Abdikadir v Miss Mercy Ndila, Academic Registrar, University of Nairobi & 2 others (Judicial Review E235 of 2024)
[2024] KEHC 14566 (KLR) (Judicial Review) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14566 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E235 OF 2024

JM CHIGITI, J

NOVEMBER 21, 2024

BETWEEN

ABDULLAHI JABIR ABDIKADIR ..... APPLICANT

AND

MISS MERCY NDILA, ACADEMIC REGISTRAR, UNIVERSITY OF NAIROBI ..... 1ST RESPONDENT

PROF. GEORG OSANJO OYAMO, ASSOCIATE DEAN, UNDERGRADUATE STUDIES, FACULTY OF HEALTH SCIENCE ..... 2ND RESPONDENT

PROF. OTIENO C.F. FREDRIC, ASSOCIATE DEAN OF MEDICINE ..... 3RD RESPONDENT

RULING

1. The application that is before this court is dated 11th October,2024 seeking the following orders:
    1. ...spent.
    2. The Applicant be granted leave to apply for orders of certiorari to quash in its entirety the Respondents decision decided on July 25, 2024 and transmitted vide a letter dated September 30th 2024.
    3. The said leave operated as stay of the Respondent's decision decided on July 25, 2024 and transmitted vide the letter dated 30th September 2024.
    4. The cost of this application be provided for.
2. The application is vehemently opposed.

Brief Background:

3. Through, a letter dated 30th September 2024, the Dean of Faculty of Health Sciences, UON, informed the Applicant that the Faculty Disciplinary Committee on 25th July 2024, had after considering the case in which he was accused of obtaining money by false pretense contrary to Section 17.1.14 of the Students Code of Conduct, 2021, withheld all services from him including examinations and suspended him for one year.

4. The Faculty Disciplinary Committee made a decision to withhold services from the Applicant on 25th July 2024, including 5th Year MBChB Examinations, and suspended him for one year.

5. The foregoing has precipitated the instant application.

The Applicant's case;

6. It is his case that sometime in April he was accused of obtaining money by false pretense by a fellow student Fahima Guleed Reg. H31/146361/2023.It is alleged that she gave him her school fee which he did not pay on time due to misunderstanding and that he was not present in school as at that time.

7. The Applicant argues that he subsequently ensured that the fee money was paid without further delay and she withdrew the matter in writing before the security department where she had reported him.

8. He is concerned by the fact that the issue was revived by the Registrar Miss. Musembi 0720362397 who texted him severally over the matter yet according to him the matter had been closed under Section 32.1.12 of the Students' Code of Conduct (Revised), 2021.

9. It is further his case that on June 18th 2024 and on 16 July 2024 he received Whatsapp messages from the said Ms. Musembi the faculty registrar, FHS summoning him for a consultative meeting about the complaints raised by fellow students on monies allegedly paid to him fraudulently and that the meeting will take place the following day 19th June 2024.

10. It is his case that on 24th July 2024 he was diagnosed with severe pneumonia as a result of which he was unable to attend the meeting on 25th July 2024.

11. On 30th September 2024 he received a letter stating that he was charged with obtaining money by false pretense contrary to section 17.1.14 of the Students' Code of Conduct (Revised) 2021, and that he stood WARNED to desist from any form of indiscipline while at the university failure to which severe disciplinary action shall be taken against him.

12. The university also withheld all services including examination and that he stood suspended from the faculty for one year, to resume studies (MBCHB V) in September 2025.

13. He prepared and filed an appeal at the Students Disciplinary Appeal Committee on 4th October 2024 which copies he availed to academic registrar, UON and Associate Dean, undergraduate studies.

14. On numerous times he sought the release of his examination results since there was upcoming supplementary examinations on 16th-18th October 2024 and he need to prepare in the event he failed a unit.

15. He argues that his fundamental rights are infringed and he is undergoing psychologically frustration caused by the actions of the respondent which is not to his best interest as a student.

Respondents' Case;

16. The Application is opposed. According to the Respondents, the Applicant was not offered any 5th Year Bachelor of Medicine and Bachelor of Surgery (MBCHB) Examinations held in August 2024.

17. There are no examination results to be released, nor is he eligible for Supplementary Examinations on the basis of 5th Year MBCHB Examinations held in 2024.

