REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 1 OF 2018

IN THE MATTER OF AN APPLICATION BY DR. BENJAMIN J. GIKENYI MAGARE

AND

IN THE MATTER OF RULES AND REGULATION GOVERNING POST GRADUATE STUDIES OF MOI UNIVERSITY

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO.42 OF 2012

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION

AND

REPUBLIC..APPLICANT

VERSUS

VICE CHANCELLOR MOI UNIVERSITY...........1ST RESPONDENT

MOI UNIVERSITY..2ND RESPONDENT

DEAN, SCHOOL OF MEDICINE

MOI UNIVERSITY..3RD RESPONDENT

AND

DR. BENJAMIN J. GIKENYI MAGARE……….. EX-PARTE APPLICANT

JUDGMENT

1. The applicant filed a notice of Motion dated 11th January, 2018 seeking for orders that:-

(a) The Honorable court be pleased to issue an order of certiorari to bring to the High court of Kenya, and quash the respondent’s decision made on, and contained in a letter dated 19th December which had an effect of suspending the exparte applicant from MMed general surgery programme with the 2nd Respondent.

(b) The Honorable court be pleased to issue an order of prohibition, prohibiting the Respondents jointly and severally, from enforcing a suspension and any further disciplinary proceedings or any way barring the Ex parte Applicant from defending his thesis, clinical work General Surgery Rotations or in any way from continuing with his research and academic work and eventual graduation.

(c) The Honorable court be pleased to issue an order of mandamus compelling the Respondents to examine the Ex parte Applicant and allow him to continue and complete his academic studies at Moi University School of Medicine for the course he is currently undertaking, that is, Masters of Medicine, in General Surgery and if successful forward his name for graduation.

(d) Costs be borne by the Respondents.

2. The application is based on the grounds that the 2nd Respondent unilaterally suspended the Ex-parte Applicant from Moi University, School of Medicine for a course leading to Masters of Medicine while remaining with two months of rotation, defence of thesis and final examination without prior notification of any complaint against the Ex-parte Applicant.

3. The Respondents made a final determination that the ex-parte applicant is unfit to continue with his studies in MMed without giving him prior notice or hearing him.

4. The ex-parte applicant worked and studied diligently for the last 4 years before proceeding on leave on 11/12/2017 which was duly approved by the respondent on 29/12/2017.

5. That while on leave, and without any notice whatsoever, the 3rd Respondent, acting on behalf of the 1st and 2nd Respondents caused the ex-parte applicant to be suspended by a letter dated 19/12/2017 but received on 9/1/2018.

6. The Respondent relied on a malicious complaint which has not been notified to the ex-parte applicant, he was denied an opportunity to defend himself, he was denied a right to education without due process of the law, and that the charges were on basis of gender and racial discrimination by a racial supremacist.

7. Lastly, that the ex-parte applicant has been subjected to unfair and inhuman treatment and has been denied his inherent right to have dignity respected and protected.

8. In their replying affidavit, the Respondent stated that the decision to suspend the applicant pending the hearing and decision of the post graduate studies committee was arrived at after receipt of a letter of complaint dated 15/10/2017 from Connie Keung, M.B Assistant Professor of Surgery at Indiana University who raised serious issues about the professional competence and ethical conduct of the applicant.

9. The allegations made were serious and in need of investigations to be undertaken and therefore the suspension was to allow for investigation to be undertaken with regard to the complaints raised.

10. That the ex-parte applicant is reported to be diverting patients to his private clinic, he is on self-enrichment contrary to the rules and regulations in place.

11. That there is a list of patients who have been reported to have been diverted by the ex-parte applicant to his private clinic and his continued stay and/or visitation and/or undertaking rotations at Moi Teaching and Referral Hospital is to say the least prejudicial and encouraging illegality contrary to the tenets of good practice.

12. That the acts complained about on the part of the Ex-parte applicant are unethical and unprofessional and contrary to the Moi University Rules and Regulations governing Post Graduate Studies and the Respondent acted in accordance to the actions either party may take in a situation where there are reasonable grounds to suspect that there are malpractices by post graduate students.

13. Lastly, that the Honorable court ought to allow the disciplinary proceedings to be carried out and be completed as the constitutional rights of the patients need to be considered to the highest standards or health care in public institutions as the 2nd Respondent is a public institution.

