



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 92 OF 2020**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS CERTIORARI AND PROHIBITION**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP. 26**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE CHAPTER OF JKUAT UNIVERSITY**

**AND**

**IN THE MATTER OF ARTICLES 10 (2) (C), 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOM UNDER ARTICLES 35 (1), 43 (1) (f), 47 (1) (2), 48, 50 (1) (2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE JKUAT UNIVERSITY STUDENT HANDBOOK AND POLICY**

**AND IN THE MATTER OF CLOSURE NOTICE DATED 30.07.2020 BY THE JKUAT UNIVERSITY GOVERNING COUNCIL OF CLOSURE OF JKUAT – UNIVERSITY ELDORET CAMPUS AND RELOCATION OF STUDENTS TO CAMPUSES IN OTHER COUNTIES**

**AND**

**IN THE MATTER OF COMMISSION FOR UNIVERSITY EDUCATION**

**BETWEEN**

**REPUBLIC EXPARTE**

**LOLEM REUBEN**

**JAHEXM DEDE**

SUSAN CHEPTOO.....APPLICANTS

VERSUS

JKUAT UNIVERSITY COUNCIL.....1<sup>ST</sup> RESPONDENT

THE VICE CHANCELLOR – JKUAT UNIVERSITY....2<sup>ND</sup> RESPONDENT

THE DIRECTOR JKUAT ELDORET CAMPUS.....3<sup>RD</sup> RESPONDENT

**RULING**

**Introduction**

[1] By Chamber Summons dated 24<sup>th</sup> August 2020, the applicants pray for leave of court to file judicial review proceedings seeking the substantive reliefs underlined below and an order that the grant of such leave do operate as a stay of the impugned decision of the respondents as follows:

**“CHAMBER SUMMONS**

1. THAT service of this application be dispensed with the first instance.
2. THAT ex-parte applicants be granted leave to apply for **an order of certiorari to remove into this Honourable Court and quash the JKUAT Eldoret Campus closure Notices issued on 29.07.2020 and 30.07.2020 requiring closure of the campus together with any other proceedings/and decisions connected therewith.**
3. THAT ex-parte applicants be granted leave to apply for **an order of prohibition against the respondents to prohibit the respondents from closing the JKUAT Eldoret Campus and/or an order rescinding the respondents decision to close down JKUAT Eldoret Campus to give the on-going students at the said campus a chance to complete their studies.**
4. THAT the leave do operate as stay of implementation of the JKUAT Eldoret Campus closure Notices issued on 29.07.2020 and 30.07.2020.
5. THAT the costs of this application be provided for.”

[2] The application is based on the grounds set out in the application as follows:

- a) “THAT the respondents are intending to act in an ultravires manner to close the JKUAT Eldoret campus and affect the ex-parte applicants’ fundamental rights.
- b) THAT the respondents are biased and cannot accord the ex-parte applicants a fair hearing as they have already made a conclusion regarding the closure of the JKUAT Eldoret Campus.
- c) The decision is bound to fundamentally affect and interrupt the ex-parte Applicants pursuit of education, the impugned decision by the respondents is contrary to the rules of natural justice and principles of fair administrative action.”

[3] The Relief sought in the intended Judicial Review proceedings is set out with the grounds therefor in the accompanying Statutory Statement dated 24<sup>th</sup> day of August 2020 setting out the applicants’ case and grounds therefor as follows:

**“STATEMENT**

**2. RELIEF SOUGHT**

- a) THAT **an order of certiorari** do issue to remove into this Honourable Court and quash the JKUAT Eldoret Campus closure Notices issued on **29.07.2020 and 30.07.2020** requiring closure of campus by 30.8.2020 together with any other proceedings/and decisions connected therewith.
- b) THAT **an order of prohibition** do issue against the respondents to prohibit the respondents from closing the JKUAT Eldoret Campus and/or **an order rescinding the respondents decision** to close down JKUAT Eldoret Campus to give the on-going students at the said campus a chance to complete their studies.
- c) The costs of the proceedings be awarded to the **ex-parte** applicants.

