



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW CASE NO. 1 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI**

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL KISII UNIVERSITY SENATE DECISION
ON 27.10.2016**

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL DECISION OF THE KISII UNIVERSITY
MANAGEMENT BOARD ON 10.10.2016**

**AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
2,10,20,22,23,27,43,47,48,50 OF THE CONSTITUTION OF KENYA (2010)**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

1. BRIAN ONYANGO MOSES

2. STEVE OMWOYO OKEMWA

3. JOSEPH LOKITANO EMURIA

4. GODFREY ORINA MOINDI

5. BERNICE NJUGUNA

6. STEVE GERRY.....APPLICANTS

VERSUS

THE VICE CHANCELLOR, KISII UNIVERSITY.....1ST RESPONDENT

KISII UNIVERSITY MANAGEMENT BOARD.....2ND RESPONDENT

JUDGMENT

Introduction

1. 8th September, 2016 was the official opening day for the Academic year 2016/2017 for Kisii University (hereinafter “the university”) when students, including the applicants herein, reported back to the said institution. Upon their return to the University, the applicants were informed about the introduction of a new human resource management system known as the Enterprise Resource Planning (ERP), which required that all students be registered biometrically and all fees be paid in full failure of which they risked automatic deferral of their studies.

2. This new system of operation was communicated to the students one day after the official reporting date. One month later, the 3rd respondent herein, through a memo dated 10th October, 2016, informed all students in session that they were required to pay their fees in full by 17th October 2016 failure of which they risked their studies being automatically deferred by the new ERP system until such a time that they would have raised the full fees. On the 17th of October, 2016, the students went on strike to protest the new rules/system and following the unrest, the university was closed indefinitely and ordered to immediately vacate the university premises.

3. Through an announcement posted in the Standard Newspaper of 28th October 2016, the 3rd respondent notified the student fraternity of the 4th respondent's decision to re-open the University on 2nd, 3rd and 4th November 2016 for the various student categories but on condition that they report on their designated days in the company of their parents/guardians.

4. The applicants herein came to this Court on 2nd November 2016 under Certificate of Urgency seeking Judicial intervention under Order 53 of the Civil Procedure Rules to quash the respondents' decisions which they alleged were unfair, unjust, unreasonable, arbitrary and detrimental to the students.

5. The applicants sought the following orders in the said application:

1. Leave to apply for an order of Judicial Review in the nature of certiorari to remove into this court the earlier decision of the 4th respondent to defer ALL students who would not have paid fees in full by 15th October 2016.

2. Leave to apply for an order of Judicial Review in the nature of certiorari to remove into this Court the decision of the 4th respondent *inter alia*, imposing a fine of Kshs. 1,800 upon ALL students in session.

3. That leave so granted do operate as order staying the decision to impose a fine of Kshs. 1,800 upon the students and the decision to defer of ALL students who would not have paid fees in full by 15th October 2016.

6. On 21st November, 2016, the application was heard ex-parte in the first instance and orders made staying the following decisions:

I. The decision of the 4th respondent to impose a fine of Kshs. 1,800 upon the students.

II. The decision of the 2nd respondent to defer ALL students who would not have paid fees in full by 15th October 2016.

7. Further orders were made as follows;

1) THAT the stay hereby granted do and hereby operate only to the 6 students -the applicants herein.

2) THAT the substantive Notice of Motion dated 17th November 2016 be heard on the 7th day of December 2016.

3) THAT parties do file and exchange their written submissions before the hearing date.

The Pleadings

7. On 17th November 2016, the applicants filed a Notice of Motion pursuant to order 53 Rule 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and sections 8 and 9 of the Law Reform Act seeking: -

1. THAT an order of judicial review proceedings in the nature of certiorari do issue to quash the respondent 's decision and prohibit the respondents from proceeding with the implementation of the decisions communicated vide memo dated 10th October 2016 bearing reference number KSU/RAA/062.

2. THAT an order of judicial review proceedings in the nature of certiorari do issue to quash the respondent's decision and prohibit the respondents from proceeding with the implementation of the decisions communicated through the Standard Newspaper of 28th October 2016; at page 46 and The Saturday Nation of 29th October 2016; at page5; particularly imposing a fine of Kshs. 1.800/= on ALL students.