18. In September 2023, while Fahima Abdi was reporting to the university as a first year medical student the Applicant, approached her, and lied to her that he was a doctor and a member of staff of the University of Nairobi And that he was in a position to assist her with registration process for first year medical students and convinced to send him money, being Ksh 250,000/- meant for her university fees, so that he would deposit the funds in the university fee accounts on her behalf through his phone number, 0714134243.

19. It is the Respondents' case that The Applicant failed to pay to the university fee as a result of which Fahima Abdi could not access some university classes, practicals and examinations, and as result she missed some examinations and eventually failed her first year of medical school.

20. It is also the Respondents case that the disciplinary process and decision of the Faculty Disciplinary Committee were fair and lawful in that:

    i. The Applicant, who is a student was charged with an offence spelt out in the Students Code of Conduct, namely obtaining money by false pretense contrary to Section 17.1.14 of the Students Code of Conduct, 2021; and the particulars of the offense were fully described in the Complaint Sheet.

    ii. The Applicant was duly notified of the complaints against him, and he has admitted to receiving the said notifications. He was notified by email, with additional information through text messages and phone calls.

    iii. The Applicant was duly notified to attend the Faculty Disciplinary Committee hearing, and he has admitted receiving the notifications.

21. It is the Respondents' case that even though the Applicant, in his written submissions, argues that he expected all communications to him ought to emanate from the Campus Security Officer, this is not the case, as the Faculty Registrar, is the Administrative Officer of the Faculty, and thus does and has authority to communicate with students on academic and administrative matters. This is in accordance with the University of Nairobi Statutes 2013, which made pursuant to the *Universities Act* 2012.

22. The Applicant did not attend the Faculty Disciplinary Committee meeting and did not provide a reason for not doing so, and only produced a medical report after the receiving the letter communicating the Committee's decision. The said medical report is expected to be considered by the Appeals Disciplinary Committee.

23. The Faculty Disciplinary Committee made a decision to withhold services from the Applicant on 25 July 2024, including 5th Year MBChB Examinations, and suspended him for one year. The decision accords with Students Code of Conduct, 2021.

24. The Respondents' assert that the disciplinary process and the decision of the Faculty Disciplinary Committee was fair and lawful in that:

i. The student was charged with a valid offence, namely, obtaining money by false pretense contrary to Section 17.1.14 of the Students Code of Conduct, 2021; and the particulars of the offense were fully described in the Complaint Sheet;

ii. The Applicant was duly notified of the complaints against him, and he has admitted so in the course of this proceedings, in his sworn verifying affidavit;

iii. The Applicant was duly notified to attend the Faculty Disciplinary Committee hearing, and he has admitted receiving the notifications;

iv. The Applicant did not attend the said Faculty Disciplinary Committee meeting at the date and venue he has admitted to having knowledge of; and he did not provide a reason for not doing so, and only produced a medical report after receiving the letter communicating the Committee's decision. The said medical report is expected to be considered by the Appeals Disciplinary Committee.

v. The Judicial Review Miscellaneous Application dated 11th October 2024 is fundamentally flawed, incompetent, bad in law and incurably defective as it does not fulfil the mandatory requirements set out Order 53 Rule 1 of the Civil Procedure Rules, 2010.

vi. The Application has not articulated the grounds that justify judicial review;

vii. The basis for the reliefs sought by the prayer for stay of the decision is overtaken by events, given the Applicant states he will apply for an orders of certiorari and mandamus to permit the Applicant sit for a Supplementary Examinations in September - October 2024, dates which have already passed.

25. The Respondents advanced the following to be the issues for determination:

i. Whether the Honourable Court has jurisdiction to entertain this suit given the Applicant.

ii. Whether the Application is fatally defective.

iii. Whether the Application has met the threshold to granting of leave to commence Judicial review proceedings; and if so,

iv. Whether the leave so granted should operate as a stay.

Whether the Application is incompetent and fatally defective;

The parties are erroneously enjoined in the Application for Judicial Review

26. The 1st, 2nd and 3rd Respondents are not public bodies and do not exercise the powers or authority the Application insinuates they exercise. As such the correct Respondent, against whom orders should be directed were the Applicant to be successful ought to be the University of Nairobi which is a corporate body capable of suing and being sued.

27. The University of Nairobi, is a public university established by the University of Nairobi Charter, 2013, pursuant to Section 13 of the *Universities Act* 2012.

