REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 683 OF 2017

FRANKLIN MITHIKA LINTURI.....APPLICANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION....1ST INTERESTED PARTY

MILTON MUGAMBI IMANYARA.....2ND INTERSTED PARTY

RULING

1. By a Chamber Summons dated 11th December, 2017, the applicant herein, **Franklin Mithika Linturi**, the incumbent Meru Senator, seeks the following orders:

1. Spent

2. That the applicant be granted leave to apply for judicial review order of certiorari to remove into this Honourable Court and quash the decision dated 30th November 2017 by the University of Nairobi to de-register the applicant, Hon. Franklin Mithika Linturi as its student.

3. That the applicant be granted leave to apply for judicial review order of mandamus to remove into this Honourable Court and compel the 1st respondent, University of Nairobi, to reinstate/re-admit the applicant, Hon. Franklin Mithika Linturi, as a student of the University of Narobi, School of Law.

4. That the applicant be granted leave to apply for judicial review order of mandamus to remove into this Honourable Court and compel the 1st Respondent, University of Nairobi, to reinstate the applicant's name in the graduation list for 22nd December, 2017.

5. That pending the hearing and determination of this application inter partes, the Honourable Court do issue a temporary order suspending the decision dated 30th November, 2017 communicated to the applicant by the 1st Respondent to the effect that the applicant has been deregistered as a student of the University of Nairobi.

6. That leave so granted do operate as a stay of any other or further administrative action against the applicant by the 1st Respondent concerning his admission as a law student in the University of Nairobi pursuant to the decision dated 30th November, 2017.

7. That costs of and incidental to this application.

8. That such further and other reliefs that this Honourable Court may deem just and expedient to grant.

2. On 11th December, 2017, I heard the application ex parte and granted the applicant leave to commence judicial review proceedings.

3. However, pursuant to the proviso to Order 53 rule 1(4) of the ***Civil Procedure Rules***, I directed that the direction whether leave ought to operate as a stay pending the hearing and determination of the substantive Motion be heard inter partes.

4. It is that limb of the application that falls for determination in this ruling.

5. According to the applicant, through his learned counsel, **Miss Awuor**, the Court has inherent jurisdiction to grant appropriate orders pursuant to sections 1A, 1B and 3A of the ***Civil Procedure Act***. It was submitted that unless the Court grants the stay, the applicant who is due to graduate on 22nd December, 2017 from the Respondent's University will be unable to graduate owing to the fact that he was deregistered from the Respondent's University.

6. It was further submitted that that will also affect the applicant's Masters Programme because the applicant was admitted to the same Programme based on the intended graduation. It was contended that the applicant has satisfied all the criteria for graduation and cleared with the Respondent University and paid the fees necessary for his intended graduation. His failure to graduate, it was submitted would lead to discontinuation of his Master's studies hence he would be subjected to great prejudice.

7. On the other hand, it was submitted, there is no prejudice that will be suffered by the Respondent University if the applicant is permitted to graduate since the University can hold on to the Degree Certificate and may even cancel the same since the same would still be in the possession of the University. It was contended that this is an exceptional case that warrants the grant of the orders of stay sought herein hence the decision of the Respondent ought to be suspended and the Respondent be compelled to permit the applicant to graduate on the said date.

8. With respect to the contention that the applicant had failed to plead the issue of graduation, it was submitted that the said issue runs throughout the application and that upon the suspension of the decision made by the Respondent, it would automatically follow that the applicant would thereby be permitted to graduate.

9. The applicant was opposed by the Respondent which, through its Learned Counsel, **Mr Donald Kipkorir**, submitted that our legal system is adversarial which means that parties are bound by their pleadings and the Court cannot look outside the prayers sought. In so submitting Learned Counsel invited the Court to look at prayer 6 of the application which seeks an order in respect of the decision of 30th November, 2017 which was basically a decision in respect of deregistration of the applicant as a student and had nothing to do with his graduation.

10. It was therefore submitted that even if the orders sought were to be granted, this Court cannot issue the orders which are not sought in which event the orders would be in vain.