**3. GROUNDS UPON WHICH THE RELIEF ARE SOUGHT**

- a) THAT the respondents are intending to act in an ultravires manner to close the JKUAT Eldoret Campus and affect the ex-parte applicants' fundamental rights.
- b) THAT the respondents are biased and cannot accord the ex-parte applicants a fair hearing as they have already made a conclusion regarding the closure of the JKUAT Eldoret Campus.
- c) The decision is bound to fundamentally affect and interrupt the ex-parte Applicants pursuit of education, the impugned decision by the respondents is contrary to the rules of natural justice and principles of fair administrative action."

### **The Facts of Case**

[4] The facts relied on by the applicants were set out in the Verifying Affidavit as follows:

#### **“VERIFYING AFFIDAVIT**

**I, LOLEM REUBEN** of Post Office Box C/o 6756 – 30100 ELDORET, being a male adult of sound mind studying at JKUAT ELDORET CAMPUS situate within ELDORET do hereby solemnly and sincerely make oath and state as follows:

1. THAT I am the 1<sup>st</sup> ex-parte applicant hence competent to swear this affidavit on my behalf, on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> ex-parte applicants and with authority of all students of JKUAT Eldoret Campus. (Annexed hereto is authority to plead marked LR-1)
2. THAT the 2<sup>nd</sup>, 3<sup>rd</sup> ex-parte applicants and I and are the students leaders of JKUAT Eldoret Campus.
3. THAT the Respondents established the JKUAT Eldoret campus and enrolled the students on the understanding that the students who signed the admission letters were to finish their education without interruption. (Annexed hereto is the university policy and a sample of one of the student at JKUAT Eldoret campus admission letter marked as LR-2 & 3.
4. THAT the Respondents University policy is clear that if the campus is to be subjected to any closure for any reason, the on-going students at the university will be afforded an opportunity to finish their studies without admitting new students which is the criteria that was applied when JKUAT closed JKUAT-KISUMU, JKUAT-KIGALI and JKUAT-RWANDA CAMPUS.
5. THAT on 29.7.2020 and 30.07.2020, the respondents issued closure notices of JKUAT Eldoret Campus (Annexed hereto is the copy of the closure notice marked as LR-4 & 5.
6. THAT the students are opposing the said closure of the JKUAT Eldoret campus on the following grounds among others:
  - (a) Most students at JKUAT Eldoret campus enrolled due to the proximity to their homes and work places to the said campus.
  - (b) Some students are employed in Eldoret and use the salary they derive from employment to meet fees and if institution is closed they tend to lose their livelihood and at the same time their education at the university will come to a halt.
  - (c) Some students had specifically enrolled for evening classes because they had job related commitments and took accommodation within Eldoret area.
7. THAT the students enrolled by signing the admission letters, they have been paying their fees as and when it is due and they expected the university to offer them quality education at JKUAT Eldoret campus without any interruption at the said campus, that was a legitimate expectation.
8. THAT the respondents are intending to act arbitrary and ultravires manner to close JKUAT Eldoret campus and affect and interrupt the ex-parte applicants' fundamental rights without affording the students an opportunity to be heard before the decision was made.
9. THAT when the Respondents require the students to shift from JKUAT ELDORET CAMPUS to any other campuses, it will only have been fair if the Respondents took into account the Applicants circumstances.
10. THAT since the impugned decision is bound to fundamentally affect the Applicants pursuit of education, the impugned decision by the respondents is contrary to the rules of natural justice and principles of fair administrative action.
11. THAT if any audit review was conducted by the Commission of University Education and/or otherwise, the same was never disclosed to the Applicants for the Applicants to make a better appreciation of the happenings.
12. THAT we are advised by our Advocate on record Mr Stanley N. Kagunza which information we verily believe to be true that under the constitution which pervades all spheres of life fairness is an imperative.

13. THAT the respondents cannot grant us a fair hearing as they have already made a biased conclusion that JKUAT Eldoret campus must be closed.

