



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW NO. 39 OF 2018**  
**IN THE MATTER OF: AN APPLICATION BY GIMFORD AKISA & 41 OTHERS FOR**  
**JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**  
**AND**  
**IN THE MATTER OF: UNIVERSITIES ACT**  
**AND**  
**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015**  
**BETWEEN**  
**GIMFORD AKISA MOSE & 4 OTHERS.....APPLICANTS**  
**AND**  
**PWANI UNIVERSITY.....RESPONDENT**  
**RULING**

**The Application**

1. By a Notice of Motion herein dated 22<sup>nd</sup> June, 2018 the Applicant prays for the following orders:
  - (a) An order of CERTIORARI to remove to this Honourable Court for purposes of being quashed the results of the 2018 PUSA elections issued by dean of students.
  - (b) An order of PROHIBITION to prohibit the University or any of its organs from swearing in or facilitating in office the persons elected pursuant to the elections held on 8.6.2018.
  - (c) A DECLARATION that the elections held on 8.6.2018 violated Article 81 of the Constitution, the Universities Act and the PUSA constitution, 2018 and are invalid and or null and void.
  - (d) An order for Costs.
  - (e) Any other orders and/or directions as this Honourable Court may deem fit.
2. The application is premised on the grounds set out in the Statement and Affidavit of Gimford Akisa Mose both filed herein on 20th June, 2018 and his Further Affidavit sworn on 13<sup>th</sup> July, 2018.
3. The Ex parte Applicant's case is that the Respondent arranged for and coordinated elections for students' council on 8.6.2018. The Applicant states that the Universities Act is couched in mandatory terms and requires every students' council to be elected in accordance

with the said Act. In general terms the law provides as follows concerning elections for students' councils:

- (i) For purposes of conducting elections of members of students' council, the students' association shall constitute itself into electoral colleges based on either academic departments, schools or faculties, as may be appropriate
- (ii) The students of each electoral college shall elect three (3) representatives from persons who are not candidates in the election
- (iii) The representatives of each electoral college shall elect the members of the students' council within thirty (30) days of their election
- (iv) Every students' association shall, in consultation with the University, formulate and enact rules to govern the conduct of elections including regulation of campaigns, election financing, offences and penalties.
- (v) An election conducted pursuant to this section shall comply with the general principles of the Kenyan electoral system under Article 81 of the Constitution and the rules governing the election of members of the student council.

4. The Applicants states that in conducting the said elections, the University blatantly breached the law. No electoral colleges were constituted. No representatives of the electoral colleges were elected. The purported election held on 8.6.2018 was by over 4,000 students when only 24 representatives of the 8 electoral colleges within the University were eligible to vote in accordance with the Universities Act. Therefore the elections conducted on 8.6.2018 are blatantly illegal and contrary to Article 81 of the constitution, and the University plans to swear in the persons elected through the illegal elections on 20.6.2018 should be stopped by this court. Unless that is done the Applicant's will suffer irreparable harm and prejudice and their fundamental rights will be breached by the University

4. The Ex parte Applicant's case is premised on illegality and procedural impropriety. No electoral colleges were constituted. No representatives of the electoral colleges were elected. The purported election held on 8.6.2018 was by over 4,000 students when only 24 representatives of the 8 electoral colleges within the University were eligible to vote in accordance with the Universities Act.

5. The Applicants state that the schools based at the University which were to constitute electoral colleges are as follows:

- (i) School of Education
- (ii) School of Agricultural Sciences and Agribusiness
- (iii) School of Humanities and Social Sciences
- (iv) School of Environment and Earth Science
- (v) School of Business and Economics
- (vi) School of Health and Human Sciences
- (vii) School of Graduate Studies
- (viii) School of Pure and Applied Sciences

5. None of the said schools constituted electoral colleges nor elected the 3 representatives required by law to elect the student council. Voting for the over 4,000 students commenced at 6.30 am and ended at 2.30pm. The Applicants referred to the University Students Association (PUSA) constitution made pursuant to the amendments in the Universities Act. This constitution requires at Article 43 thereof that voting shall be through electoral colleges. However, that notwithstanding the Chairman of the Electoral Commission of the University issued a memo dated 25.5.2018 declaring vacancies in the students' council and setting the election date. In the said memo, the Electoral Commission undertook to conduct the elections under the Universities Amendment Act as well as under the provisions of the PUSA constitution. However, this was not adhered to. Due to these alleged irregularities, the applicant urges the court to allow this application.

