that was not brought to the applicant's attention and without hearing the applicant on such evidence in violation of the rules of natural justice. Further, that the respondent's conduct was discriminatory in view of the fact that another student on the same program who was initially withdrawn for late submission of his thesis was later allowed to submit his thesis.

This Court considered the applicant's ex-parte application for leave to apply for judicial review and was not sure whether there was or there was not a case fit for further investigation at a full hearing. Consequently, this Court decided to call the putative respondent to make representations on the issue of the leave applied for by the applicant herein. This was done pursuant to the relevant practice as provided in Note 53/14/55 to Order 53 rule 14 Rules of the Supreme Court.

This Court is aware that the purpose of a leave application like the instant one is firstly to eliminate at an early stage applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi* Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported); *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93.

This Court is further aware that leave to apply for judicial review will be granted if the Court is satisfied that there is an arguable case for granting the relief claimed by the applicant. At this stage there is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an arguable case then leave should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review. See *Ombudsman v Malawi Broadcasting Corporation*.

The facts of this case are that the applicant is an employee of the respondent and also enrolled on an 18 months Master of Laws (Commercial Law). The applicant duly finalized his class work within the required 12 months period and passed the same and all that remained was for the applicant to complete and submit a thesis to

conclude the masters program herein within the following six months. Submission of a thesis by a particular date is an important component of the masters program herein. And that is where the issues in this case rest.

Initially, the applicant and many other students on the same program, failed to submit the required thesis on the due date of September 2013 and the putative respondent states that it granted a blanket extension of three months to the applicant and the other students to submit their thesis by December 2013. The applicant contends that he was never advised of such an extension by the putative respondent. However, that after he had applied for an extension and never got a formal reply, that indeed he was treated as a student beyond the due date of September 2013 together with the rest of the students on the masters program.

The applicant stated that from the extension that the putative respondent gave, which it says was to run to December 2013 and which date the applicant states he was not aware of, the putative respondent continued to treat the applicant as a student and no new due date for submission was communicated to the applicant until all of a sudden in 2015 the putative respondent withdrew the applicant for failure to submit his thesis on time. The putative respondent on the other hand vehemently submitted that a new date for submission was communicated to the applicant and the other students and that the applicant failed to adhere to this new due date.

This Court was consequently curious to find out from the applicant how he accounted for a whole year without concluding the thesis and then ask for another extension in February 2015. This Court was curious because in the view of this Court the applicant had the initial six months to write the thesis in line with the program rules. Thereafter the applicant was granted, along with other students, a three months extension which ended in December 2013. Thereafter, the applicant took another 12 months in 2014 without submitting his thesis. Only in February 2015 did the applicant seek an extension to submit his thesis which he said was almost ready. This Court was curious to find out how the applicant accounted for that extended period of time. The applicant's response was that the putative respondent did not give him a due date after the extension in September 2013 and the putative respondent continued to treat the applicant as a student until suddenly in 2015 the putative respondent withdrew the applicant from the program.

This Court has reflected long and hard on this line of argument pursued by the applicant in support of leave.

This Court notes that from the papers filed by the applicant in support of leave the applicant contends that he was never given any formal response on his application for extension and simply proceeded as if the putative respondent gave him an extension. The applicant actually added in his affidavit that the entire class proceeded as if they had an extension. The papers filed by the applicant however disclose a different scenario altogether. In particular the applicant in his affidavit in support of the application for leave he states as follows

Para 7. That having successfully completed the classroom work, I embarked on dissertation writing but having realized that I could not finish on time, I did apply for extension-MM2 is a copy of my application letter.

Para 8. That though the relevant authorities did not formally respond to my application, I continued with the studies and submission of the work which was being duly checked –MM3 is a copy of my work checked after the application.

Para 17. That as regards there being no evidence that the letters were received and they were not signed, it has to be noted that the first letter for which extension was granted was delivered to the faculty just as the second letter...

The applicant states in one breath, in paragraphs 7 and 8 of his affidavit, that on the first application for extension in which he made in November 2013 he was never formally replied to. Yet in another breath, in paragraph 17, the applicant indicates that on the first application in November 2013 an extension was granted. The applicant appears not to be credible on this aspect. And one would think that it is not credible that the putative respondent simply treated the applicant as a student without indicating a due date for submission of his dissertation.

