



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**JUDICIAL REVIEW NO. 219 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE BY WAKOLI KUNANI FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS**

**AND**

**IN THE MATTER OF THE DECISION OF THE SENATE OF UNIVERSITY OF NAIROBI CONTAINED IN THE LETTER DATED 21<sup>ST</sup> APRIL 2016**

**IN THE MATTER OF ARTICLE 25(C), 27, 47 50 OF THE CONSTITUTION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**UNIVERSITY OF NAIROBI.....RESPONDENT**

**LAZARUS WAKOLI KUNANI, MAGAWI MAXWELL ODHIAMBO &**

**CHORE ROBERT OUKO.....EX PARTE APPLICANTS**

**RULING**

1. On 30<sup>th</sup> May, 2016, this Court granted leave to the applicant to commence judicial review proceedings in order to challenge the decision made by Respondent’s Senate by which the applicants were expelled from the Respondent University.
2. The applicants were directed to file and serve their Motion within 3 days. However those directions were not complied with. On 29<sup>th</sup> June, 2016 when the matter came up for the highlighting of submissions, the ex parte applicants were unrepresented while the Respondent was represented by **Miss Nyagah**, learned counsel who applied for the dismissal of the application. The Court accordingly proceeded to strike out the application for failure on the part of the applicant to comply with the directions of the Court with respect to the filing and service of the Motion.
3. By a Notice of Motion dated 23<sup>rd</sup> November, 2016, the applicants now seek the order that this application be reinstated.
4. According to the applicants, on the 21<sup>st</sup> day of April 2016, they were unlawfully, illegally and in utter violation of the rules of natural justice summarily expelled by the Respondent following an alleged

recommendation by the Disciplinary Committee. Aggrieved by the decision, they commenced these proceedings through the firm of **Musyoki Mogaka & Co Advocates** to quash the decision to expel them and further to compel the Respondent to reinstate them as students therein which application was set for hearing on 29<sup>th</sup> June 2016. However, their said advocates did not attend court as a result of which the Application was struck out for non-attendance.

5. According to the applicants, being quite naïve as to matters of the law, they fully relied on his Advocate's counsel and assurance that they would see to it that the matter was heard and determined. Upon realising that no communication was emanating from his said Advocates, the applicants started following up the matter in court and to their consternation and dismay, they discovered that the same had been struck out for non-attendance.

6. It was the applicants' case that they stood to suffer injustice as a result of the non-attendance by their appointed advocates at the time and pleaded that the mistakes of an Advocate should not be visited on a client. To them, **Order 12 Rule 7** of the **Civil Procedure Rules 2010** provides that where a suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

7. It was therefore the applicants' case that it is only just that their suit be reinstated as their education has been brought into a dramatic and an undeserved premature end and their hopes of being lawyers remained nothing but dreams by virtue of the illegal and irrational decision to expel them for merely demanding for an address by the Dean of the Law School. The applicants averred that in the face of the already lost academic year by themselves and the Overriding Objective as advocated for by the **Civil Procedure Act** Cap 21 and **Civil Procedure Rules** of 2010, it is only prudent in the circumstances that their suit herein be reinstated.

8. The application was opposed by the Respondent University which averred that the application was struck out for failure to comply with the directions of the Court and not for non-attendance as contended by the applicant. It was however contended that there was no demonstration of the reason for the failure to file the Motion within the prescribed time.

9. It was further averred that the present application was filed 5 months after these proceedings were struck out hence the instant application was made after an inordinate delay without any explanation for the same.

### **Determinations**

10. I have considered the foregoing as well as the submissions filed.

11. That the instant application was very casually prosecuted is not in doubt. Whereas the Notice of Appointment of Advocates seems to have been filed on behalf of the 2<sup>nd</sup> applicant only, **Magawi Maxwell Odhiambo**, the affidavit in support of the application is however sworn by **Lazarus Wakoli Kunani**. The submissions themselves are rather convoluted referring to non-parties while references to the deponents are clearly erroneous. With due respect the advocates for the applicants on record seems not to have taken care to adequately appraise themselves with the record since even the basis upon which the application was struck out was clearly misapprehended by the applicant's advocates.

12. In my view such casual and I daresay careless approach to such a serious matter where the future of the applicants are at stake may well call for an investigation as to why the costs of the application cannot be borne by the counsel concerned personally.

13. However, it is clear that the errors alluded to hereinabove and procedural errors which, taking into consideration the fact that these are judicial review proceedings and that **Civil Procedure Rules** do not ordinarily apply, thereto, the provisions of Article 159 of the Constitution ought to be invoked to cure such procedural miss-steps.

14. It is clear from the foregoing that the basis of this application is that the applicants were let down by their erstwhile advocates. The law is however now that it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In **John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

**“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent”.**

15. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** Kimaru, J expressed himself as follows:

**“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.**

16. In this case, the applicant’s future is on the verge of being ruined. The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** it was held as follows:

**“That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate”.**

17. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22**, Oder, JSC stated:

**“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.**

18. Having considered the foregoing I am satisfied that this is a matter where the Court in exercising its discretion ought to balance the interests of both parties. The Respondent has not shown that any serious prejudice will be occasioned to it if these proceedings are reinstated.

19. Therefore balancing the interests of the parties herein, I grant the Notice of Motion dated 23<sup>rd</sup> November, 2016 and enlarge the time within which the substantive motion is to be filed and served with a further period of 3 days from the date hereof. For avoidance of doubt, in default, these proceedings will stand dismissed with costs to the Respondent.

20. The costs of this application are awarded to the Respondent in any event.

**Dated at Nairobi this 16<sup>th</sup> day of May, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Otieno for the Applicant**

**Miss Macharia for Mr Ngatia for the Respondent**

**CA Mwangi**