### **The Response**

6. The Respondent oppose the application vide a Replying Affidavit of Ronald Juma sworn on 9<sup>th</sup> July, 2018. The deponent states that he is the Dean of Students of the Respondent University and he is well versed with the matters herein.

7. The Respondent's case is that in accordance with the governing statute – the Universities Act, No. 42 of 2012- the students of the Respondent, including the ex-parte applicants herein have constituted themselves as an Association known as Pwani University Students Association (PUSA). The PUSA Constitution requires that an election is conducted annually to elect its Students' Council in a competitive process in line with the provisions of the PUSA Constitution, the Universities Act and Article 81 of the Constitution of Kenya. The Respondent referred the Court to Article 48 of the PUSA Constitution which provides as follows:

#### **Article 48: Elections Appeals**

- 1) A Petition may be lodged to the Appeals Committee by a candidate **or any member of PUSA** on the following grounds:

a. Whenever such a candidate or member has reason to believe or has evidence that there has been a contravention of any election procedure or rule during the election period.

b. Whenever there is an allegation of bribing of voters, intimidation, and/or harassment of voters and/or candidates

c. Whenever there is evidence that a candidate has breached this Constitution.

2) A petitioner may bring a petition regarding nomination or campaign or elections.

3) A petition must be lodged within the election period but not later than seventy-two (72) hours after the elections and must be signed by at least 100 members of PUSA

12) Any resolution made by the PUSA Electoral Appeals Committee shall be final, binding and conclusive.

8. Article 48 of the PUSA constitution is also replicated in Clause 9.9. of the PUSA Students Council Election Regulations of 2017. **(A copy of the Regulations was annexed marked “RJ-1”)**

9. The Respondent’s case is that there is a clear elections dispute resolution mechanism aforementioned within the PUSA **Constitution** and the PUSA Students Council Election Regulations of 2017 which the ex-parte applicants have completely by-passed to move this Court, actions which amount to a blatant abuse of the court process. Therefore,

The Respondent states that since the ex-parte applicants have not exhausted the remedies available to them in the existing student election regulations, this Court does not have jurisdiction to hear this application as the same will amount to usurpation of the powers conferred upon the PUSA Electoral Appeals Committee. Accordingly, the Notice of Motion Application dated 22<sup>nd</sup> June, 2018 ought to be dismissed with costs to the Respondent as the same is an afterthought, the applicants having failed to move the PUSA Electoral Appeals Committee within the timelines provided due to their own indolence.

9. The Respondent further states that **all** allegations of illegality are denied entirely and that the Respondent followed the law in conducting the said election. For instance and following the Universities (Amendment) Act of 2016, the Respondent appointed a committee to develop guidelines in conducting the student elections. This appointment was communicated to “All Students” of the Respondent via an Internal Memo dated 10<sup>th</sup> October, 2017 duly affixed at a conspicuous place in the several campuses of the University. **See annexure “RJ-2.”** The said committee in consultation with the students of the Respondent and aspiring candidates for the various positions of the Students Council came up with the following recommendations:

a) The PUSA Student Council Election Regulations of 2017 were developed and approved by PUSA Congress as required and the said approval communicated via letter dated 12<sup>th</sup> June, 2017. **(See annexure “RJ-3”)**

b) That the forthcoming PUSA Government 2018/19 academic year be a transition government which shall facilitate the domestication of the new Amendments to the University Act for the next election scheduled for March, 2019.

c) That the voting system for the 8<sup>th</sup> June, 2018 election shall remain the one-man-one-vote system.