3. THAT the costs of this application do abide the outcome of the substantive application for judicial review.

8. The application was supported by the 1st applicant's affidavit wherein he deposes that, like other students, he reported to the University on the 8th September 2016 as required and read the 3rd respondent's memo dated 6th October 2016 requiring all students to pay the full fees by 15th October 2016 or risk being deferred by the newly introduced ERP system. He contends that the said ERP system was introduced and communicated to the students without prior notice to them and without seeking their views on the new regulations so as to enable them present their opinion over the same as is required by the law.

9. He further avers that on 10th October, 2016 the 3rd respondent sent a memo to the students informing all those who had not paid their fees in full fees not to attend lectures and that they risked automatic deferral of their courses should they not pay full fees by 17th October 2016. He states that on 17th October the students went on strike to protest against the introduction and implementation of the new rules after which the police were called in to calm the situation but that thereafter, the University was closed indefinitely and all the students ordered to immediately vacate its precincts.

10. He further states that on 28th October, 2016, the 3rd respondent posted an advertisement the newspaper informing all the students to report back to the University with the full fees due and a fine of Kshs. 1,800. He contends that the students were not accorded any hearing or subjected to any trial before the fine of Kshs. 1,800 was imposed on them.

11. He maintains that the imposition of a fine is a punitive measure applicable only to persons who had been found guilty of an offence after being accorded a fair hearing in accordance with the law and that all the affected persons ought to have been given the reasons for the said decision, in writing, in line with the law on fair administrative action.

12. Lastly, he insists that on the grounds of legitimate expectation, presumption of innocence, fair administrative action, fair hearing and public participation, the respondents' impugned decisions are illegal and should be declared as such and their substance quashed by this honourable court.

13. The application was opposed by the respondents through the 3rd respondent's replying affidavit dated 1st December 2016. He maintained that the application is fatally defective as it offends the mandatory provisions of Order 53 Rule 4(1) of the Civil Procedure Rules which stipulates that an applicant in judicial review applications is always the Republic rather than the person aggrieved by the decision sought to be quashed. He further stated that the instant proceedings were instituted by the applicants with the sole intention of subverting and overturning the proper institutional process of disciplinary action taken against the students for gross misconduct in line with the Kisii University Regulations Governing the Association, Conduct and Discipline of Students. He attached a copy of the said regulations to his affidavit as annexure "**PO 1.**"

14. He further stated that the said regulations empowered Kisii University to levy fees on all its students in accordance with the Kisii University Fee Payment Policy. He attached a copy of the said Kisii University Fee Payment Policy for academic year 2015/2016 to his replying affidavit and it was marked as "**PO 2.**" He further contended that it was a requirement that all the University students pay full fees for the academic year upfront and/or pay per semester in two instalments as follows:

a. First semester 75% of the semester's tuition fee shall be paid before the start of the semester plus 100% of other applicable charges including examination, medical subscription, activity, registration, student's identification card, computer, internet, field academic trips, attachment, library, student's union and accommodation.

b. Those accommodated by the University shall pay 100% of the boarding charges up -front.

c. Second instalment of 35% of the semester's tuition fees must be paid in full or before the end of the third week from the date of commencement of a semester.

d. Failure to clear full fees by the third week shall lead to the student being advised to take academic leave or defer a semester and thereafter sit for the examinations when next offered upon clearance of fees.

e. Exceptional circumstances shall be handled at the discretion of the Register Academic Affairs.

15. He thus contended that it would be unfair and/or impracticable for the students to learn for the whole semester and demand to sit end of semester exams without paying all the fees due in line with the said University Rules and Regulations as, if that were to happen, the University would be unable to meet its financial obligations including the payment of salaries to the teaching and non-teaching staff amongst other expenses.

16. He confirmed that the University was rocked by student riots on 17th and 18th October 2016 which disrupted its academic programs and led to the destruction of property whose value was estimated at Kshs. 16 million. He therefore justified the fine of Kshs. 1,800/= imposed on every student to be in tandem with the value attached to the damaged property. He attached a copy of the minutes of the Senate meeting held on 27th October, 2016 marked as "**PO3.**" He further averred that after the university senate deliberations on the amount to be levied on all students following the recommendations made by the Assessment of Damage Ad Hoc Committee, the proposed fine was approved based on the student population of 9,100.

17. Lastly, he contended that there was no demonstration of bias, lack of jurisdiction or failure to abide by the principles of natural justice on the part of the Respondent in arriving at the decision which was contained and communicated in the newspaper advertisement of 28/10/2016. The respondents' case was that that the ex -parte applicant's rights were not violated as such rights are under Article 24 of the Constitution of Kenya (2010) subject to limitations if found to be in contravention of other people's right(s).