14. THAT to the best of our knowledge the respondents are motivated by ulterior motives, the actions are unreasonable, made in bad faith and are inconsistent with public interests.

15. THAT it is necessary the notice be quashed by certiorari as it is intended to carry out **ultravires** purposes.

16. THAT an order of prohibition is and rescission of the closure of JKUAT Eldoret Campus necessary as the respondent intends to close JKUAT Eldoret Campus without allowing the on-going students to complete their studies without admitting new students.

17. THAT we pray the leave granted do operate as stay since if the respondents decision is implemented it shall result to closure of JKUAT Eldoret Campus.

18. THAT I do make oath conscientiously believing the aforesaid deponed particulars to be true to the best of my knowledge and belief.”

[5] Upon hearing Mr. Kagunza, Counsel for the applicants *ex parte* in accordance with the rules of court, the issue for determination, therefore, is whether the court shall on the known principles grant leave of the court to institute judicial review proceedings and whether the grant of such leave shall operate as a stay of the decision of the review in terms of Order 53 Rule 1 (3) of the Civil Procedure Rules.

### **Principles for the grant of leave to file judicial review proceedings**

#### *Preliminary*

[6] Being an application for certiorari, the court has considered that the application is not affected by the required to file with six months of the challenged as the decision in this case is not *ejusdem generis* a **judicial** decision in the nature of “*judgment, order, decree, conviction or other proceeding*” within the meaning of Order 53 Rules (2) of the Civil Procedure Rules, which provides as follows:

“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

[7] The applicant’s counsel said that he had been instructed late to file judicial proceedings and the Respondent’s letter attached as exhibit LM 5 indicates that the decision to close the Campus was made by the Commission for University Education (CUE) at the latest on 6<sup>th</sup> December 2019 when following inspection of the Respondent’s Eldoret Campus on 20<sup>th</sup> August 2019 the commission ordered the Campus closed within 9 days which period was subsequently extended as set in the Internal Memo subject of this judicial review application. If any delay is adjudged on the part of the applicants in presenting the application against the decision to close the campus, not being a **judicial** decision, it may be a ground for refusal in discretion of judicial review orders. Obviously, that would be a matter, not for the leave court, but for the trial court upon hearing of the substantive motion for judicial review.

#### *Arguable case*

[8] The Court of Appeal decision in **Meixner & Another v. Attorney General** (2005) 2 KLR 189, held:

“1. The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion. The Court of Appeal can only interfere with the discretion of the judge denying the appellants leave to apply for judicial review on the firmly established principles stated in *Mbogo v Shah* [1968] EA 93.”

[9] An **arguable** case has been judicially defined in the context of an application for injunction pending appeal as one that is **not frivolous** in **Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & another** [2006] eKLR (Omolo, Tunoi (as he then was) & O’Kubasu, JJA.) where the Court of Appeal said as follows:

“The principles which the Court applies in applications of this nature are now old-hat – **an applicant under Rule 5(2)(b) must show an arguable appeal, i.e. an appeal which is not frivolous** and next he must show that if the stay or the injunction sought is not granted, the intended appeal, if it were to be successful, would have been rendered nugatory by the refusal to grant the stay.”

[10] In similar wording the Court in **EAST AFRICAN CABLES LIMITED v PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD & ANOTHER** [2007] eKLR (Tunoi (as he then was), O’Kubasu & Githinji, JJA.) while considering another Rule 5 (2) (b) application for injunction said as follows:

“**The orders are sought under rule 5(2) (b) of the Rules of this Court and the principles that guide the Court in considering such applications are now well settled. The applicant, in order to succeed, must satisfy the Court that the appeal or intended appeal is**

**an arguable one, that is, that it is not a frivolous appeal.”**

[11] More recently, the Court of Appeal in *Fred Matiang’i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR, (Nambuye, Kiage and MInoti, JJA.) has in the context of an appeal relied on a test for an **arguable** case of compact phraseology of **a single bona fide point which need not succeed**, citing the Court’s decision in *STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS* [2013] eKLR, that -

**“vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.**

**vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008”**

and concluded that *“arguable appeal is no more than one that raises a single bona fide point to be urged and worthy of response from the other side and interrogation by the Court”* [and] *“those points or any one of them need not succeed, which is itself a matter in the purview of the Judges to hear the appeal.”*

[12] In my understanding, by analogy an applicant for leave must show that he has a serious question to be put before the court for determination, but he need not, and indeed cannot, show that it is one that must succeed because at this stage of leave the court has not seen the respondent’s answer to the applicant’s claim.