Further, the applicant exhibited to his affidavit a letter marked exhibit MM4 which he had written to the putative respondent asking for an extension in February 2015 and in the first paragraph it reads

I write to request to submit my LLM thesis later than the directed date. The delay has been due to serious personal circumstances that affected my concentration in the course of writing the thesis.

What this Court notes from this paragraph is that the applicant had a directed date for submitting his thesis after the extension of September 2013. The applicant can therefore not be heard to claim, as he did at the hearing before this Court, that after the extension that was granted in September 2013 he was never given a clarification as to the due date. This is also clear if one considers that the applicant is asking for an extension in February 2015 by exhibit MM4 by referring to personal circumstances as the cause for his failure to submit his thesis on time. The applicant does not at all raise the issue of lack of clarity on the part of the putative respondent as to the due date for submission of his thesis. The applicant's case for leave for judicial review therefore lacks credibility. The applicant appears to have no proper explanation for failure to adhere to the directed date for submission of his thesis in this matter and the allegation that he was never told the due date is merely a smoke screen.

Therefore, on the papers, the case of the applicant is obviously unsustainable on the alleged ground that in the circumstances the respondent treated the applicant as a student due to finalize and submit his thesis but suddenly and without a warning as to the due date for finalizing the thesis withdrew him. The applicant's own papers show that he was withdrawn after due notice as to the due date for submission of his thesis. There is no arguable case on the alleged ground of the putative respondent's unreasonableness. This Court therefore agrees with the putative respondent that the applicant's application for leave should not be allowed on that ground.

The other ground for seeking leave to apply for judicial review is that the putative respondent withdrew the applicant on the basis of evidence that was not brought to the applicant's attention and without hearing the applicant on such evidence in violation of the rules of natural justice. This evidence in issue is that which partly informed the decision of the appeals committee on its ruling in this matter when the applicant appealed against the original decision to withdraw him. The appeals committee confirmed the original decision to withdraw the applicant in the circumstances. This Court has considered that the original decision of the putative respondent cannot be faulted by the applicant as unreasonable and so that it would not make sense to allow leave herein due to the appeal decision that confirmed the original decision by partial reference to some evidence which the applicant seeks to dispute. The original decision having been found to be unassailable after a

consideration of the applicant's own papers this Court cannot allow a review of the same original decision on the basis of the applicant's challenge to part of the basis of the appeal's committee's decision herein.

Lastly, the applicant claimed that another candidate in his class, Mr Gustave Kaliwo, was withdrawn on similar grounds as the applicant herein. Further that Mr Kaliwo also appealed and was granted an extension. Consequently, that the respondent's conduct was discriminatory in view of the fact that another student on the same program who was initially withdrawn for late submission of his thesis was later allowed to submit his thesis.

The putative respondent argued that there is no evidence by the applicant, apart from the allegation made, to show that Mr Kaliwo's circumstances were similar to those of the applicant so as to buttress the applicant's claim of discrimination. The applicant replied that he can only speak from his personal knowledge and it is up to the putative respondent to have filed an affidavit to challenge the applicant's claim and show that Mr Kaliwo's situation was different. This Court reflected on this issue.

What would be expected in the circumstances where an affidavit is used to apply for leave was for the applicant not only to claim that Mr Kaliwo was in a similar situation. The applicant ought to have laid down the facts that support his claim that actually his own situation was similar to that of Mr Kaliwo. The applicant bears the burden of proof and not the defendant. The applicant has, among other things, not disclosed in his affidavit whether the alleged delay in submission of the thesis by Mr Kaliwo was as inordinate as that of his own to make Mr Kaliwo's case similar to his own. The applicant has not laid down the facts that support his claim that Mr Kaliwo's situation was similar to his own situation. In such circumstances the applicant's case on the papers as they stand is obviously unsustainable.

The other arguments advanced by the putative respondent at the hearing herein will not be considered in view of the foregoing findings of this Court.

In the foregoing premises this Court therefore agrees with the putative respondent that there is no case suitable for consideration at a full hearing and that leave to

apply for judicial review should not be granted. The applicant's application for leave is accordingly declined and so too the prayer for ancillary relief.

Made in chambers at Blantyre this 8th February 2016.

M.A. Tembo

JUDGE