



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 618 OF 2016

**IN THE MATER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND MANDAMUS**

REPUBLIC.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....1ST RESPONDENT

STUDENTS DISCIPLINARY COMMITTEE KENYATTA UNIVERSITY....2ND RESPONDENT

SENATE-KENYATTA UNIVERSITY.....3RD RESPONDENT

GATETUA MACHARIA KENNEDY.....EXPARTE APPLICANT

RULING ON PRELIMINARY OBJECTION

1. This ruling determines the respondent's preliminary objection dated 28th February 2017 to the exparte applicant's notice of motion dated 30th January 2017.
2. The preliminary objection asserts that the proceedings herein are fatally defective, incurably incompetent, have no basis in law and should be struck out with costs on the grounds that: These proceedings have been instituted in a separate cause although the exparte applicant complains that the judgment in Nairobi Miscellaneous Application No. 264/13 was not adhered to; The proper cause within which to ventilate that issue any claim for failure to be afforded fair administrative action connected thereto is Nairobi Miscellaneous Application No. 264/2013.
3. The parties agreed to canvass the preliminary objection first before considering the merits of the judicial Review proceedings herein wherein leave to commence the substantive motion was granted on 18th January 2017 without objection from the respondent during the interpartes hearing of the chamber summons for leave.
4. According to the respondents, as per their submissions filed on 6th March 2017, the proceedings hereto were necessitated by the University's failure to comply with the judgment of the court in Nairobi Miscellaneous Application No. 264 of 2013 Republic vs Kenyatta University and 2 Others exparte Gatetua Macharia Kennedy. That in conducting disciplinary proceedings subsequent to that judgment, the University blantly disregarded the court's direction in several respects which he had enumerated.

5. It is therefore contended that the applicant should not have instituted a separate cause. Reliance was placed on **Eliud Nyauma Onwoyo vs Kenyatta University & Others [2016] eKLR** Onguto J wherein the applicants after obtaining Judicial Review orders and the university being ordered to conduct fresh disciplinary proceedings in compliance with the law; on being dissatisfied with the results, one of the students returned to court through a separate constitutional petition complaining that subsequent proceedings did not comply with the directions of the judgment of Lenaola J in various respects.
6. It was submitted that in dismissing the petition in its entirety, Onguto J held that the right forum to file the suit was the one within which the orders emanated and that non compliance with the orders of the court by failing to afford the applicant fair administrative action too ought to form or constitute a ground for contempt of court application.
7. This court was urged to uphold the preliminary objection as hearing this case will place the court in the same position as that of the former suit(case) hence going through a repeat of the same trial process and if vindicated, the applicant would end up with much the same orders as held by Onguto J.
8. Further, it was contended that the applicant has made the same argument that he made in the earlier case. The rest of the submissions by the respondents go into the merits of the notice of motion.
9. In opposition to the respondent's preliminary objection dated 25th February 2017, the ex parte applicant filed written submissions dated 14th March 2017 contending that the preliminary objection as raised has the effect of denying a party a right of audience on the merits of a case hence the preliminary objection does not fall within the purview of the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors [1969] EA 696**.
10. According to the ex parte applicant, the subsequent disciplinary proceedings after Honourable Korir J quashed the earlier proceedings gave rise to a totally new decision and that the mere fact of there being alternative remedies does not bar one to seek Judicial Review reliefs. Reliance was placed on **Republic vs The Commissioner of Lands ex parte Lake Flowers Ltd HCC Application 1235 of 1998** adopted in **Republic vs CM's Court Milimani Commercial Courts & 5 others [2014] eKLR**.
11. It was also submitted that by necessary implication, the preliminary objection claims that these Judicial Review proceedings are *Resjudicata* HCC JR 264/2013. it was therefore submitted that based on the decision in **Republic vs Judicial Service Commission Ex parte Pareno [2004] eKLR**, *resjudicata* has no place in Judicial Review proceedings and that in any event, these proceedings are not a repeat of the petition No. 264/2013 and that even though, the court will have the benefit of examining the evidence and satisfying itself as to whether there was breach of procedure or the matter should be considered as contempt.
12. That this court cannot be invited to probe contempt after certiorari has been issued with no express orders of mandamus having been violated. That in this case, the respondents adhered to the court's ruling by holding fresh disciplinary proceedings but that the procedure adopted in the said later disciplinary proceedings is what the ex parte applicant seeks to challenge hence the preliminary objection should be dismissed for want of merit.
13. Further, that this case can be distinguished from Eliud Omwoyo case in that in that case, the petitioner sought a declaration that the respondent was in contempt of court orders unlike in this case which is not a contempt proceeding hence there is no basis of a preliminary objection.
14. In addition, that whereas the failure of the respondents to adhere to the court's ruling partly informs the current motion, the ex parte applicant seeks orders of certiorari against the decisions of the respondents and orders of mandamus which was not the case in the Eliud Omwoyo decision which is clearly distinguishable from this case.
15. The applicant urged the court to dismiss the preliminary objection.

