



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI,  
MILINMANI LAW COURTS  
JUDICIAL REVIEW DIVISION  
MISCELLANEOUS CIVIL APPLICATION NO. 28 OF 2017  
IN THE MATTER OF AN APPLICATION BY ANTHONY MWAMBIA THURANIRA  
AND  
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
FOR ORDERS OF *CERTIORARI* AND *MANDAMUS*  
AND  
IN THE MATTER OF THE CONSTITUTION OF KENYA  
AND  
IN THE MATTER OF UNIVERSITY OF NAIROBI RULES AND REGULATIONS  
GOVERNING THE ORGANIZATION, CONDUCT AND DISCIPLINE OF STUDENTS  
AND  
IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015  
AND  
IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010  
AND  
IN THE MATTER OF LAW REFORM ACT, CHAPTER 26, LAWS OF KENYA  
BETWEEN  
REPUBLIC.....APPLICANT  
VERSUS  
THE UNIVERSITY OF NAIROBI.....RESPONDENT  
AND  
ANTHONY MWAMBIA THURANIRA.....EX-PARTE APPLICANT  
**JUDGMENT**

**Ex parte applicant's case.**

1. Pursuant to the leave of this Court granted on 30<sup>th</sup> January 2017, the *ex parte* applicant moved this Court seeking the following orders:-

**a. An order of Certiorari** to call, remove and deliver up to this Honorable Court and quash the decisions and or orders of the Respondent in the letter dated 29<sup>th</sup> July 2016 to discontinue the *ex parte* applicant from his studies.

**b. A order of Mandamus** compelling the Respondent to reinstate the *ex parte* applicant back to his studies and further compel the

Respondent to administer all the exams that the *ex parte* applicant has missed out during the period of his suspension and discontinuation from his studies.

c. That the Honorable Court be pleased to give orders and or directions as to the application in the light of the urgent circumstances of the case herein.

d. That the costs of this application be in the cause.

2. Briefly, the grounds relied upon are:-

a. that the *ex parte* applicant was a registered third year student at the Respondent's Institution studying Statistics and Economics and that *at or around March and April 2016, disputed election riots erupted at the University causing the closure of the University;*

b. that on **11<sup>th</sup>** April 2016, he received a letter from the Respondent stating that between **8<sup>th</sup>** April 2016 and **11<sup>th</sup>** April 2016 unauthorized items were discovered in his room which he shared with three other students, and that the letter which invited him to appear before the disciplinary committee also suspended him and ordered that he stays away from the University's precincts until finalization of the disciplinary process;

c. that he was suspended without knowledge of what the alleged prohibited and unauthorized items were, and that on **13<sup>th</sup>** April 2016 an Internal Memo was circulated to the Registrar, Students Affairs from the Chief Legal Officer regarding four counts. Further, on **14<sup>th</sup>** April 2016, he received a letter requiring him to appear before the College Disciplinary Committee on **19<sup>th</sup>** April 2016 accompanied by a guardian. He attended the proceedings, but he never faced his accusers and no evidence was tendered on the alleged possession of *cannabis sativa*.

d. That he received a letter expelling him from the University and that his appeal to the Senate Student Disciplinary Committee was dismissed. Further, the decision to expel him is unlawful, procedurally unfair, irrational, unreasonable and made in bad faith.

### **Respondent's Replying Affidavit.**

**3. Professor Henry W. Mutoro**, the Respondent's Acting Vice-Chancellor, Student Affairs avers that he served as the Respondent's Chairman of the Senate Student Disciplinary Committee, the appellate body that deliberated upon the *ex parte* applicant's appeal. He averred that upon being admitted at the University, the *ex parte* applicant accepted to abide by the regulations governing the conduct and discipline of students.

**4. Prof. Mutoro** also averred that *cannabis sativa* was found at the *ex parte* applicant's room during a routine University management students room inspection which act is criminal and contravention of the Rules and Regulations Governing the Organization, Conduct and Discipline of Students. He further averred that the Principal, College of Humanities and Social Sciences wrote to the Vice-Chancellor requesting that appropriate disciplinary action be taken against the *ex parte* applicant among other students who had unauthorized materials in their rooms. Further, he averred that the Vice-Chancellor suspended the *ex parte* applicant pending the hearing and determination of the disciplinary case. Also, he averred that the *ex parte* applicant was issued with the charge sheet dated **13<sup>th</sup>** April 2016 and was invited to attend the College Disciplinary Committee. He averred that the *ex parte* applicant appeared before the College Disciplinary Committee on **19<sup>th</sup>** April 2016, he was heard and the Committee considered his statement and evidence and recommended his expulsion.

**5. Prof. Mutoro** further averred that the College Disciplinary Committee duly approved the decision and issued an expulsion letter dated **21<sup>st</sup>** April 2016. Further, he averred that the *ex parte* applicant appealed against the decision but the decision was upheld. Lastly, he averred that the decision was communicated to the *ex parte* applicant.

### **Issues for determination.**

6. I find that only one issue falls for determination, namely, whether or not the *ex parte* applicant has demonstrated any grounds to warrant this Court to grant the Judicial Review orders sought.

