REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 212 OF 2016

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF UNIVERSITY OF NAIROBI RULES AND REGULATIONS GOVERNING THE ORGANISATION, CONDUCT AND DISCIPLINE OF STUDENTS

AND

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

AND

IN THE MATTER OF ORDER 51 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

MICHAEL JACOBS ODHIAMBO & OTHERS……..APPLICANTS

VERSUS

THE UNIVERSITY OF NAIROBI…...…….RESPONDENT

RULING

1. The applicants herein were until their suspension or expulsion from the University of Nairobi, the Respondent herein (hereinafter referred to as "the University") were students of the said University.
2. Following the declaration of the results of the elections for various positions in the Students Organisation of Nairobi University (hereinafter referred to as "SONU") on 2nd April, 2016 which elections were held on 1st April, 2016, some of the students of the University took to the streets protesting the said declaration. Subsequently, the University was closed and the University authorities initiated disciplinary proceedings against some of the students who it was alleged to

have participated in the aforesaid unrest which culminated into the suspension and/or expulsion of some of the students of the University including the applicants herein.

3. It is this action on the part of the University authorities that provoked these proceedings by which the applicants intend to seek *inter alia* an order quashing the said decisions. Pending the hearing and determination of the application the applicants are seeking that the grant of leave ought to operate as a stay of the said decisions and that they be allowed to access the University and attend classes.
4. On 10th May, 2016, the application for leave to commence judicial review proceedings came for hearing before the **Hon. Mr Justice Korir**, who upon considering the application granted leave as sought but deferred the hearing of the limb for directions that the leave so granted do operate as a stay for hearing *inter partes* pursuant to the proviso to provisions of Order 53 rule 1(4) of the ***Civil Procedure Rules.***
5. It is therefore the said prayer for stay that is the subject of the present ruling.
6. In his submissions, **Mr Ojiambo**, learned counsel for the applicants submitted that as the applicants had established a prima facie case, it was only fair that the applicants should not be prejudiced by the stay not being granted. He submitted that the applicants were finalists at the University and the effect of the decision would be to lock them from their programme of studies. To the learned counsel the denial of the stay would mean that the applicants' studies would be put on hold and in the event that they succeed in these proceedings they would not be in a position to recover the lost time as their only option would be to repeat. That eventuality, according to learned counsel would affect their progress in life.
7. On the other hand, it was submitted that the grant of the temporary access to the applicant to study would not prejudice the Respondent. Based on **Paul Nyongesa Otuoma & 2 Others vs. AG & 2 Others [2007] eKLR**, it was submitted that in the event of the applicants succeeding they would be denied full benefit of their success as they would have lost a full academic year.
8. Learned counsel urged the Court to take into consideration the fact that the applicants were challenging the denial of their constitutional right to education and submitted that the same can only be limited where exceptional circumstances are shown to exist. He relied on **Frank Mutembei Kinyua vs. Jomo Kenyatta University of Agriculture & Technology [2008] eKLR** and urged the Court to find that if the stay is not granted the applicants are likely to suffer grave prejudice.
9. The applicants urged the Court to weigh the competing interests of the parties and to decide where the scale of justice tilts. On the issue that the decision sought to be stayed had already been made, it was submitted that since the decision is a continuous process and the applicants have not completed serving their suspension, stay can still be granted.
10. On behalf of the Respondent, it was submitted by **Miss Nyagah**, learned counsel that the Court ought to consider the fact that in this case, the applicants had already been issued with suspension and expulsion letters and that the decision sought to be stayed had already been implemented. It was her view therefore that there was nothing to be stayed.
11. According to learned counsel to grant the stay would amount to reversing the decision yet a stay is not meant to reverse or undo what has already been done. It was further submitted that to grant the stay would mean that there would be nothing pending for hearing.
12. It was submitted that the Respondent had the duty to maintain discipline as the act that led to the suspension and expulsion of the applicants was as a result of participation in conduct which contravened the University rules and Regulations. It was submitted that to reinstate the applicants would pose serious disciplinary challenges. It was learned counsel's submissions that the order of stay would not be an appropriate remedy to grant at this stage. In support of her submissions, learned counsel relied on **Senator Johnston Muthama vs. The Director of Public Prosecutions & 4 Others Misc. Appl. No. 424 of 2014** and **Taib A. Taib vs. The Minister for Local Government & 3 Others Misc. Civil Appl. No. 158 of 2006**.
13. It was further submitted that even if the stay is not granted these proceedings would not be rendered nugatory since the applicants would be at liberty to continue with their studies upon successful determination of these proceedings. Instead of seeking the stay, it was the Respondent's case that the applicants ought to expedite the hearing of their Motion instead.
14. I have considered the application and the rivalling contentions by the parties herein.
15. 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.**

16. 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.
17. 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.
18. **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].

19. 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."

20. In this case, the Court appreciates that some of the applicants were only suspended while others were expelled. As was held in **Taib A. Taib vs. The Minister for Local Government & 3 Others** (supra) 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.
21. 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. In this case, the applicants seek that by granting the stay, the Respondent would be directed to allow access to the applicants to continue with their studies. In other words, the Respondent would be compelled to facilitate the applicants' education. Such an order would obviously not be prohibitory in nature but would be mandatory.
22. Whereas this Court appreciates that in certain cases a stay may be granted even where its effect may 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. It is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."

23. In this case it was not contended that these proceedings cannot be determined before the end of the suspension period. Whereas the applicants contend that they stand to lose their academic progress, the Respondent's position is that the discipline at the University cannot be guaranteed if the applicants are temporarily admitted. 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.**
24. In this case, if the Court were to reinstate the applicants to their studies, one wonders how such action will be undone if eventually the applicants do not succeed in their studies. I have considered the decision in **Frank Mutembei Kinyua vs. Jomo Kenyatta University of Agriculture & Technology** (supra), and it is my considered view that that case is distinguishable from the present one as there, the application was not opposed
25. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

26. 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.
27. The costs of this application will be in the cause.
28. It is so ordered.

Dated at Nairobi this 27th of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ojiambo for the ex parte Applicants

Miss Nyagah for Mr Ngatia for the Respondent

Cc Mutisya