ISSUES FOR DETERMINATION

Having gone through the ex-parte applicant's notice of motion, the response by the respondent and the parties' respective submissions supported by authorities, I find the main issue for determination in this matter to be whether the ex-parte applicant is, on the material placed before this court, entitled to the Judicial Review orders of certiorari, prohibition and mandamus sought.

The crucial questions to be considered in this case revolves around the disciplinary procedure undertaken by the respondent, Moi University against the ex-parte applicant student Dr. Benjamin J. Gikenyi.

Certain matters are not in dispute including whether the applicant was a bonafide student of the Respondent, admitted in the MMed Class. It is also not in dispute that the respondent had the power under the Rules and Regulations governing the organization concerning conduct and discipline of students, to take disciplinary action against delinquent students, which issue has not been impugned by the ex-parte applicant student.

The Respondent University has elaborate Rules and Regulations and procedures which the ex-parte applicant subscribed to on admission to the University and this is not in dispute either.

The main question is whether the respondent in the undertaken disciplinary procedure of the ex-parte applicant, subjected him to due process and or whether it complied with the stipulated disciplinary procedures in the process of arriving at the decision of suspending the ex-parte applicant who was a 4th year Masters of Medicine- general Surgery student.

It is not within the jurisdiction of this court to determine whether or not there was sufficient evidence adduced by the respondent to warrant the suspension of the ex-parte applicant from the University.

In other words, the court is alive to the well-established principle of law that in the exercise of Judicial Review jurisdiction, it is exercising neither civil or criminal jurisdiction and therefore it is not acting as an appellate court.

That being the case, the court is prohibited from substituting the respondent's decision with its own decision. What is expected of this court is to satisfy itself that the disciplinary procedures adopted by the respondent met the threshold of what constitutes a fair process.

The applicable principles which are now settled were laid down by Nyaranga JA (as he then was) in ***Nyongesa & others v Egerton University College (1990) KLR 692*** where the learned Judge of Appeal pronounced himself as follows:

> ***"Having this stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies.***
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> ***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 justify hearing the person concerned or the other side. What constitutes a fair process is dependent on the facts and circumstances of each case. Implicit in the concept of fairness is flexibility".***
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> ***A University Disciplinary committee dealing with student's disciplinary matters must have the necessary flexibility, having regard to the college environment and the right to education, to deal with such disciplinary cases, provided that the process is fair, that the students is given a hearing and an opportunity to defend himself (see Pearlberg vs Varty Inspector of Taxes (1972) 1 WLR 534; KNEC vs Geoffrey Njoroge & others Nairobi CA 266/1996 (UR); Commissioner General, Kenya Revenue authority vs Vano Onema Omwaki t/a Marenga Filing Station Kisumu CA 45/2000, unreported."***
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> The parameters for judicial review remedies were set out in the ***Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300*** Court of Appeal case citing with approval ***Council of Civil Unions v Minister for the Civil Service [1985] AC 1 and Re Application by Bukoba Gymkhana Club (1963) EA 478 at 479*** that:
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> ***"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety….illegality is when the decision – making authority commits an error of law in the process of taking or making the act, the subject of the complaint acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…..irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards….Procedural impropriety is when there is a failure to act fairly on the part of the decision – making authority in the process of taking a decision. The unfairness may be its none observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."***

In disciplinary matters, compliance with procedures is critical because due process has evolved over time as a way of ensuring that accusatory proceedings produce accurate and truthful results. Due process has become one of the most vital components of a free, decent, and fair society. Due process ensures the best chance of learning the truth during the trial process since the decision maker is given the best chance of getting to the bottom of sophisticated factual matters.

The jurisprudence of due process is heavily concerned with identifying specific procedures that are effective in discovery of the truth. The case of ***Republic v Institute of certified Public Accountants of Kenya (ICPAK) ex-parte Vipichandria Bhatt t/a JV Bhatt & Company Nairobi HCC Miscellaneous Application 285/2006*** (UR) settled the issue of powers and the procedure to be adopted by disciplinary bodies thus:-

> ***"….An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law….It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to do so exercise such power arbitrarily and capriciously or in bad faith."***

On the consequences of failure to adhere to the procedural rules, the case of ***Resley vs The City Council of Nairobi (2006) 2 EA 311*** is instructive interalia:

> ***"In this case there is an apparent disregard of statutory provisions….and it is essential that bureaucracy should be kept in its place…."***