10. The Respondent submitted that it is in the public domain that students of various public universities in Kenya including students of the Respondent have previously expressed discontent with the Amendments introduced by the Universities (Amendment) Act of 2016 with riots and protests arising and the amendments even challenged before this Court in **Were Samwel & 14 Others v Attorney General & 2 others [2017] eKLR. See annexure “RJ-4”**

11. The Respondent’s case is that the delay in implementing the system of electoral colleges was not in bad faith and was only due to the uncertainties surrounding the new provisions in light of the High Court Petition aforementioned challenging the constitutionality of the amendments to the Act and the need to maintain peace and order in the University while allowing a transition period where students and all stakeholders would be sensitized on the new provisions of the Universities Act. Accordingly, the Respondent and the Students Fraternity were all in agreement that a transitional government was necessary to allow time for sensitization of the students and all stakeholders on the new student election rules to curb potential unrest among the students. **(See copy of minutes of the consultation marked “RJ-5”)**

12. The Respondent also refuted all allegations of procedural impropriety, and stated that the Respondent acted within its mandate to ensure a free and fair election as follows:

a) Students were formally notified about the impugned election via internal memos of 18<sup>th</sup> May, 2018 and 7<sup>th</sup> June, 2018 both annexed to the applicants’ supporting affidavit.

b) PUSA held its AGM on 25/5/2018 and discussed among other things the appointment of the Electoral Commission to manage the elections.

c) The sitting government was dissolved by the Chair of the Electoral Commission 2018 and all positions in the student council declared vacant.

d) Interested aspirants started picking nomination papers from the dean of students’ office as from 26<sup>th</sup> May, 2018 and returned the

duly filled forms to the commission on 28<sup>th</sup> May, 2018.

- e) Verification and issue of certificates to the qualified candidates was finalized on 29<sup>th</sup> May, 2018. Election campaigns and civic education then kicked off.
- f) The Commission and University management met with qualified candidates on 30<sup>th</sup> May, 2018 to discuss logistics of the election.
- g) No student raised any concern during the civic education and voter register verification.
- h) Elections were held as scheduled on 8<sup>th</sup> June, 2018 in eight (8) polling stations and vote count done and displayed in each station and transmitted to the main tallying center.
- i) Formal announcement of the results was made by the Chairperson of the Commission on the same day 8<sup>th</sup> June, 2018 at the University car park grounds.
- j) Candidates who lost accepted defeat and no appeals or complaints were received within 72hrs as stipulated in the PUSA constitution and the 2017 Election Regulations.

13. The Respondent submitted that it did not receive any objection to the 8<sup>th</sup> June, 2018 election guidelines communicated, formal or otherwise, from the time the memo was issued until after the election was conducted and concluded when the ex-parte applicants herein moved this Court via the instant application.

14. The Respondent also denies all allegations of constitutional breaches. The impugned elections were conducted in a free and fair manner and in accordance with Article 81 of the Constitution of Kenya and no appeal was lodged to the PUSA Electoral Appeals Committee challenging the accuracy of the election results or conduct of the election by a candidate or any member of PUSA. Further no evidence has been tendered in this application challenging the accuracy of the results of the 8<sup>th</sup> June, 2018 election. The Respondent kept the students including the ex-parte applicants informed throughout the preparation and conduct of the impugned election giving the applicants plenty of room and opportunity to challenge the same but not a single complaint was received. It is the Respondent's case that the Orders sought by the ex-parte applicant are not capable of enforcement as this application has already been overtaken by events. The newly elected members of the Student Council were sworn in on **20<sup>th</sup> June, 2018** and have taken office. The Respondent states that the stay orders of this Court issued on **22<sup>nd</sup> June, 2018** were only served upon the Respondent on **28<sup>th</sup> June, 2018** after the fact.

### Submissions

14. With the leave of Court parties filed submissions which were orally highlighted in court on 20<sup>th</sup> September, 2018. I have carefully considered those submissions. In my view the only issue to be determined by this court is whether the alleged violations are good enough to allow the grant of the prerogative orders sought herein, and whether this court has the jurisdiction in this matter.

