REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 226 OF 2016

IN THE MATTER OF AN APPLICATION BY NABISWA WAKENYA MOSES TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION AGAINST THE UNIVERSITY OF NAIROBI AND THE STUDENT ORGANIZATION OF NAIROBI UNIVERSITY (SONU)

IN THE MATTER OF UNIVERSITIES ACT NO. 42 OF 2012 LAWS OF KENYA AND CONSTITUTION OF THE STUDENT ORGANIZATION OF NAIROBI UNIVERSITY (SONU)

IN THE MATER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLIC…….....…….……...…..……APPLICANT

VERSUS

THE UNIVERSITY OF NAIROBI…….....…….1ST RESPONDENT

THE STUDENT ORGANIZATION OF NAIROBI UNIVERSITY (SONU)…..2ND RESPONDENT

EX PARTE: NABISWA WAKENYA MOSES

JUDGEMENT

Introduction

1. By a Notice of Motion dated 26th May, 2015, the ex parte applicant herein, **Nabiswa Wakenya Moses**, seeks the following orders:

1. **That a writ or order of Mandamus do issue to compel the 1st and 2nd Respondents to enforce and comply with the ruling delivered on 5th May 2016 by the 2nd Respondent election panel committee declaring the Ex parte Applicant the winner of KNH Campus representative post.**
2. **That a writ or order of Prohibition do issue to prohibit the 1st and 2nd Respondents from allowing any person to discharge duties in the position of KNH Campus representative and the Ex Parte Applicant be sworn in as the duly legally elected official of the 2nd Respondent in the position of finance secretary as ruled on 5th May 2016 by the 2nd Respondent's election committee panel.**

3. **That the honourable court be pleased to make further such orders as it may deem fit and just.**
4. **Costs of the application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the Applicant, during the elections of **The Student Organization of Nairobi University** (hereinafter referred to as "SONU") conducted in the month of April 2016, the Applicant contested in the position of student representative for KNH Campus, in which contest there were numerous contestants, one of whom was **Kodiwo Anthony Bernard**.

3. According to the Applicant, SONU's Constitution stipulates the rules, conditions, requirements and regulations to be adhere to ensure free and fair elections. The Applicant disclosed that though the said **Kowido Anthony Bernard's** election was nullified on account of irregularities, the Respondent proceeded to swear him in for the post of KNH Campus student representative.

4. According to the Applicant, the said **Kowido Anthony Bernard** was illegally declared as the winner and the Applicant was the runner-up for the post. Dissatisfied with the results and the manner the elections were conducted for the post, the Applicant filed a complaint and petition with the SONU's election committee panel to amicably have the dispute resolved which petition was heard by all the fourteen (14) members and in the presence of all the parties. After hearing the petition, the panel made determination nullifying the election of the said **Kowido Anthony Bernard** on account of irregularities as a student representative of KNH Campus and further proceeded to declare the Applicant the winner for the position of campus representative for KNH.

5. However, it was contended that despite the direction by the panel that the Applicant be sworn in, the said **Kowido Anthony Bernard** continued to illegally continue discharging duties purporting to be the duly elected campus student representative for KNH. According to the Applicant, he has tried severally to follow-up the issue with the Respondents including the vice-chancellor but the issue has not been resolved.

6. It was therefore the Applicant's case that it is in the interest of justice, fairness, rule of law and enforcement of SONU's constitution, that the application be allowed and he be sworn in as the student representative for KNH Campus.

7. It was submitted on behalf of the Applicant by **Mr Nyangito**, his legal counsel that though the SONU Constitution provides for a dispute resolution mechanism, this being an election Tribunal's decision, it was proper for the applicant to approach this Court. In his view, this was so because after the determination by the Panel, the matter cannot go back for such alternative dispute resolution mechanism.

8. It was therefore submitted that it is only proper that this Court compels the University, a public body, to carry out its mandate since the University, being a creation of a statute under the Ministry of Education, is subject to this Court.

9. On the contention that the panel ought to have ordered for re-election, it was contended that the decision to decide whether or not a re-election be conducted was a discretion of the Tribunal.

The 1st Respondent's Case

10. In opposing the application, the 1st respondent herein, **The University of Nairobi,** (hereinafter referred to as "the University") averred that this suit is bad in law for contravening section 41 of the ***Universities Act*** No. 42 of 2012 and urged the Court to strike out and/or dismiss the same on that ground.

11. It was averred by the University that SONU is formed pursuant to section 41 of the said Act as an organization to secure for students' academic freedom, excellence, liberty and welfare and that in line with the SONU Constitution, the Respondent's student's fraternity held elections on 1st April 2016 to

elect the leaders of SONU for the 2016/2017 academic year. On 2nd April 2016, election results in respect of the said elections were declared and the Applicant herein who was a candidate for the position of KNH Campus Representative came second, while **Kidiwo Antony Bernard**, was declared the newly elected KNH Campus Representative.