Whether the Honourable Court has jurisdiction:

28. It is the Respondents case that The Honourable Court should not review an administrative action when internal mechanisms remain incomplete. Section 9 of the *Fair Administrative Action Act*, provides that:

> " (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

29. They argue that it is common ground that the Applicant has appealed the decision of the University Faculty Disciplinary Committee at the University Appeals Disciplinary Committee as provided under the Students Code of Conduct (Revised), 2021.

30. Reliance is placed in the case of The Speaker of the National Assembly – vs - Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling), the Court of Appeal stated as follows:

> " 15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."

31. This was reiterated by Odunga J (as he then was) in Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR as follows;

> " 40. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute."

32. It is their case that the university internal mechanisms should be exhausted before the matter is presented to the Honourable Court for adjudication.

33. Suffice to state that the Honourable Court during the proceedings granted a stay of the Internal Appeal Procedure, which the Applicant has not prayed for even when given the opportunity, the stay should be lifted.

34. Furthermore, in the course of the proceedings, the Honourable Court, suo moto, stayed the appeal proceedings at the University of Nairobi, without a request by the Applicant.

35. It is the Respondents' case that the Applicant has not denied the serious charge of obtaining money by false pretense contrary to Section 17.1.14 of the UON Students Code of Conduct (Revised) 2021, that he was accused of, which forms the basis of the decision of the Faculty Disciplinary Committee.

36. The Applicant has no remorse whatsoever of the devastating consequences of his action. In his defence, he says:

i. "d) Another accused person Hussein Salat alongside the Applicant (Sad that he has not been summoned/charged and is enjoying his 6th year studies while the co-accused classmate is battling suspension. Sad discrimination and victimization!" [Applicants Submissions, Page 4]. This ignores pertinent facts, that the Applicant's conduct satisfied all the elements of the charge he is accused of. For example, the Applicant, is the only person accused of receiving the money.

ii. The Applicant also alleges that the complaint was withdrawn, without providing any evidence. However, as clarified in the Respondent's Affidavit, no withdrawal was received by the University by the time the Faculty Disciplinary Committee met. Any such evidence of withdrawal will be considered by the Appeals Disciplinary Committee.

iii. A review of the Respondents Replying Affidavit reveals that the Applicant was communicated to, which communications he received regarding the enquiry and invitation to the Faculty Disciplinary Committee, which numerous invitations he ignored.

iv. The Applicant has admitted to ignoring the text messages and emails from the Faculty Registrar.

37. In Republic –Vs- Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku [2022] eKLR Gakeri J, reviewed the law with regard to stay of proceedings or a decision of an administrative authority as follows:

"

> " 41. A stay suspends or stops the proceedings that are challenged by the application for judicial review. Its purpose being to preserve the status quo pending determination of the judicial review proceedings.
>
> 44. .... in Jared Benson Kangwana v Attorney General HCCC No. 446 of 1995, *Taib Ali Taib v Minister for Local Government & Others HC Misc. No. 158 of 2006*, Republic v Cabinet Secretary for Transport and Infrastructure & 4 others, Exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR and James Opiyo Wandayi v Kenya National Assembly and 2 others (supra) where Judges held that where the decision sought to be stayed is complete, the Court cannot stay the same unless it is a continuing process in which the case the Court considers the completeness or continuing nature of the implementation.
>
> 46. Finally, in the words of Maraga J. (as he then was) in Taib A. Jaib v Minister of Local Government & 3 others (supra)
>
> "The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made.
>
> It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister, and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is however, not appropriate to compel a public body to act."

49. It is not in dispute that the decision sought to be stayed was taken on 21st December 2021, more than three months ago and continuing.

50. Based on the judicial authorities citied above, the Court is of the view that a stay at this stage would be tantamount to granting the substantive Orders sought by the Ex Parte Applicant and would be inappropriate, inefficacious and is likely to occasion confusion and disruption."

38. It is their case that the basis of requesting for stay orders by the Applicant, is for his examination results allegedly withheld to be released, or as formulated in the prayer "his examination results be released and he be permitted to sit for supplementary examinations due for 16th -18th September 2024 [sic]".

39. It is the Respondents' case that at the leave stage the Honourable Court may not compel the Respondents to act, as such would be tantamount to an order of mandamus, which the Honourable Court may not grant at the leave stage.

