REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICAL REVIEW NO. 40 OF 2011

ONKWANI DAVID.....APPLICANT

VERSUS

EGERTON UNIVERSITY.....RESPONDENT

JUDGMENT

1. After duly obtaining leave, the *Ex Parte* Applicant brought the present Application seeking two substantive Judicial Review Orders thus:

> *a. An order of certiorari to move into this Honourable Court and quash the decision of the University made on 7th May, 2009 and 14th January, 2011.*
>
> b. *An order prohibiting the University from expelling the Applicant and stopping him from completing his teaching practice*.

2. The Application was opposed by the Respondent, Egerton University (the "University"), *vide* a Replying Affidavit sworn by Prof. S.F. Owido, the Registrar, Academic Affairs at the University.

3. Directions were taken that the parties file Written Submissions and then appear in Court for oral highlighting. The matter seems to have gone into hibernation at some point after the parties filed their Written Submissions. In any event, at the Court's own motion, the matter was listed for mention and directions before me. During the scheduled mention, the parties informed me that the controversy was still live and they desired a judgment. Neither party chose to highlight their submissions.

4. The facts are as follows. The *Ex Parte* Applicant was a student at Egerton University. He was in his fourth and final year. He says that while he was doing his teaching practice at Cardinal Otunga High School, he was informed that he needed to get in touch with the University. When he did so, he says he was served with an expulsion letter. He claims that came as a surprise to him because he had not been heard. He believes that the decision to expel him "was based on an abuse of power, irrelevant considerations, unreasonableness, breach of constitutional rights, breach of natural rules of natal justice, bad faith, beyond the university mandate and in breach of the Applicant's legitimate expectation of completing his studies and graduating."

5. The *Ex Parte* Applicant's Written Submissions expound on the basis for his action. The *Ex Parte* Applicant says he received a letter dated 15/06/2009. The letter informed him that he had been expelled from Egerton University. This was, the letter said, because he had been found "guilty" of three charges:

> a. Theft;
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> b. Possession of bhang; and
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> c. Illegal occupation of a University House.

6. The *Ex Parte* Applicant says that his appeal to the University in accordance with the University Rules and Regulations was dismissed. He now wants the Court to quash the decision of the University to expel him on three grounds:

> a. That the *Ex Parte* Applicant was not accorded a fair hearing;
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> b. That the University was in breach of the rules of natural justice; and

c. That the decision breached the *Ex Parte* Applicant legitimate expectations.

7. The *Ex Parte* Applicant says that the hearing was unfair because the University did not consider the two letters he submitted on appeal: a letter dated 25/06/2009 by Monicah Wanjiru Muroki and a letter by Dr. Charles Choti of even date. He says that these two letters exonerate from the charges of theft and illegal occupation of a university house.

8. The *Ex Parte* Applicant also argues that the decision to expel him was in breach of the rules of natural justice because it was not based on evidence and "was clearly a predetermined issue". The *Ex Parte* Applicant submits that looking at the proceedings, it is not clear why the statements by Dr. Choti and Monicah Wairimu Muroki were not taken into account in coming to a conclusion on the charges. The *Ex Parte* Applicant argues that this is evidence that the University was not impartial when making its decision. The *Ex Parte* Applicant also contested the manner in which he was found responsible for the bhang recovered from the house he was living in. He says that in the absence of evidence by his roommate, Hillary Robert Michira, the *Ex Parte* Applicant should have been given the benefit of doubt whether the bhang actually belonged to him.

9. Finally, the *Ex Parte* Applicant submitted that his legitimate expectations to finish his course of study was shattered by the University. His arguments in this regard are the same as those made in urging the other two grounds.

10. On its part, the University strongly opposed the Application. First, the University argued that the orders of certiorari could not be granted because the Application was time-barred: the decision to expel the *Ex Parte* Applicant was made on 07/05/2009 yet the Application was first brought on 22/03/2011 well outside the period stipulated by Order 53 Rule 2 (which is six months). The University cited ***James Githinji Kiara v William Wachira Mwaniki [2005] eKLR*** for the proposition that an application for certiorari which is brought outside the six months statutory period should be struck out.

11. I wish to deal with this technical objection outright: I find it unavailing and would overrule it without further ado. In doing so, I would repeat what I said in ***R v Kiambu County Executive Committee ex parte James Gacheru Kariuki & 9 Others 2017 eKLR*** regarding my doubts about the constitutional status of the six-month limit for Judicial Review Applications prescribed by Order 53 Rule 2 in the Post-2010 period:

> *My reading of these two provisions [Articles 23 and 47 of the Constitution] is that they have the functional effect of blitzing the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya Law Reform Act) and those based expressly on the Constitution. In a straightforward petition to enforce the Bill of Rights under Article 23 of the Constitution, the High Court can issue an order for Judicial Review. Conversely, one can found a substantive suit challenging the exercise of administrative power under Article 47 of the Constitution or the FAAA which is the statute enacted to perfect that Article.*
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> *30. If that is the case, what, pray, is the utility of insisting on strict procedural timelines for one form of action and not the other? The County Executive says predictability and certainty are the operative functions. However, that predictability in the formalist traditional common-law based judicial review is precisely what the Constitution of Kenya 2010 hoped to overturn and install in its place a jurisprudence and process more in keeping with Article 47. In this regard, it is important to point out that the FAAA does not have any set time limits on when an aggrieved party can bring an action. Tellingly, at section 10(1) it provides that an application for judicial review shall be heard and determined without undue regard to procedural technicalities.*

12. Second, the University argued that the University has power to expel students for gross misconduct and that it acted within that power. The University cited Egerton University Statutes and one case law: ***R v Egerton University ex parte Robert Kipkemoi Koskey (Misc. App. No. 712 of 2005***).