DETERMINATION.

16. I have considered the preliminary objection, submissions by parties' advocates and the authorities relied on. The main issue for determination is whether the preliminary objection raised should be upheld.

17. Basically, the preliminary objection was by implication, though not expressly stated by the respondents based on the doctrine of resjudicata which, according to the exparte applicant, has no place in Judicial Review proceedings. The exparte applicant also contends that the preliminary objection as argued does not meet the test laid down in the **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696**.

18. The question is, what is a preliminary objection and whether the preliminary objection raised herein qualifies as one. In the Mukisa Biscuits (supra) case, Sir Charles Newbold observed that:

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of point of law by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issue. This improper practice should stop.”

19. In addition, a preliminary objection being a pure point of law should not raise factual matters which require probing and interrogation by way of affidavit evidence to ascertain the truth thereof. Where facts require ascertainment, by adduction of evidence then it is appropriate to raise a preliminary objection by way of a notice of motion or while urging the main cause and not by way of arguments from the bar.

20. In the instant case, there are allegations that the applicant is complaining against the respondent's failure to adhere to the judgment of Korir J in Petition 264/2013 which was determined and that therefore he should have filed a motion in the said petition, seeking to cite the respondents for contempt of court and not to institute fresh proceedings.

21. On the other hand, the applicant avers that the judgment of Korir J was adhered to by the respondent reconstituting fresh disciplinary proceedings against the applicant but that in the process, failed to adhere to the Rules of natural justice.

22. Moreso, that as no order of mandamus was issued, the applicant is right in seeking for certiorari and mandamus to quash the fresh disciplinary proceedings and decision of 26th March 2015 and of appeal of 5th October 2016 and to compel the respondents to clear him for graduation and issue him with his degree certificate. While urging the preliminary objection, the respondent's counsel also delved into the merits of the substantive motion which, in my view, diluted the preliminary objection as evidence was being adduced in the wrong forum.

23. Although the question of whether or not the plea of resjudicata can be raised in Judicial Review proceedings is an arguable one, and has been subject of many judicial decisions by this court, I nonetheless would not at this stage determine that issue conclusively as the respondents did not exhaustively argue that point of *Resjudicata* for my determination.

24. In my humble view, all the issues raised by the respondents and responded to by the applicant's counsel can adequately be dealt with at the hearing of the main motion so that the applicant is accorded a hearing to ventilate his grievances against the respondents and the respondents be given ample opportunity to attack the merits of the motion which, on the face of it, this court cannot determine, without hearing the parties, that it is frivolous.

25. For those reasons, I find that the preliminary objection raised is not a pure point of law for disposal as it raised factual matters requiring probing and interrogation.

26. Accordingly, the preliminary objection is dismissed with costs in the cause.

The parties to fix a hearing date for the main motion.

Dated, signed and delivered in open court at Nairobi this 31st day of May 2017.

R. E. ABURILI

JUDGE