18. When the application came up for hearing before Karanjah J. on 21/11/2016, parties agreed to canvass it by way of written submissions.

APPLICANTS' WRITTEN SUBMISSIONS

19. The applicants written submissions are anchored on the following grounds: -

1. Legitimate Expectation

20. The applicants submitted that students have in the past paid fees with no condition of clearance of full fees or risk of deferral within specified time but rather the payment of fees was in three quarters of the prescribed fees. The applicants therefore termed the respondents action of changing the *modus operandi* of fee collection as unjustifiable, without cause, without written reasons and without notice. They relied on the case of **Diana Kethi Kilonzo & another v The Independent Electoral & Boundaries Commission (IEBC) & Others** at paragraph 133 wherein the doctrine of legitimate expectation was discussed.

2. Fair Hearing

21. The applicants submitted that they were entitled to a fair hearing before the decision to impose a fine on them was made. They relied on the case of **R. v Disciplinary Committee JKUAT exparte Peter Kung'u Muraya Judicial Review No. 93 of 2014** wherein it was held that the applicant did not receive fair administrative action due to noncompliance with the rules of natural justice.

3. Presumption of Innocence

22. The applicants stated that before the respondents imposed a fine on the students thereby adjudging them guilty and liable for the damages arising from the student unrest, they ought to have been presumed innocent and accorded a fair opportunity to present their case.

4. Public Participation

23. The applicants contended that the respondent's decision to introduce the ERP system and later impose fines on them was not lawful for lack of the participation of the student population whose views were not sought prior to the making of the said decisions. They relied on the case of **Republic v National Transport & Safety Authority & 10 Others Ex parte James Maina Mugo [2015] eKLR** wherein the court held that as far as possible, public views ought to be considered in the decision-making process and that the outcome of the process ought to be a reflection of the public participation.

5. Abuse of Power

24. The applicants argued that in making the impugned decisions, the respondents acted illegally, irregularly and improperly as they did not observe the rules of natural justice.

RESPONDENTS SUBMISSIONS

25. On their part, the respondents challenged the applicant's application on the following grounds:

1. Institution of Judicial Review Proceedings

26. The respondents submitted that the application is fatally defective as it offends the mandatory provisions of Order 53 rule 4(1) of the Civil Procedure Rules 2010 which stipulates that the Republic is always the applicant in Judicial Review applications rather than the person aggrieved by the impugned decision. They relied on the case of **Mohamed Ahmed v R [1957] EA 523** in which the court observed *inter alia* that the crown cannot be both the applicant and the respondent in the same matter.

2. On Fees Payment/Method/System

27. The respondents stated that the Enterprise Resource Planning (ERP) and the requirement that full fees

be paid before a student is allowed to sit for end of semester examinations was the respondents' sole administrative function granted to the respondent through Universities Act (2012) and the Kisii University Charter. They respondents submitted that subjecting respondents' every action and administrative function to public participation by the students would be tantamount to stopping the University from exercising its functions and authority over the students. They argued that the respondent is a self-governing institution and that the Court should not unnecessarily interfere in the internal processes of independent institutions. They relied on the cases of **Nyongesa and 4 others v Egerton University [1990] KLR 962** and **Oluoch Dan Owino v Kenyatta University [2014] eKLR** wherein the subject of interference with institutions' internal processes was discussed.

28. The respondents urged the court to dismiss the instant application with costs to the respondents as the disciplinary proceedings undertaken by the respondents which culminated in its decision to impose a fine of Kshs. 1,800 together with the decision requiring the payment of full fees before students are allowed to sit for end of semester exams were lawful and met both constitutional and other relevant statutory threshold.

Analysis and determination

29. Upon considering the application, the replying affidavit and the parties' respective written submissions, I note that the issues that arise for determination are as follows:

- 1. Whether the application is fatally defective for offending the mandatory provisions of Order 53 Rule 4(1).**
- 2. Whether the respondents acted *ultra vires* by imposing a fine of Kshs. 1,800 on all students following the damage allegedly caused to the respondents' property during the student riots.**
- 3. Whether the respondents acted illegally by establishing the Enterprise Resource Planning (ERP) which required payment of fees of a whole semester before a student is allowed to sit for end of year examination.**

30. With regard to the first issue, I must agree that the motion itself is not properly instituted. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others v Transport Licensing Appeal Tribunal [1959] EA 779**.

31. However as was held in **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi (Milimani)HCCC NO.810 OF 2001KLR 470; [2001]2EA 460**:

"Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that.....[a party] has attempted to comply with the rule[s].....but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not to be treated as nullifying the legal requirements thus affected and the court should rise to its higher calling to do justice by saving the proceedings in issue."