*The present application*

[13] Counsel for the applicants emphasized as a basis of their claim lack of consultation with the student stakeholders and want of fair administrative action pointing out that in other cases where the University has taken similar decision as in Kisumu Campus and Kigali, Rwanda, the on-going students have been allowed to complete their studies before closure of the Campus and only new student admissions are barred. Counsel reiterated the prejudice on the part of the students who he said as deponed to in the affidavit of the 1<sup>st</sup> applicant set out above that –

- a) *“Most students at JKUAT Eldoret campus enrolled due to the proximity to their homes and work places to the said campus.*
- b) *Some students are employed in Eldoret and use the salary they derive from employment to meet fees and if institution is closed they tend to lose their livelihood and at the same time their education at the university will come to a halt.*
- c) *Some students had specifically enrolled for evening classes because they had job related commitments and took accommodation within Eldoret area.”*

[14] Having considered the application, I find that the applicants have an arguable case in the serious questions to be put before the judicial review court as follows:

1. Whether the decision to close the respondent’s Eldoret Campus was made with consultation by way of stakeholder participation of the students in accordance with the principle of participation of the people under Article 10 (2) (a) of the Constitution cited by the Applicants;
2. Whether the decision to close the campus was made in violation of the applicant’s constitutional right to fair administrative action under Article 47 of the Constitution relied on by the applicants; and
3. Whether the decision to close the campus should have been made to commence at a later stage giving allowance for the present students already registered to continue their study to completion at the Campus; and therefore to affect **only** new admissions as urged by the applicants.

The applicant’s case need not be one that eventually succeeds, and there is no need for multiple arguable points; one arguable point suffices to raise an arguable case.

[15] The primary impugned decision is the Internal Memo by the Deputy Vice Chancellor dated 29<sup>th</sup> July 2020, of which the latter Memo of 30<sup>th</sup> July 2020 by the 3<sup>rd</sup> Respondent Director of the Campus appears to be a reminder, in terms as follows:

**“INTERNAL MEMO**

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**FROM: DEPUTY VICE CHANCELLOR (AA)**

**DATE: 29<sup>TH</sup> JULY 2020**

**TO: ALL STUDENTS – ELDORET CAMPUS REF: JKU/2/003/182**

**SUBJECT: CLOSURE OF THE JKUAT ELDORET CAMPUS**

The Commission for University Education (CUE) inspected JKUAT's Eldoret Campus on 20<sup>th</sup> August 2019. The inspection was aimed at assessing the progress made in mobilizing academic and physical resources to support academic programmes on offer.

Following the inspection, the commission ordered the campus closed within ninety (90) days from **6<sup>th</sup> December 2019**. The University Senate considered the CUE order and requested for additional time. This was granted and the closure notice was extended to **30<sup>th</sup> August 2020**.

You are therefore required to indicate through your Campus Director your preferred mode of study. This may include transfer to a preferred JKUAT Campus or to the School of Distance and E-Learning (SODEL).

The University is committed to supporting your studies in whichever mode of study you choose.

Kind regards.

PROF. ROBERT KINYUA, Ph.D.,

**DEPUTY VICE CHANCELLOR (ACADEMIC AFFAIRS)**

**Copy to:**

Vice Chancellor

Registrar AA

Director, Eldoret Campus

Chairperson, JKUSA"

*Balance of convenience*

[16] Counsel for the applicants submitted from the Bar that the affected students in the ongoing courses at the Campus were 1580 at various stages of completion of their study. The Verifying Affidavit, however, shows authority to plead given to one Musa Korir (not the deponent) "to plead and swear all necessary affidavits in respect of this application" on behalf of only 138 persons. However, as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicant have in their own behalf sworn affidavits to verify and support the cause, the application may proceed to hearing on the basis of **their** claim which they share with the other students affected even without a valid authority to plead for the other students.