12. To the University, the Applicant's application is incompetent, is brought in bad faith and unsustainable. The university contended that the prayers sought in the application are against section 41 (3) of the ***Universities Act No. 42 of 2012*** which provides that it is only elected students who are supposed to be official of the University of Nairobi Students Association. It was therefore averred that the Applicant, as second runners up, has no sufficient legal interest in the position he vied for and should be subjected to the students' popular mandate. It was further contended that the prayers sought are unconstitutional and offend section 41(3) of the ***Universities Act No. 42 of 2012*** and as such should be dismissed

13. In addition the University contended that swearing in of elected SONU Officials is a ceremonial function as opposed to statutory responsibility, and in the circumstances orders sought cannot issue hence the University cannot be compelled by orders of mandamus and prohibition to perform a non-statutory function.

14. In the University's view, the Applicant has the alternative remedy of vying for the seat through SONU electoral process rather than seeking elective posts through backdoor mechanisms which backdoor process is contrary to section 41(3) of the ***Universities Act No. 42 of 2012***. It was therefore the University's position that the application as filed is pre-mature as the Applicant has not exhausted or even attempted to vie for a second time as provided in the SONU Constitution 2015. To the University, the Applicant has not demonstrated irreparable injury and or exceptional circumstances to warrant granting of the orders sought, and failed to exercise the right of other method of relief available to him.

15. According to the University, granting orders sought by the Applicant is disruptive and would disenfranchise student's rights to choose a leader of their own through SONU electoral process.

16. It was submitted by **Mr Omondi**, learned counsel for the University that the order sought can only be granted where a public body is required to perform specific duty. In this case, it was reiterated that swearing in is a ceremonial function as opposed to a public duty and is adopted pursuant to Article 10 of the SONU Constitution. As such it was the University's position hat the orders sought herein are untenable since there id no provision requiring the swearing in of elected leaders of SONU.

17. According to learned counsel, SONU, being a creature of section 41(3) of the Universities Act, only elected students can be sworn in and as the Applicant was not so elected, swearing him in would be contrary to law and would amount to disenfranchising the students.

18. According to the University, the elections panel had no mandate under the SONU Constitution to declare the 1st runners up as the winner. To the University, if the panel found that the elections were marred with irregularities, it could only recommend to the SONU Parliament through the Speaker for the nullification of the election and declaration of the vacancy of the said seat. It was accordingly submitted that the panel exceeded it mandate and its decision cannot stand.

19. According to the University, Article 35 of the SONU Constitution deals with dispute resolution mechanism and as such this Court lacks the jurisdiction to entertain this application. In support of this submission counsel relied on **Antony Munene Maina vs. University of Nairobi & Another [2015] eKLR**.

Determinations

20. I have considered the material before me.

21. The Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey**

Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR expressed itself *inter alia* as follows:

> **"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way…These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. 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 without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

22. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie, J** eloquently, in my view, expressed himself, *inter alia*, as follows:

> ***"Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment."**

23. According to the University, since swearing in is a ceremonial function as opposed to a legal obligation an order of mandamus cannot issue to compel its performance. However it is clear from **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others** (supra) that mandamus is a command requiring a person to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. It therefore my view that even where there is no

statutory provision obliging an authority to act, where the case meets the criteria hereinabove, mandamus may go forth.

24. In this case Article 26 of the SONU Constitution provides as follows:

1. ***The elected officials shall be sworn in by the Chief Legal Officer of the University of Nairobi or such other person as may be appointed by Senate after the announcement of the results subject to clause 3 and certificates issued to the winning candidates.***
2. ***The ceremony shall take place in public at the Chancellor's Court or at such other places as may be designated by the Electoral Commission.***
3. **……..**
4. ***Elected officials shall take office upon being sworn in.***

25. According to the above provision, it is clear that the elected officials can only assume office upon being sworn in. Swearing in is therefore an integral part of the assumption of office. The senate of the University is therefore under a duty to effectuate the assumption of the elective offices by facilitating the swearing in of the said elected officials and if the University fails in so doing, it can be compelled to do so.

26. It was however contended that the University, not being a public body cannot be compelled by an order of mandamus to conduct the said function. In my view, the definition of public bodies ought to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions. In this case, the University is obviously a body operating under the ***Universities Act***, hence under a statutory mandate. Apart from that being a public university, it carries out public functions. Accordingly in appropriate circumstances, judicial review orders may properly issue against it.

