REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW NO. 205 OF 2019

RABUT NICHOLAS NEAL.....APPLICANT

VERSUS

THE UNIVERSITY COUNCIL, UNIVERSITY OF ELDORET.....1ST RESPONDENT

THE VICE CHANCELLOR, UNIVERSITY OF ELDORET.....2ND RESPONDENT

THE DEAN, SCHOOL OF AGRICULTURE.....3RD RESPONDENT

R U L I N G

The applicant filed the present application seeking leave to apply for an order of prohibition to release the graduation list by the senate for the graduation on 29th November 2019 to a later date. He also sought leave to apply for judicial review orders of mandamus to compel the respondent to remark by an external examiner and release results of the applicant before proceeding with the graduation. The applicant also sought orders that the leave operate as stay of execution of the decision of the respondents to hold the graduation.

APPLICANT'S CASE

The applicant based the application on the grounds that he is a bonafide student who was admitted in 2012 to undertake a bachelor of Science degree in Agriculture. He sat for all the examinations required for the award of the said degree save for one paper which is perennial crop production and management.

The applicant attempted the exam for close to five times ostensibly but has never had a chance to get through. He made an application for a remark and paid for the same but it was never conducted. He has never received the details to date. The university made the decision of holding the graduation on 29th November and the list of granduands was released without considering the plight of the applicant.

He made several follow-ups with his advocates and even wrote a demand letter on 7th October 2019 about the issue but the university never addressed the issue of the remark. The university intimated to the applicant that they could reach an amicable solution and there were several meetings between the applicant, his advocates and the senior legal officer of the university but there was no solution given for the remarking of the paper from 2018 to date.

The decision not to remark the paper was in bad faith. There is a time frame within which the papers should be remarked and that is specifically 3 weeks. The same is at common rules and regulations for undergraduate examinations, university of Eldoret. The applicant referred the court to part 5:6 which provides for the appeal for reassessment of university results. The applicant complied with 5:6 II and the rest remained with the respondent. Clause 5:6(6) shows that the independent examiner appointed shall mark exams within 2 weeks and report to the board. The time frame for remarking is not clear. Part 18 of the regulations gives the limit but was not provided to court by the Applicant. There is no procedural requirement that the applicant was to submit a payment receipt. Annexure RNN-2 does not raise the issue of the receipt. The applicant did not submit the alleged receipt and they still remarked. They were not held back from remarking by the receipt.

The applicant is concerned with the non-observance of the rules by the respondents and would have no problem if the remark resulted in him not attaining the required marks. The remarking should have been done as soon as possible. If stay is not granted the applicant will be out again for a whole year for non-compliance with the rules by the respondent.

The applicant questions the procedure used in getting the remark done and why it was done after they had filed a suit. The applicant has proven a case for leave to be granted and for that leave to operate as stay. The respondent did not explain the delay in remarking and the done remarking was an afterthought.

RESPONDENT'S CASE

The respondents filed an affidavit on 27th November 2019. They also filed a preliminary objection.

It was the respondent's submission that there was no meritorious case to warrant granting of leave and for that leave to operate as stay. Leave is entitled to the applicant who demonstrates sufficient interest that he's affected by a decision of a public body. He must demonstrate that he has an arguable case with high chances of success. He must demonstrate that the public body has acted ultra vires and in an unreasonable manner. The applicant has not satisfied any of the conditions. The pleadings lack any paragraph demonstrating the public law element that entitles the court to grant leave. It is not said that the university acted ultra vires, unreasonably or in excess of its authority. Rule 5:6 of the university regulations is the only averment close to triggering the jurisdiction of this court to exercise judicial review. The 21 days is a limit to the students to apply for remarking and not for the university to undertake remarking.

The result of a supplementary paper for the applicant in the year 2018 indicate that he failed. He scored 28% and applied for a remark for which he was to pay kshs. 1000. He paid but never caused the receipt to be accompanied with his request for remarking. Consequently, the 3rd respondent was unable to submit his script for remarking. On 7th October 2019, the university received a letter from the applicants' advocate. The university went to their records and established payment was made in the finance office and was not transmitted by the student to the school where he studied. After confirmation they set the remarking process in motion. The remarking process commenced on 7 th October 2019 and was completed yesterday. The report of the examiner was annexed as RO8.

All the prayers sought are overtaken by events. Remarking has been done and prayer 2 and 3 make the outcome of the result immaterial. The applicant scored 33% and the pass mark is 40%. The marks cannot allow him to graduate.

The student can reattempt the paper and has one last attempt available to him. The court should consider balancing the question of public interest. There are 3,700 granduands expecting to graduate tomorrow. Other processes have been undertaken to procure necessary services for the occasion. If stay is to be granted it would be against a balance of convenience to the respondents.

ISSUES FOR DETERMINATION

a) Whether the applicants should be granted leave to file for Judicial Review orders

b) Whether the leave should operate as stay

WHETHER THE APPLICANTS SHOULD BE GRANTED LEAVE TO FILE FOR JUDICIAL REVIEW ORDERS

The rationale for the requirement that leave be sought and obtained is to exclude frivolous, vexatious or applications which *prima facie* appear to be an abuse of the process of the Court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case.

The yardstick for the grant of leave was pronounced by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> ***It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."***

The purpose of seeking leave therefore is to determine whether there is prima facie case that would warrant the hearing of the judicial review application to determine whether the orders sought should be granted. It is clear that the 2nd respondent is the chair of the senate, and the senate is the authority on academic matters for the University which is a public body. The delay in remarking the paper is unexplained and despite the absence of regulations stating the time frame, I find that the delay was inordinate and no adequate explanation was given. There was no requirement for the receipt to be produced in order for the remark to be done. This is evidenced by the fact that there was a remark regardless of the receipt never having been produced. The applicant has a prima facie case in the premises, which warrants him leave, but the orders he wish to obtain are all spent. List of the granduands is already released and the remarks has been done and the results disclosed.

WHETHER THE LEAVE SHOULD OPERATE AS STAY

In **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** **Maraga, J** (as he then was) expressed himself as follows:

> ***"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… 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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

The law on whether the leave so granted should operate as a stay is Order 53 Rule 1(4) of the Civil Procedure Rules, which provides as follows:

> **"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."**

The decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

In **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** the court held;

> **The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is now settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay, as was held in George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

In Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College [2000] eKLR the court held that:

> **Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in.**

The court must in this case consider that arrangements are in place for 3,700 granduands to graduate today, the 29th November 2019. These are innocent third parties who cannot be held as sacrificial lambs in a matter of which they are not involved. In the premises, the stay cannot be granted as the balance of convenience lies in allowing the graduation to proceed or take place. The applicant will still have an opportunity to join other graduating groups in future if he qualifies to graduate and/or upon resolution of the dispute herein.

He had a cause to come to court, but allowing the application, given the circumstances, will not aid his situation in anyway but will rather heavily prejudice the other granduands and incur heavy financial losses on the Respondents. On the grounds the application lacks merit and is hereby dismissed. However, given that the unfair conduct of the Respondents prompted the process herein, they will bear the costs of the application.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **29th** day of **November,** 2019.

In the presence of:-

Mr. Barasa for the Applicant

Mr. Kipkosgei for the Respondents

Ms Abigael - Court clerk

S. M GITHINJI

JUDGE