15. The Respondent arranged for and coordinated elections for students' council on 8.6.2018. The Universities Act is couched in mandatory terms and requires that every students' council shall be elected in accordance with the said Act. In general terms the law provides as follows concerning elections for students' councils:

- (i) For purposes of conducting elections of members of students' council, the students' association shall constitute itself into electoral colleges based either on either academic departments, schools or faculties, as may be appropriate
- (ii) The students of each Electoral College shall elect three (3) representatives from persons who are not candidates in the election
- (iii) The representatives of each Electoral College shall elect the members of the students' council within thirty (30) days of their election
- (iv) Every students' association shall, in consultation with the University, formulate and enact rules to govern the conduct of elections including regulation of campaigns, election financing, offences and penalties.
- (v) An election conducted pursuant to this section shall comply with the general principles of the Kenyan electoral system under Article 81 of the Constitution and the rules governing the election of members of the student council.

16. On the allegations that there were procedural irregularities the Respondent attached PUSA Student Council Election Regulations 2017 as **RJ-1**. The said Regulations were approved and a letter to the effect issued by Deputy Speaker and Chair of Constitutional Affairs on 12<sup>th</sup> April, 2017. (See annexure RJ-3 attached to the Replying Affidavit of Ronald Juma.) Subsequently, there was a consultative meeting between PUSA Aspirants, EC-PUSA 2018 and Dean of Students or 2018 PUSA Elections. (See annexure **RJ-5**.) These procedural requirements attached to the affidavit were not challenged by the Applicant.

17. There was also allegation by the Applicant that the Appellate process under which the losing party would mount an appeal had not been set up, and that there were no internal dispute resolution mechanism in place and so the court was the only option. I have seen the Election Regulations and other processes which were put in place. However, I cannot tell whether or not they were adequate.

18. Judicial Review proceedings do not allow parties to provide oral evidence where disputed claims can be resolved. Judicial Review

proceedings cures violations which prima facie are evident the proof of which is limited to affidavit evidence.

19. The Applicant has also alleged breach of law and the constitution. Where breach of law is alleged it must also be a clear one which does not require an elaborate response. A court may not necessarily question a breach of law in Judicial Review proceedings because doing that could end up judging the merit of the decision to be quashed.

20. Article 48(3) of the PUSA constitution requires that any person who wishes to challenge the student council elections must obtain the signatures of at least 100 members in support of the petition to ensure that the will of the majority is always respected. I have not seen such a list of members attached to the petition. The Applicant had submitted that they were unable to appeal because appeals committee had not been put in place. That may be so. It is an issue which requires evidence. But still even as they came to this court, nothing had stopped them from filing before this court a list of 100 members in support of their case.

21. I have carefully considered the matter before the court. Judicial Review remedies are discretionary in nature. Because they aim at delivering justice in the shortest time possible, the court may still decline to grant them even where they are deserved, if granting the orders would itself cause a great deal of inconvenience or would upset a situation in a very negative way.

22. There are three reasons why, even though the orders sought herein may be deserved, I decline to grant them. Firstly, the PUSA officials who were elected are already sworn into the office. The order stopping their swearing in was served after the swearing in had taken place. Secondly, the procedural impropriety cited in this application are matters bordering on oral evidence which is not within the jurisdiction of this court. Thirdly, I have accepted the submissions by the Respondent that the impugned elections produced intermediate officials, like a care taker government, which will work with all stakeholders to align the PUSA constitution with the Universities Act, after which fresh elections will be held in March, 2019. March 2019 is only two months away. The current office holders should be given that time to do their work of aligning PUSA constitution with the Universities Act, and to properly prepare for the March 2019 elections as envisaged.

For the foregoing reasons the application herein dated 22<sup>nd</sup> June, 2018 is not allowed. Parties to bear own costs.

That is the Ruling of the Court.

**Dated, Signed and Delivered in Mombasa this 19<sup>th</sup> day of December, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

M/S Kitari for Applicant

M/S Mukoya holding brief M/S Mureithi for Respondent

Court Assistant Kaunda