40. Reliance is also placed, in *Kihingo Village (Waridi Gardens) Management Limited v Attorney General & 2 others (Judicial Review 169 of 2023*) [2023] KEHC 26714 (KLR) (Judicial Review) (20 December 2023) (Ruling) the court posed as follows: "Can I grant this prayer in view of the scope and purpose of the stay order as stated above" I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them."

41. According to the prayers of the Applicant, he wishes to sit for Supplementary Examinations in September – October 2024, period. Even if this were so (which is not the case as the Applicant was not offered examinations, by dint of the decision of the Faculty Disciplinary Committee), then the dates are already past.

42. They argue that The Honourable Court should not therefore grant prayers given that the time period for examinations have passed and the prayer is no longer tenable.

43. The Respondents also have an issue which it believes is veiled as a request for an order of mandamus, which cannot be granted by the Honourable Court at the leave stage.

Analysis and Determination;

Following are the issues for determination:

1. Whether this court has jurisdiction?

2. Whether the Applicant is entitled to the orders sought?

3. Who will bear the costs of the suit?

The 1st Issue

Whether this court has jurisdiction to hear and determine this suit;

44. In Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus [paragraph 68]:

"(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which Is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of

mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law." (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex in Re the Matter of the Interim Independent Electoral Commission where the Court stated: -

"[29 Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."(underlining supplied)

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

45. Section 9(2) and (4) of Fair Administrative Actions Act stipulates that:

" (2) The High Court or a subordinate court under Sub section (I) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(4) notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the Applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to being the interest of justice."

46. In the case of Clifford Keya v Jackline Inguitiah & 5 others; Atieno Aoko & 3 others (Interested Party) [2022] eKLR;

" The doctrine of exhaustion is applicable to constitutional Petitions. If successfully raised, it is a complete bar and a Court will not move an inch ahead. There are, however, instances where the doctrine will be inapplicable.

The doctrine of exhaustion traces its origin in Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution.

> The doctrine is further entrenched in Section 9 of the *Fair Administrative Action Act*; 2015 which provision forbids the High Court from assuming jurisdiction in matters where a party does not exhaust internal remedies except where exceptional circumstances for exemption are proved to exist."

47. It is not in dispute that there is an ongoing redress mechanism that is available to the Applicant. The applicant does not deny that in line with the Students Code of Conduct (Revised), 2021, the Committee recommended that he could appeal the decision with the Appeals Disciplinary Committee within seven days upon receipt of the disciplinary decision.

48. This court notes that the Applicant went ahead and lodged an appeal through his letter dated 4 October 2024, which is under consideration by the University and the same is pending determination.

49. The university Student's Appeals Disciplinary Committee will be rendered otiose if this court takes away its role or interferes with the ongoing appeal.

50. The Application is premature; as the appellate procedure he has invoked in the university is active. The Applicant will have an opportunity to raise his concerns before the university appeals forum.

51. He has not argued that the university redress mechanisms are not available to him. In any event should the finding of the university appeals platform offend the rule of law then the Applicant will have his day in the superior court to challenge the decision.

52. In this circumstance, this court finds that it lacks jurisdiction. The court does not find any justification for the grant of the orders sought by the applicant to institute Judicial Review proceeding and I so hold.

The 2nd Issue

Whether or not the Applicant is entitled to the orders sought.

53. Having found that this court lacks jurisdiction, this court cannot determine the other issues. In so finding I am guided by the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."(underlining supplied).

The 3rd issue

Who should bear the costs.

54. The general rule flowing from Section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya is that costs should follow the event. That is to say, the successful party should be awarded its costs. This general rule is elaborated by Justice Kuloba in his book, Judicial Hints on Civil Procedure, Vol. 1 at p. 99 as follows:

> "The first question is what is meant by "the event" in the proviso to subsection (1) of this section? The words "the event" mean the result of all the proceedings incidental to the litigation. The event is the result of the entire litigation. .... Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action." (Emphasis provided).

55. This court has the discretion to award costs. I have noted that this suit is anchored in and connected albeit remotely to the right to education, and that the Applicant is a student at the university as a result of which the court directs that each party shall bear its costs.

Disposition;

56. The Honourable Court lacks jurisdiction to hear this matter, as the Applicant has initiated an appeal through internal dispute resolution mechanism.

57. The application does not meet the threshold of granting the orders sought.

Order;

The application is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

J. M. CHIGITI

JUDGE