In adopting the decision in ***Pastoli vs Kabale*** (supra), the following paragraph is cited by Odunga J in ***Republic vs UON Eparte Michael Jacobs Odhiambo.***

> ***"In my view where the action under challenge has the potential of restricting human rights and fundamental freedoms under the Bill of rights, any procedural rule enacted with a view to ensuring the due process is adhered to before any adverse action is taken ought to be considered seriously since under Article 19 of the Constitution, the Bill of Rights is the framework for social, economic and cultural policies and the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Our Constitution appreciates that the rights and fundamental freedoms in the bill of Rights belong to each individual and are not granted by the State. This position was restated with respect to the rules of natural justice by the Uganda Supreme Court in The Management Committee of Makondo primary school and Another vs Uganda National Examination***

Board, HC Civil Misc Application No. 18 of 2010, as follows:

"It is cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rule enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of Natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

Nyamu, J in Kenya Bus Service Ltd & 2 others vs Attorney General [2005] 1 KLR 787, eloquently asserted as follows:-

> ***" The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the world. The exparte order could not have been spared in any event for the reason for all by blocking the 221 persons while the rivers of Constitutional Justice or any justice at all should flow pure for all to drink from them".***

The applicant is entitled to a right to education which must be promoted and protected. However, this is not to say that the right is absolute. In the ***Oluoch Dan Owino v Kenyatta University HC Petition 54/2014***, case the court stated:-

> ***"As I understand it, the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in education institutions".***

The right to education is enshrined in Article 19 of the Constitution which is embedded in the Chapter on the Bill of Rights. It therefore follows that the procedure to be adopted in any disciplinary proceedings that would adversely affect that right to education, like all other rights guaranteed by the Constitution must adhere to the procedural underpinnings grounded in *Article 47 of the Constitution*, *Article 50 of the Constitution* on the right to fair administrative action and the right to a fair hearing so as to preserve the dignity of individuals and to promote social justice.

The courts should be cautious in interfering with internal mechanisms for administrative bodies in the exercise of their mandate under the established rules and statutes, nonetheless courts would ordinary interfere to give prudence to the procedure adopted and put on course a seemingly flawed disciplinary process in order to prevent the blatant violation of the respondent's own established disciplinary processes.

It is my opinion that talking of administrative action has serious constitutional imperatives as fair administrative action is now a fundamental human right enshrined in *Article 47* of the *Constitution* as implemented by the *Fair Administrative Action No. 4 of 2015* and therefore enforceable as such right under *Articles 22* and *23 of the Constitution.*

In ***Geothermal Development Ltd v Attorney General & 3 others (2013) eKLR*** the court held inter alia:

> ***"As a component of the due process, it is important that a party has reasonable opportunity to know the basis of allegations against it.***
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> ***Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (see Donoghere vs South Eastern Health Board [2005] 4 IR 217….Article 47 of the Constitution enshrines the right of every person to fair administrative action….Fair and reasonable administrative action demands that the tax payer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken …. In my jurisdiction of the world. It has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be …."***

The emerging facts in this matter is that the applicant was suspended pending the hearing and decision of the Post Graduate Studies Committee, after a complaint was raised against him via a letter dated 15th October, 2017 from Connie Keung, M.B, Assistant Professor of Surgery of Indiana university who alleged that the applicants knowledge and skills are below training level and programme expection; he had failed to organize adequate coverage and was absent from duty on 7th October, 2017 and he routinely referred hospital patients to his own private practice, contrary to proper ethical practice expected of MMED students and a registered Medical Practitioner. Of concern to this court is that while suspension is a negative action against the applicant, of which affects his study plan and schedule, before the decision to suspend him was arrived at he was not given a hearing, whether orally or in writing. It was unfair and unjust for the respondent to just receive a complaint against the applicant and without giving him any form of hearing acted on it in a manner which adversely affected his MMed studies. At that level, before suspension, he deserved a hearing before proper deliberation of his case by the full Graduate Studies Committee, at the second level. The respondent's decision was therefore irrational and unreasonable; it is in clear violation of *Article 47* of the *Constitution* on the right to a fair administrative action. I accordingly find the application merited and is allowed as prayed. However, I wish make it vivid that the Respondent is free to follow due legal process on the issue at hand.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of March 2019

In the presence of:

Ms Wahome for the Respondent

Mr. Mwelem – Court assistant

And in the absence of other parties