11. It was submitted that the applicant has in the affidavit in support of his case disclosed the existence of three cases relating to alleged forgery of his degree and none of which has been determined. It was therefore submitted that to allow the applicant to graduate would amount to pre-empting the outcome of

the said cases. According to the Respondent, the applicant ought to have applied for stay in the said cases otherwise there is a risk that the orders issued herein may contradict the orders that may be issued in the said cases in which allegations of forgery, alteration of register, falsification of documents are made.

12. It was the Respondent's case that the applicant ought not to be permitted to graduate when his degree is in doubt. According to the Respondent, graduation is just a ceremony which has nothing to do with the applicant's degree and once the case is over the applicant can have his degree if he is successful.

13. The Court was therefore urged to disallow the prayer for stay.

14. On behalf of the 1st interested party, **Miss Kihuria** associated herself with the submissions made on behalf of the Respondent and emphasised that the purpose of the various pending matters would be defeated if the applicant's prayer is allowed to and the applicant proceeds to graduate.

15. Learned Counsel therefore urged the Court to dismiss the said relief.

16. The prayer was similarly opposed by **Mr Gitonga**, Learned Counsel for the 2nd interested party.

17. According to him irreparable prejudice would be suffered by the 2nd interested party if the Respondent's decision is suspended and the applicant allowed to participate in the graduation.

18. It was contended that if the applicant is allowed to graduate the Court would be aiding the conferment of the degree on the applicant which has not been duly earned.

19. It was therefore urged that the Court ought not to grant the relief sought.

20. I have considered the issues raised in this application as well as the submissions made.

21. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is nolonger efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

22. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

23. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

24. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"…as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…I also want to state that in judicial review applications like this one the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose**

of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process *(if it has not yet been completed)* being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body *if it has been taken*. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

"THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined." [Emphasis added].

25. As this Court held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre**;

"....it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."

26. In **Taib A. Taib vs. The Minister for Local Government & 3 Others** (supra) it was held that the purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. In other words, stay is meant to prohibit the continuation of the decision making process where the process is still ongoing. Where however the decision has been made, the implementation thereof can still be stayed where the same is yet to be implemented.

27. However where the decision has been implemented to grant the stay would be meaningless where the effect is to maintain the *status quo* if the *status quo* would be that the decision remains in force. On the other hand where a stay is granted after the decision has taken effect, its upshot may well be to reverse the decision made by the Respondent. Ordinarily as stated above orders of stay in judicial review as opposed to conservatory orders in Constitutional Petitions are not to be granted if the result would be in the nature of mandatory injunctions. This must be so since as was held by **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138:

> **"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo."**

28. In this case, the applicants seeks that by granting the stay, the Respondent would be directed to facilitate the applicant's graduation from the Respondent University. Such an order would obviously not be prohibitory in nature but would be mandatory.

29. Whereas this Court appreciates that in certain cases a stay may be granted even where its effect might be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist.

30. In this case whereas the applicant contends that unless the stay is granted, he will lose an opportunity to graduate, the Respondent's position is that graduation is just a ceremony and if the applicant eventually succeeds in his application, there will be no impediment to his receiving his degree certificate and even participating in any future graduation ceremony. However to permit the applicant to graduate when there are several cases hanging over his head revolving around his competency to graduate would prejudice the pending cases. At this stage this Court cannot say with certainty what the effect of the applicant's graduation would have on the said cases. It is however clear that some of those cases revolve around the very basis of his intended graduation and without making a definite finding, the possibility that the determination of the same may very well impact on the applicant's ability to graduate cannot be overruled.

31. Clearly, here are competing interests. In such circumstances the Court ought to balance the said competing interest with a view to arriving at a decision based on the lower risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

32. In this case, if the Court were to permit the graduation to proceed, would such ceremony be undone if the applicant's case was to be found unmerited? The answer must obviously be in the negative. Whereas that consideration, taken alone cannot be the basis for denying stay, where there exist other factors which militate against the grant of such orders, that factor may well be taken into consideration in deciding whether or not the Court ought to favourably exercise its discretion. In this case there exist unresolved matters which seek to challenge the very basis upon which the applicant seeks to be permitted to graduate.