### **Determination.**

7. The *ex parte* applicant's counsel submitted that the decision is illegal, procedurally unfair, [\[1\]](#) irrational, unreasonable and made in bad faith. He also argued that the decision contravened the University Regulations and that the Students Representative did not attend the proceedings. He also argued that the *ex parte* applicant was not accorded a fair hearing, [\[2\]](#) that the decision was a violation of the *ex parte* applicant's constitutional right to education [\[3\]](#) and his rights under Article 47 of the Constitution.

8. Counsel for the Respondent submitted that:- **(i)** the absence of the a student representative in the Disciplinary Proceedings did not vitiate the proceedings, [\[4\]](#) **(ii)** that the process was fair and met constitutional threshold, [\[5\]](#) and, **(iii)** that the *ex parte* applicant is not entitled to the reliefs sought.

### **Determination.**

9. 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.

10. 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[6]:-

*“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.....”*

11. 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.

12. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. The *ex parte* applicant alleges that the decision to expel him is illegal. Details of the alleged illegality have not been supplied. **Illegal** is a description for something that is in violation of statute, regulation or ordinance.[7] No breach or violation of a statute, a Regulation or ordinance has been proved in this case.

13. In the case of *Omondi Michael Haya & 4 Others vs University of Nairobi*[8] cited by the Respondent's counsel which involved similar issues as raised in this case, I observed that "the disciplinary power of a university is quite often derived from the Act by which the university was established, or the statute from which it derives its authority. It is common for the "primary" statute to empower the university Council or some other body to make disciplinary rules or Regulations. Thus, the University of Nairobi Regulations governing the conduct and Discipline of Students provides for inter alia general conduct of students. A student of the University is subject to the disciplinary provisions prescribed in the Regulations. Also, at the time of admission, a Student executes a Bond binding himself/herself to observe the rules and Regulations governing the conduct of the Student while at the University."

14. It has not been demonstrated that University exceeded its legal mandate or acted *ultra vires* or the statute or the Regulations. The allegation that the students representative did not attend the proceedings is not sufficient to invalidate the decision. It has not been shown that the Committee was not properly constituted.

15. From the material before me, it is common ground that the *ex parte* applicant was notified of the charges against him in advance. He was invited to attend the Disciplinary proceedings. He attended and participated in the proceedings. The decision was communicated to him. He appealed against the decision and the decision was upheld. He was notified the outcome of the appeal.

16. The *ex parte* applicant has annexed a copy of the expulsion letter which clearly states the reasons for the expulsion. Also annexed is a copy of the suspension letter. It also stated reasons for the suspension. More significant is the fact that the *ex parte* applicant also annexed a copy of the charge sheet. All these confirm that there was sufficient communication at all the stages, that is, at the time of the suspension, prior the commencement of the proceedings, the decision, the reasons for the decision and the outcome of the appeal. It is not enough for the *ex parte* applicant to allege illegality, unreasonableness or procedural impropriety. He is under a duty to particularize the illegalities and prove them to the required standard.

17. In the above cited case of *Omondi Michael Haya & 4 Others vs University of Nairobi*[9]I observed that "it is imperative that individuals who are affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made."[10] The *ex parte* applicant has not demonstrated that he was denied the opportunity to present his case nor did he demonstrate any impartiality or breach of the principles of natural justice.

18. Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. There is nothing to show that the decision is tainted by bias nor has it been demonstrated that the Respondent exhibited bias during the investigations, or the proceedings or even after the final decision.

19. In the above cited case,[11] I cited an observation by Charles Goredema who stated:-

"The relationship between a university student and the university appears at first sight to be entirely contractual. It may appear that the student's position is analogous to that of a party to a contract which makes certain demands on him and offers him reciprocal benefits. On enrolling the student, the university under takes to provide tutorship, facilities and a learning environment that is conducive to the pursuit of knowledge. The student in turn undertakes to pay the fees which will make it possible for the university

to provide these services. He also undertakes to commit himself to the process of learning. The relationship does, however, have a disciplinary dimension to it. In so far as the university commits itself to creating and maintaining an environment that is conducive to learning, it assumes a position of authority in relation to the student. In turn the student undertakes to accept that authoritative status.

A relationship of authority is by definition hierarchical. It is a relationship in which the student is in a subordinate position and the university is in a superior, super ordinate, position. The relationship is also administrative. An administrative relationship is characterized by the unequal distribution of power between the subordinate and the super ordinate. The attribute by which the latter is easily identifiable is the vesting of power in it, power which it is in a position to enforce. The power is usually derived from statute, and normally the same statute will define the subsidiary position of the subordinate. A common formula is to provide that every registered student shall be subject to the disciplinary authority of the university council. As an administrative relationship, the student/university relationship is regulated by administrative law. Apart from creating and recognizing certain rights, administrative law also serves to prevent the wrongful encroachment upon or violation of those rights."<sup>[12]</sup>

20. It has not been shown that the decision in question is unreasonable such that no reasonable tribunal properly applying its mind to the law and the material before it could arrive at such a decision. The test of unreasonableness was set out in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*.<sup>[13]</sup> The law places the onus on the Petitioner to demonstrate that the decision was so absurd that no sensible person could ever dream that it lays within the powers of the Respondent.<sup>[14]</sup>

21. The Respondent has not only a statutory duty but also a moral duty to uphold Discipline at the University. It would in general be wrong to whittle away the obligation of the Respondent as a public body to uphold Discipline within the University and enforce compliance with the law and Regulations to ensure efficient learning. A lenient approach could be an open invitation to the Respondent to act against its legal mandate. My understanding of the Petitioners case is that the legal mandate of the Respondent to conduct the disciplinary proceedings in issue is not disputed. The bone of contention is whether the proceedings were fairly conducted.

