



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION EX

MISCELLANEOUS CIVIL APPLICATION NO. 12 OF 2018

IN THE MATTER OF THE LAW REFORM ACT & ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF AN APPLICATION BY ANTONY MUCHERE SEEKING LEAVE TO

COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF *CERTIORARI*

AND *MANDAMUS* AGAINST MOUNT KENYA UNIVERSITY

AND

IN THE MATTER OF A DECISION BY THE REGISTRAR-ACADEMIC

AFFAIRS OF MOUNT KENYA UNIVERSITY EXPELLING ANTONY

MUCHERE FROM MOUNT KENYA UNIVERSITY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE REGISTRAR-ACADEMIC AFFAIRS,

MOUNT KENYA UNIVERSITY.....1STRESPONDENT

MOUNT KENYA UNIVERSITY.....2NDRESPONDENT

AND

ANTONY MUCHERE.....*EX-PARTE* APPLICANT

JUDGMENT

Ex parte applicant's case.

1. Pursuant to the leave of this Court, the *ex parte* applicant moved this Court seeking orders of :- **(a)** Certiorari for the purposes of quashing the entire decision of the University Senate of the first Respondent communicated through the letter dated 14th October 2017 expelling him from the second Respondent; **(b)** Mandamus compelling the first Respondent to permit him to continue as student of and pursue his studies with the second Respondent; **(c)** Costs of the application.
2. Essentially, the grounds relied upon are:- **(i)** the first Respondent irregularly and in violation of its Handbook expelled the applicant, a student at the second Respondent's School of Business and Economics; **(ii)** that the applicant was not given the evidence against him, **(iii)** that the applicant was never invited to appear before the University Disciplinary Committee nor informed the accusations against him, **(iv)** the applicant's right to pursue education has been violated, **(v)** he has never been served with the decision of the Disciplinary Committee nor was he summoned to appear before it or be heard, **(v)** failure to give him reasons for the expulsion.

Respondent's Replying Affidavit.

3. **Dr. Ronald Maathai**, the first Respondent herein who is also the second Respondent's Registrar, Academic Affairs swore the Replying Affidavit dated 28th March 2018. He states that:-

i. the *ex parte* applicant was admitted to the second Respondent in September 2014 to pursue a Diploma in Journalism and Mass Communication, which he completed and graduated on 7th July 2017. During the period he engaged in various acts of indiscipline attracting administrative action against him;

ii. in August 2015, he was suspended on account of stealing a fire extinguisher from the second Respondent's Students' Centre and for using abusive language;

iii. in 2016, the *ex parte* applicant was admitted to study a Diploma in Banking and Finance, but he failed to register for any units or pay any fees or attend lectures, but notwithstanding the failure to register, he continued accessing the second respondent's facilities. Aggrieved by the *ex parte* applicant's actions, the second Respondent issued him with a letter forbidding him from entering its premises;

iv. that the *ex parte* applicant has been engaged in negative and provocative blogging aimed at tarnishing the reputation and institutional name of the second Respondent using pseudonyms and also posting abusive and sexist words against the second Respondent's members as particularized in paragraphs 17 to 20 of his Replying affidavit;

v. that the *ex parte* applicant has been engaged in various acts of violence and indiscipline against the second Respondents teaching and administrative officers and fellow students including engaging in violence against the second respondents rugby team for which he was punished;

vi. that the *ex parte* applicant is the self declared opposition leader after failing in his bid to be elected as a student leader, and he convened irregular meetings and incited students;

vii. that on 9th October 2017, the *ex parte* applicant while at the second Respondents' premises engaged in acts of harassment, incitement, destruction of property and disruption of teaching; and that on 12th October 2017 the *ex parte* applicant forced his way into the Vice-Chancellors Office and harassed the second Respondents' non-academic staff working therein;

viii. that the *ex parte* applicant was invited by way of a text message to appear before the Disciplinary Committee on 12th October 2017 to answer charges of inter alia incitement, and that he responded to the text message, and appeared before the disciplinary committee on 12th October 2017, he was afforded an opportunity to be heard and was given reasons, despite not having registered; and,

ix. that he failed to exhaust the appellate mechanism under the second Respondents' Regulations.

Ex parte Applicant's further Affidavit.

4. In a further affidavit filed on 18th May 2018, the *ex parte* applicant essentially denies the contents of the above Replying Affidavit and averred that the Disciplinary Committee took in to account extraneous considerations.

Respondent's Supplementary Affidavit.

5. **Dr. Maathai** swore the Supplementary Affidavit dated 4th June 2018. He averred that the *ex parte* applicant's Replying affidavit contains matters which were not in the original affidavit.

Ex parte applicant's advocates written submissions.

6. The *ex parte* applicant's counsel submitted that the impugned decision is illegal, and that the applicant was not afforded an opportunity to be heard^[1] or provided with the detail of the allegations,^[2] and urged the Court to grant the orders sought.

Respondent's Advocate's written submissions.

7. Counsel for the Respondents submitted that the *ex parte* applicant was accorded an opportunity to be heard, and that natural justice depends of the circumstances of each case,^[3] and that a distinction must be made between a hearing and a opportunity to be heard, in that what the law requires is the former.^[4] Counsel also submitted that Judicial Review orders are discretionary and may be refused even where grounds exist. ^[5] Further, he argued that Courts do not act in vain, and that the *ex parte* applicant has not registered as a student. Also, he argued that the applicant failed to disclose material facts and that it is in public interest that students abide by rules and regulations. Lastly, counsel argued that that the court cannot order admission of a student who has not paid fees, and that in any event the applicant failed to appeal against the said decision.

Determination.