33. Apart from the foregoing, Order 53 Rule 1(4) of the ***Civil Procedure Rules*** provides:

> ***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.*** [Emphasis mine].

34. It is therefore clear that stay pursuant to the foregoing provision is only available where the applicant is seeking either an order of prohibition or certiorari. In other words stay cannot be granted where the only relief sought is in the nature of *mandamus* since as was held in **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR** a decision which was based on ***Halsbury's Law of England,* 4th Edition Volume 1 at page 111 from paragraph 89**:

> **"An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done… Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

35. If an order of *mandamus* cannot quash that which has already been done, it follows that to grant an order of stay where only an order of *mandamus* is sought would be in vain. The rationale for this is clear because a relief in the nature of *mandamus* presupposes that there is a duty the performance of which the authority concerned has refused or failed to fulfil. In such cases there is really nothing to stay since the duty in question being a positive action which the applicant seeks to be performed, to stay the same would defeat the very purposes of seeking an order of *mandamus*.

36. Apart from that it is my view that the phrase "proceedings in question" must of necessity refer to the proceedings in respect of which leave is sought.

37. In this case, the applicant is challenging the Respondent's decision to deregister him as a student of the Respondent's University. With respect to the relief directed at the graduation ceremony the applicant seeks an order of *mandamus* to compel the 1st Respondent, University of Nairobi, to reinstate the applicant's name in the graduation list for 22nd December, 2017. As already discussed hereinabove, such a relief cannot attract a direction in the nature of stay.

38. However, though not expressly sought in the body of the application, the stay sought from the submissions is directed towards the graduation ceremony. In other words, in so far as the stay is concerned, the graduation ceremony is just consequential to the decision of the Respondent. In my view without an express prayer directed at the said ceremony by way of either prohibition or certiorari, the Court cannot ordinarily purport to issue orders whose effect would be to compel the applicant to graduate when the applicant is not seeking to quash the decision barring him from the said graduation. To make matters worse, that is not the prayer sought in the Chamber Summons and specifically the prayers the subject of this ruling.

39. In my view Order 53 rule 1(4) is clear on what should be the target of stay and the Court cannot by purporting to invoke its inherent powers grant orders which were not sought and were not in the contemplation of the parties in that such orders are not the subject of attack in the proceedings under review. The Court's inherent jurisdiction, it has been held, is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in **Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529**, it is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.

40. I have also considered the affidavit in support of the application and there is no mention of the consequences of the refusal to issue the stay therein. In my view an affidavit in support of the application for leave and directions in the nature of stay should not only expound on the existence of a *prima facie* case but should also disclose as succinctly as possible the prejudice which the applicant stands to suffer if the stay is not granted. In this case the only paragraph that addresses the prayer for stay is paragraph 23 of the verifying affidavit which states that:

> ***Unless this matter is heard and determined urgently, the applicant is not going to graduate on 22nd December, 2017 and suffer further violation of his rights by the EACC and UON because of a fundamentally flawed process of malice smeared and politically motivated investigation.***

41. The said affidavit does not attempt to disclose any prejudice if any that the applicant stands to suffer if he does not graduate. Such factual matters, it is my view ought to be deposed to in an affidavit and cannot be left to be dealt with in the submissions of counsel as happened in this case.

42. To my mind, it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings.

In this case apart from the evidence from the bar there is no tangible evidence in support of the allegation of the great prejudice the applicant stands to suffer if the stay is not granted. The Respondent has disclosed that nothing will bar the Court from directing that the applicant be issued with a degree certificate, assuming such a prayer is even sought.

43. Having considered the application herein I am not satisfied based on the scanty evidence presented that the applicant/s have established a case warranting the grant of stay.

44. Accordingly doing the best I can in the circumstances of this case, it is my view and I hold that the lesser injustice would be to decline to direct that the leave granted herein operates as a stay which I hereby do and instead direct the parties to expedite the hearing and determination of the substantive Motion.

45. Orders accordingly.

Dated at Nairobi this 20th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Hassan for the Applicant

Mr Kipkorir for the Respondent

Miss Okwara for Miss Kibogi for the 1st interested party

Mr Gitonga for the 2nd interested party

CA Ooko