22. On the alleged violation of Article 47 Rights, I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*<sup>[15]</sup> which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.<sup>[16]</sup> *Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.*

23. Reflecting on the facts presented in this case, I am reminded of the decision in *Republic vs. Kenya Power & Lighting Company Limited & Another*<sup>[17]</sup> where the court observed that:-

**“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”**

24. **Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or issue an order prohibiting its implementation since a Judicial Review court does not function as an appellate court.**

25. **Besides, the purpose of Judicial Review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial Review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates<sup>[18]</sup> unless the decision is arrived at in violation of the Constitution or the relevant statute.**

26. The other crucial question which must be answered is what is the standard by which the legality of the decision and conformity with the Fair Administrative Action Act<sup>[19]</sup> and Article 47 of the Constitution should be judged. In this regard such a question should be answered with reference to the standards of review laid down by Courts when the legality or constitutionality of decisions are challenged which include two main standards.

a. The first is the “rationality” test. This is the standard that applies to all legislation under the rule of law;

b. The second, and more exacting standard, is that of “reasonableness” or “proportionality”, which applies when a decision or legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is “reasonable and justifiable in an open and democratic society.”

27. It is important to mention that the Regulations and Disciplinary Proceedings are “reasonably related” to a legitimate purpose, that is to uphold Discipline in the University and to enable the Respondent fulfill its statutory mandate of managing the institution. In determining reasonableness, relevant factors include:-(a) whether there is a “valid, rational connection” between the decision and a legitimate and public interest to justify it, which connection cannot be so remote as to render the decision arbitrary or irrational. In this regard I hold the view that maintaining discipline in Universities is a legitimate purpose. These grounds meet the limitation test under Article 24 of the Constitution. Perhaps I should add that the rights alleged to have been violated, namely, the Right to education and the right to a Fair Administrative Action are not absolute.

28. It is equally important that the court should also as far as possible, avoid any decision or interpretation which would bring about the result of rendering the system of managing Discipline in Universities unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue. In this case, the law and the Regulations are aimed at the good of the society in

maintaining discipline in Universities. This meets the proportionality test. It is my view that the decision has not been shown to be unreasonable and or violating the Petitioners Right to fair Administrative Action or any Constitutional provisions as alleged. It is logically related to the legitimate purpose as discussed above.

29. 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.<sup>[20]</sup> 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.

30. 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.

31. 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.**<sup>[21]</sup>

32. *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.

33. 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 or 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. The before granting Judicial Review orders, 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.

34. Upon considering the facts presented by the parties, and upon applying the facts to the law and the circumstances of this case, I find no reasonable basis to exercise this Court's discretion and grant the Judicial Review reliefs sought in the application. The upshot is that I dismiss the application dated 14<sup>th</sup> February 2017 with no orders as to costs.

Orders accordingly.

**Signed, Delivered, Dated at Nairobi this 31<sup>st</sup> day of July ,2018**

**John M. Mativo**

**Judge.**

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[1] Counsel cited *Pastoli vs Kabale District Local Government Council & Others* {2008} 2 EA 300.

[2] Counsel cited *Lucy Wanjiku Gitumbi & Another vs Dedan Kimathi University of Technology*, JR No. 164 of 2016.

[3] *Onyango Oloo vs The A.G.* {1986-89} EA.

[4] Counsel cited *Arnold Obadha Odeno & Others vs University of Nairobi*.

[5] counsel cited *Omondi Michael Haya & 4 Others vs University of Nairobi* {2017} eKLR

[6] {2014} eKLR.

[7]<https://definitions.uslegal.com/i/illegal/>

[8] {2017} eKLR

[9] {2017} eKLR.

[10] David Phillip JONES and Anne S. de VILLARS, *Principles of Administrative Law* (4th edition), Thomson Carswell, 2004, p. 251.

[11] {2017}eKLR

[12]*Observations on the Observance of Administrative Law in University Student Disciplinary Proceedings: A Survey of Selected*

*Universities in Southern Africa*, Charles Goredema Lecturer, Department of Public Law, University of the Western Cape, Zimbabwe Law Review, Vol 13, 1996.

[13] {1948}1 KB 223.

[14] Counsel cited *R vs. Kenya Power & Lighting Co Ltd & Another* {2013}eKLR.

[15] {2015}eKLR.

[16] Ibid.

[17]{2013} eKLR.

[18] See **Githua J in *Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012* [2012] eKLR.**

[19] Ibid

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

[21] *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).