[17] Should the Campus as scheduled on 30<sup>th</sup> August 2020, the huge number of students affected by the closure would have their studies, and, in cases of employed persons attending evening classes, their employment where their pursuit of study was connected with their job placement station at the town of Eldoret, disrupted with the result that some, including those said to be in their final year of study, may drop off their study while others would be compelled to seek to complete their study in different modes or at different Campus at considerable costs as deponed in the Supporting Affidavit. It would not help even if the students eventually succeeded in the suit against the closure of the Campus and their suit would have been rendered nugatory and their victory pyrrhic. The grant of leave should in this circumstances be ordered to operate as a stay of the decision.

**Conclusion**

[18] The applicants have an arguable case for breach of stakeholder consultation under participation of people principle of Article 10 (2) (a) of the Constitution and of the right to fair administrative action under Article 47 of the Constitution, which case is not frivolous and which may upon full hearing and determination succeed.

[19] The decision to close the respondent University Campus is shown to affect a huge number of students, said to be 1580 of them, who whether they have validly given the applicants their authority to plead or not, stand to suffer from the closure in the meantime of the Campus. The disruption of their studies and the relocation and other costs that may be incurred by the students in adjustment to the situation engendered by the closure of the Campus compels this court to hold the **status quo** by an order for stay of the decision to close the Campus, pending the determination of the validity of the decision. So that the uncertainty ensuing these proceedings is not protracted, the court shall order an expedited hearing and determination thereof.

*Notice on Directly Affected Persons*

[20] As shown in the Deputy Vice Chancellor's Internal Memo of 29<sup>th</sup> July 2020 set out above, the Commission for University Education (CUE) as the primary decision maker of the decision to close the Campus, in implementation of which the respondents have been challenged herein, and the Commission is, therefore, a **person directly affected** by the proceedings within the meaning of Order 53 Rule (3) (2) of the Civil Procedure Rules which is in the following terms:

**“(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”**

The Commission shall, therefore, be served with the substantive Notice of Motion herein.

### **Orders**

[21] Accordingly, for the reasons set out above, the court makes the following orders:

1. Leave of court is granted for the applicants to file judicial review application for certiorari and prohibition as prayed in the Chamber Summons dated 24<sup>th</sup> August 2020.
2. The grant of leave to file judicial review proceedings herein shall operate as a stay of the decision to close the Eldoret Campus of the Respondent pending the hearing and determination of the judicial review proceedings.
3. For avoidance of doubt, the order for stay does not compel or authorise the reopening of the Campus inconsistently with, or in the period intervening any determination by the Ministry of Education for the reopening of learning institutions, in accordance with its Covid -19 containment and management policy, as may in place from time to time.
4. It is further clarified that the order for stay herein relates and affects **only** the applicants and the students for the time being registered with the Campus at various stages of completion of study, and it does **not** authorise the admission of new students or classes, courses or programmes at the respondent Campus.
5. In view of the urgency and great public importance of the matter of the closure of the university campus and, therefore, the need for expedited determination of the dispute, the court pursuant to Order 53 Rule 3(1) of the Civil Procedure Rules directs that the substantive Notice of Motion for Judicial Review shall be filed and served with seven (7) days for hearing thereof within 30 days from today.
6. The Notice of Motion shall be served upon the Commission of University Education as a “**person directly affected**” in terms of Order 53 Rule 3 (2) of the Civil Procedure Rules.
7. For the necessary directions as to hearing the matter shall be mentioned before the court on **16<sup>th</sup> September 2020**.

*Order accordingly.*

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF AUGUST 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Kagunza, Advocate for the Ex Parte Applicants.