32. In my observation, the intent of the above decision is now captured in the spirit of Article 159 (2) (d) of the Constitution which advocates for the dispensation of substantial justice without undue regard to procedural technicalities. I therefore find no merit in this ground of contention by the respondent as the same does not go to the jurisdiction of the court or prejudice the respondent in any fundamental respect.

33. With regard to the question of whether the respondents acted *ultra vires* by imposing a fine of Kshs. 1,800 on every student in Kisii University to cater for the damages caused by the students during the unrest. While relying on the decision in the case of **R. v Disciplinary Committee JKUAT exparte Peter**

Kung'u Muraya Judicial Review No. 93 of 2014, the applicants contended that they were entitled to a fair hearing before the decision imposing a fine on them was made. The applicants further contended that they ought to have been presumed innocent and given a fair opportunity to present their case before the respondent fined them.

34. On their part, the respondents contended that the disciplinary process undertaken was in line with the Kisii University Regulations Governing the Association, Conduct and Discipline of Students. They attached a copy of the said regulations which were marked as "**PO 1.**"

35. Contained herein below is an extract of the minutes of the Kisii University Special Senate Meeting held on 27th October 2016 marked as "**PO3**" in the respondents bundle of documents: -

“SNT 03/1016 “To Receive, Discuss and Adopt a Report from the Assessment of Damages Ad Hoc Committee Reported:

Following the student unrest on 18th October, 2016 that led to the destruction of University property, senate in its sitting on 24th October, 2016 adopted the appointment of the following members to evaluate and assess the damages incurred during the unrest: -

1. Prof Charles Oluoga -Chairperson

2. Mr. Johnson Mwaura

3. Mr. Fred Onkware

4. Mr. David Basweti.

5. Mr. Julius Angwenyi

6. Mr. Dennis Nyamasenge.

The Committee carried out the assessment of damages as a result of the unrest which amounted to 16 million.

Recommended

The committee recommended that each student pays a fine of Kshs. 1,000 based on the entire student population of sixteen thousand.

Proposed

Based on the nine thousand one hundred (9,100) population of the students that had been registered by the ERP system, members suggested for a higher figure and they proposed the following figures other than what had been set by the Adhoc Committee:

1. 1,500

2. 1,800

3. 2,000

Members finally settled at a figure of one thousand eight hundred (1,800) per student as fine.

Approved;

Senate unanimously approved the proposed figure of one thousand eight hundred (Kshs.

1,800) fine per student based on the ERP statistics on the nine thousand one hundred students registered."

36. The applicants contended that the rules of natural justice were not adhered to by the ad hoc committee when it imposed a fine on all students registered in the institution without establishing which students participated in the strike. In my humble view, in a situation where a learning institution experiences student unrest, such as the one before the court, it would not be humanly possible to establish which particular student was involved in the unrest as the unrest itself is usually marred by a lot of confusion, stampedes and disarray. For the applicants to propose that the respondents should have established the persons behind the riots as opposed to fining all students, in my opinion, would be close to impossible as none of the students would have admitted having participated in the unrest. Furthermore, the operations of the university would grind to a complete halt if the administration was to embark on granting each student a hearing, as proposed by the applicants, going by the huge number of student population that is reported to have been a total of 9,100 students. The bottom line is that it was not disputed by the applicants that the students went on the rampage for two days and this is what led to the indefinite closure of the institution. It is therefore my finding that the decision to impose a fine on each student was fair and justified.

37. The applicants also questioned the criteria that the University Senate used in determining how much each student was to pay as a fine considering that no valuation report was tabled by the senate to enable it arrive at the figure of Kshs. 1,800. As correctly submitted by the applicants there was no valuation report filed by the respondents to establish the value of the property that was damaged during the student unrest so as to justify the imposition of the fine of Kshs. 1,800 on each student.

38. In the case of **Pastoli v Kabale District Local Government Council and Others [2008]2EA 300** it was held:

"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, irrationality and procedural impropriety.... illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultravires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standardsProcedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one party affected by the decision."