8. From the above opposing facts presented by the parties, I find that the following issues distil themselves for determination, namely; **(a)** whether the *ex parte* applicant ought to have exhausted the laid down appellate mechanism; **(b)** whether the *ex parte* applicant has demonstrated grounds to qualify for Judicial Review orders sought.

9. Before addressing the above issues, one fundamental issue needs to be addressed. The Respondent's position is that the *ex parte* applicant did not pay fees, he never attended classes nor did register as a student. The *ex parte* applicant filed two further affidavits, but failed to attach receipts in support of payment of tuition and registration fees to rebut this averment. However, since the Respondent admits that it subjected the *ex parte* applicant to the disciplinary proceedings, one wonders why a non-student could be subjected to the disciplinary process and be "expelled." The letter complained of is clearly written "*expulsion from Mount Kenya University.*" I do not think the Respondents could engage in the exercise of subjecting a non-student to the disciplinary process and expel the "*non-student*" from the University. Hence, the argument that the *ex parte* applicant was not a student lacks substance. Alternatively, having subjected the *ex parte* applicant to the disciplinary process, which to my mind are subjected to students, the Respondent are estopped from denying that the *ex parte* applicant was not a student.

(a) Whether the *ex parte* applicant ought to have exhausted the laid down appellate mechanism.

10. The *ex parte* applicant annexed a letter to his further affidavit showing that he appealed against the impugned decision through the appellate mechanism. He however has not stated the outcome of the appeal or whether it is pending. The Respondent's position is that he failed to appeal. The Students Handbook provides that a Notice of Appeal against the Disciplinary Committee Decision must be given in writing and addressed to the Vice-Chancellor within fourteen days of communication of the Senate decision. The decision was made on 12th October 2017. The letter communicating the expulsion is dated 14th October 2017. The applicant's letter appealing against the decision is dated 17th October 2017 and bears the University Stamp showing that it was received on the same day.

11. This is a case where the parties opt to take diametrically opposed positions even where the facts are clear as above. From the above letter, it is evident that the *ex parte* applicant appealed against the said decision. I find no difficulty in concluding that he appealed as required. The Respondent's assertion to the contrary is unconvincing. What is not clear is whether the appeal was heard or is still pending. Unfortunately, the parties were economical with such crucial information, yet they expect the Court to make a sound determination. The applicant did not elaborate on the status of the appeal, while the Respondent's position is that no appeal was filed, a position betrayed by the second Respondent's stamp on the letter communicating the appeal.

12. My finding is that the appeal was filed. Further, the *ex parte* applicant ought to move a step further and inform the Court the status of the appeal. If the appeal is still pending, then, the *ex parte* applicant ought to have said so and seek appropriate orders compelling the second Respondent to hear it. Alternatively, if the appeal was determined, the *ex parte* applicant ought to have provided the outcome. What the Court discourages is to entertain a situation whereby an appeal is pending and still entertain this case. That would be improper because it would amount to allowing a party to pursue two proceedings on the same dispute in two forums.

13. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another*^[6] underlined the conventional judicial policy as established by the courts over time and now settled that litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law.

14. It is also important to point out that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. It is therefore my conclusion that since the *ex parte* applicant appealed, then he ought to pursue the appeal instead of approaching this Court and on this ground alone I decline to entertain these proceedings.

(b) whether the *ex parte* applicant has demonstrated grounds to qualify for Judicial Review orders sought.

15. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

16. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*^[7]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

17. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

18. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. The *ex parte* applicant states that he was not given the evidence against him, that he was never invited to appear before the University Disciplinary Committee nor informed the accusations against him and that he has never been served with the decision of the Disciplinary Committee nor was he summoned to appear before it or be heard. Further, he states that he was not given reasons for the expulsion.

19. The Respondents' case is that the *ex parte* applicant was notified and invited to attend the hearing and he was given a hearing and a decision was made. The Respondents also state that the applicant was notified of the decision.

20. The *ex parte* applicant has annexed a copy of the expulsion letter and his appeal to his further affidavit. He has not explained how he got the decision and even preferred an appeal. Such details could have helped the Court to weigh the veracity of his allegations. The opposing view is that he was invited to attend the hearing. There is a text message inviting him. He appealed against the decision within three days. I am inclined to find that he was supplied with the decision and reasons. Judicial Review is not an appeal and the Court is not concerned with the merits of the decision. I am not persuaded that the *ex parte* applicant has provided cogent evidence in support of the illegality of the decision.

21. The applicant seeks an order of *Certiorari* quash the decision. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. 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.[8] Perhaps I should add that the Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been proved or even alleged that the second Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters.

22. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

23. The applicant also seeks an order of *Mandamus*. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. *Mandamus* is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**[9]

24. *Mandamus, Certiorari and Prohibition* are discretionary remedies, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

25. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

26. The grant of the orders or certiorari, mandamus and prohibition being discretionary, the court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. Upon considering the facts presented by the parties, I find no reasonable basis to exercise the Court's discretion and grant the Judicial Review reliefs sought in the application. The upshot is that I dismiss this Judicial Review application with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 21st day of June 2018

John M. Mativo

Judge.

[1] Counsel cited Section 4 (3) of the Fair Administrative Action Act.

[2] *R vs Disciplinary Committee of Jomo Kenyatta University of Agriculture & Technology* {201} eKLR.

[3] Counsel cited *Turker L. J. Russel vs Duke of Norfolk* {194} 1 ALL ER 118.

[4] Citing *R vs Energy Regulatory Commission ex parte Kenya Gas Supplies Ltd*, HC Misc App. No. 355 of 2015.

[5] Counsel cited *R vs Judicial Service Commission* ,HC Misc App No. 1025 of 2003.

[6] {2016} eKLR

[7] {2014} eKLR.

[8] *Pastoli vs Kabale District Local Government Council and Others* {2008} 2EA 300

[9] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).