13. Third, the University submitted that it gave a fair hearing to the *Ex Parte* Applicant and that it was not otherwise in breach of natural justice. The University pointed out that the Applicant was informed of the charges well in advance and was invited to appear before the Disciplinary Committee. The University submitted that the *Ex Parte* Applicant did appear before the Committee and made representations on his own behalf. The University argues that it was not duty-bound to create another opportunity for the *Ex Parte* Applicant to appear before the Senate which makes the final decision to expel. In this regard, the University relied on ***R v The Senate Examination Disciplinary Committee & Another ex parte Shadrack Muchemi Mbau (Nairobi Misc. App. No. 1297 of 2005)***.

14. Further, the University submitted that all the rules of natural justice were adhered to: the *Ex Parte* Applicant was given an opportunity to be heard; the hearing was by impartial officials who had no vested interest in the matter; and the ultimate decision was based on the evidence.

15. Fourth, on the doctrine of legitimate expectations, the University argued that completing studies and graduating was subject to the *Ex Parte* Applicant acting in accordance with the provisions of the University Statutes and that there can be no legitimate expectations where a person acts illegally.

16. Fifth, the University argued that the claim that the University violated the constitutional rights of the Applicant was too vague to be adequately responded to and that this claim should be dismissed outright for not being sufficiently precise.

17. In a parting shot, the University reminded the Court the nature of Judicial Review and cited ***North Wales Police v Evans [1982] 1 WLR*** in this regard. The holding in that case is the main theme in the treatise, The Supreme Court Practice, 1997 Vol. 53/1-14/6 which is in the following words:

> *The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the*

remedy of judicial review 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.

18. I think this is a good place to begin an analysis of the present case. The Court of Appeal put it quite felicitously in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd***:-

Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters… The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

19. Hence, as our Courts have said before, "where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:- (i) where there is an abuse of discretion; (ii) where the decision-maker exercises discretion for an improper purpose; (iii) where the decision-maker is in breach of the duty to act fairly; (iv) where the decision-maker has failed to exercise statutory discretion reasonably; (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (vi) where the decision-maker fetters the discretion given; (vii) where the decision-maker fails to exercise discretion; (viii) where the decision-maker is irrational and unreasonable." See ***Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze.***

20. In the present case, the *Ex Parte* Applicant's first complaint is that he was not accorded fair hearing. I have looked at the entire set of documents presented to the Court in this case. It reveals that the *Ex Parte* Applicant was served with a notice informing him of the charges he was facing and the date of the hearing before the University Disciplinary Committee. When he appeared before the Disciplinary Committee on 18/03/2009, he was given an opportunity to give his side of the story. He also had an opportunity to hear the evidence of the complainant with respect to the charge of theft, Ms. Monicah Wanjiru Muroki. In the circumstances, it is quite a stretch for the *Ex Parte* Applicant to complain that he was not given an opportunity to be heard.

21. Perhaps what the *Ex Parte* Applicant seeks to argue is that the decision of the University went against the weight of the evidence and that no reasonable Tribunal could have made the decision that it made. This appears to be his complaint when he says that the two letters he presented were not taken into account. In dealing with this complaint, it is important to recall that the *Ex Parte* Applicant's case at the University unfolded in three phases. The first phase was before the University Disciplinary Committee. He was invited to appear there. He appeared and gave evidence. One of his accusers, Ms. Monicah Wanjiru Muroki who was a victim of the theft appeared and gave incriminating evidence against the *Ex Parte* Applicant as well.

22. At that hearing, also, Dr. Choti had not written his letter. Therefore, when the Disciplinary Committee sat to deliberate on its decision, it did not, as yet, have the two letters the *Ex Parte* Applicant complains were not considered. Indeed, the author of one of the letters, Ms. Muroki gave evidence against the *Ex Parte* Applicant. It is therefore unavailing for the *Ex Parte* Applicant to impugn the finding of the Disciplinary Committee or Senate on the grounds that the two letters are not reflected in the decision of the Committee. The *Ex Parte* Applicant only filed the two letters at the appeals stage. At that point, the Grievances Handling and Appeals Committee considered his appeal and upheld the decision of the Disciplinary Committee and the Senate to expel the *Ex Parte* Applicant.

23. Bearing in mind that the task of the Court at this stage is not to review the evidence *de novo*, I am unable to come to the conclusion that on the available evidence the decision by the Disciplinary Committee, Senate and Grievances Handling and Appeals Committee met the standard of "Wednesbury unreasonableness": that it was if it is so unreasonable that no reasonable person or tribunal acting reasonably could have made it (***Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223***).

24. **The result is that I find the Judicial Review Application wholly unmeritorious and I hereby dismiss it with costs**.

25. Orders accordingly.

Dated and delivered at Nakuru this 30th day of May, 2019

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JOEL NGUGI

JUDGE