39. In the instant case as noted hereinabove, there was an ad hoc committee that was set up after the student unrest to establish the amount of damage that the university incurred. The ad hoc committee, after its deliberations, settled for Kshs 1,000 fine on each student. However, the criteria that the ad hoc Committee used to assess the damage caused so as to arrive at the decision that each student needed to pay a fine of Kshs. 1,000 remains a mystery as no documentation was filed by the respondents to establish exactly which property was damaged during the unrest and the extent of the said damage. One would have expected the university to avail a valuation report quantifying the extent of the damage caused to the institution during the unrest. Notwithstanding the lack of proof of the damage, the university senate not only adopted the report by the ad hoc committee but arbitrarily raised the fine from the proposed Kshs.1,000 to Kshs. 1,800 without any explanation. In my humble view, there was procedural impropriety on the part of the respondents in not seeking and tabling a valuation report to support their claim for the specific amount of fine imposed on each student. I find that the respondents' decision to impose a fine without a supporting valuation report was arbitrary and amounted to a procedural impropriety and the same cannot stand.

40. The applicants also took issue with the respondent's introduction of the Enterprise Resource Planning (ERP) while stating that former students paid fees with no condition of clearance of full fees before the

taking of examinations. They argued that the fees payment was previously made in three quarters of the prescribed fees. The applicants termed the respondents action to change the *modus operandi* of conducting fee collection as unjustifiable, without cause, without written reasons and without notice.

41. The respondents on their part argued that the introduction of the ERP system and the payment of fees for the whole semester before a student is allowed to sit for end of semester exam was an administrative function that is solely granted to the respondent through Universities Act (2012) and the Kisii University Charter.

42. I have perused the respondents University Fee Payment Policy 2015/2016 marked as "PO2" which at paragraph 6.3 under the title; Payment by Instalments states as follows:

"In the event of inability to pay fees in full before the start of the semester, the student shall be allowed to pay by instalments. Under this plan, payment shall be in two instalments as follows: -

a. First instalment of 75% of the semester's tuition fees shall be paid before the start of the semester plus 100% of other applicable charges include examination, medical subscription, activity, registration, student's identification card, computer, internet, field /academic trips, attachment, library, student's union and accommodation.

b. Those accommodated by the University shall pay 100% of the boarding charges up-front.

c. Second instalment of 35% of the semester's tuition fees must be paid in full on or before the end of the third week from the date of commencement of a semester.

d. Failure to clear full fees by the third week shall lead to the student being advised to take academic leave or deferrer a semester and thereafter sit for the examination when next offered upon clearance of fees.

e. Exceptional circumstances shall be handled at the discretion of the Registrar, Academic Affairs.

6.4 Eligibility to sit for University Examinations

The registrar, Academic Affairs, in consultation with the student finance office shall compile a list of bona fide students (Students who are registered in the Enterprise Resource Planning System (ERP) system and have fully paid their fees for the semester) by the 8th week of the semester. Only the students on the bona fide list in ERP will be eligible to sit for University examinations. The list of bona fide students shall be made available to examination invigilators as the examinations attendance list."

43. In this courts observation, the respondent is under a statutory duty to ensure that their academic standards are maintained and not compromised. In my view, the respondents acted within their mandate as provided for in the statutes to demand for payment of full semester fees.

44. In the case of *Nyongesa and 4 Others vs. Egerton University* [1990] KLR 962 Nyarangi J.A stated that:

"Having stated thus, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies....."

45. In the case of *Oluoch Dan Owino vs. Kenyatta University* [2014] eKLR Mumbi J held: -

"As I understand it, the right to education does not denote the right to undergo a course of education in particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations and those wishing to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions. I can therefore find no violation of the right to education in respect of the petitioners."

46. Taking a cue from the above decisions, it is my view that the introduction of ERP and the new fees payment system by the respondents was an administrative function solely granted to the respondents through the Universities Act (2012) and the Kisii University Charter. The action of subjecting the respondents' administrative function (manner of fees payment) to public participation by the students who ordinarily do not pay the fees, in the first place as the same is paid by their parents or guardians, would be tantamount to stopping the university from exercising its functions and authority over the students. Furthermore, this court also observes that a university is a self-governing institution whose operations the court should not unnecessarily interfere with.

47. In the end, and having regards to the above findings and observations, I find that the applicants judicial review application dated 11th November 2016 succeeds but only partially in the following terms:

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1. An order of judicial review is hereby granted in the nature of certiorari quashing the decision by the respondents to impose a fine of Kshs. 1,800 on the applicants for damage allegedly occasioned by the student unrest.

2. The interim orders issued on 21st November 2016 are hereby vacated.

3. Each party shall bear their own costs.

48. It is so ordered.

Dated, signed and delivered in open court this 21st day of June, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Applicant in person
- N/A for the Respondent
- Omwoyo: Court Clerk