27. It was contended that the decision made by the panel was made without jurisdiction since the panel had no power to declare the Applicant an elected official of SONU. Suffice it to say that no challenge has been taken before me seeking to quash the decision of the panel on the basis that it had no jurisdiction to grant the orders it granted. In this case, it is perplexing that the University which appointed the panel to hear and determine the disputes arising from SONU elections has suddenly made an about turn and attempted to disown the decision of the panel, which panel in effect was the University's agent without properly impugning the same. Whereas the University contends that the panel had no jurisdiction to make the orders it made, the University has not deemed it fit to legally challenge the findings of the said panel. One however can understand why the University would find it difficult to take such course taking into account the fact that the panel was actually constituted by the University itself.

28. In my view the effect of the finality clause in Article 25(10) of the SONU Constitution is that the decision of the elections panel cannot be challenged by any procedure prescribed under the SONU Constitution. However, in **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520 Visram, J** (as he then was), citing **Anisminic Ltd. vs. The Foreign Compensation Commission & Another [1969] 1 All ER 208**, held that in determining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not. The learned Judge further held that where an Act contains a finality clause that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction.

29. Finality clauses have the effect of purporting to oust the jurisdiction of the Court. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,**where it was held that

> **"It is, a well established principle that no statute shall be so construed as to oust or restrict**

the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."

30. I associate myself with the position adopted by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** to the effect that:

> **"The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."**

31. Therefore, the mere fact that a decision is expressed to be final, does not necessarily deprive the Court of its supervisory jurisdiction conferred under Article 165(6) of the Constitution to issue orders of judicial review. As was held in **Nyakinyua and Kang'ei Farmers Company Ltd vs. Kariuki Gathecha Resources Ltd (No 2) [1984] KLR 110:**

> **"The Act declares that the decision of the board, one way or another, shall be final and conclusive and shall not be questioned in any court. Such words ousting the powers of the High Court to review such decisions must be construed strictly. They do not oust this power if the board has acted without jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is a nullity (i.e. breached the rules of natural justice)."**

32. Therefore if the University was of the view that the panel had no jurisdiction to declare the Applicant herein a duly elected official of SONU it ought to have properly moved this Court to quash the said decision which by SONU's own Constitution is expressed to be final. In other words the finality of the panel's decision operates only in so far as there are no avenues for challenging the same under the procedures provided under the SONU Constitution. That however does not bar the Court from entertaining a challenge to the panel's decision in proceedings of this nature.

33. In my view, where a remedy provided is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. In appreciating this position the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109**, quoted **Smith vs. East Elloe Rural District Council [1956] AC 736 at 750-1** and **R vs. Port of London Authority Ex Parte Kynoch Ltd [1919] 1 KB 176 AT 188** and stated that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.

34. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The**

Electoral Commission of Kenya HCMCA No. 13 of 2008 it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

35. The law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

36. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. In the present case the ex parte applicants contend that they cannot move the Board in order to have their grievances solved for the simple reasons that they do not have locus before the Board and their grievances do not fall within the jurisdiction of the Board and their contention is not without merit. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the ex parte applicants have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

37. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) the Court held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

38. As was stated in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati** (supra), ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. Where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be ignored or even struck down as being unreasonable.

39. It is my view that the so called alternative remedy of the Applicant seeking a re-election when no such order was made by the panel would at best be a mirage.

40. It was contended that the orders sought herein, if granted, would be disruptive and would disenfranchise student's rights to choose a leader of their own through SONU electoral process. To the issue of the allegation of disruption of the students' activities, I only wish to refer to **Resley vs. The City Council of Nairobi [2006] 2 EA 311** where it was held that:

> **"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where**

that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

41. The University's position seems to have been hinged on public interest or policy. It is however trite that contravention of the law cannot be justified on the plea of public interest as public interest is best served by enforcing the rule of law and as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR**:

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

42. The rule of law must be obeyed since to fail to do so would be a clear recipe for chaos and anarchy.

43. In the premises, I find merit in the Notice of Motion dated 26th May, 2016.

Order

44. Consequently:

a. **An order of prohibition is hereby issued prohibiting the 1st and 2nd Respondents from allowing any person other than the Applicant herein from discharging duties of SONU's KNH Campus representative.**
b. **An order of mandamus is hereby issued compelling the 1st respondent to facilitate the swearing in of the Ex Parte Applicant as the duly legally elected official of the 2nd Respondent in the position of finance secretary as ruled on 5th May 2016 by the 2nd Respondent's election committee panel.**

45. The Applicant will have the costs of these proceedings to be borne by the 1st Respondent. Orders accordingly.

Dated at Nairobi this 27th day of June, 2016

G V ODUNGA

JUDGE

<u>Delivered in the presence of:</u>

Miss Onyinkwa for the ex parte applicant

Mr Omondi for the Respondent

Cc Mutisya