**REPUBLIC OF KENYA**

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

**(MILIMANI LAW COURTS)**

**JUDICIAL REVIEW DIVISION**

**J.R. MISC. CIVIL APPLICATION NO. 214 OF 2016**

**IN THE MATTER OF AN APPLICATION BY KATE KOKUMU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI 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 THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**IN THE MATTER BETWEEN**

**KATE KOKUMU…….....……..…..……APPLICANT**

**VERSUS**

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

**THE STUDENT ORGANIZATION OF NAIROBI**

**UNIVERSITY (SONU)…….....……..2ND RESPONDENT**

**SONU ELECTIONS PETITIONS PANEL.....INTERESTED PARTY**

**RULING**

**Introduction**

1. The Applicant herein, **Kate Kokumu**, averred that she is a student of the 1st Respondent, **The University of Nairobi** (hereinafter referred to as "the University") and also a member of the 2nd Respondent, **Student Organisation of Nairobi University** (hereinafter referred to as "SONU") with all the attendant rights and responsibility as per the constitution provided.
2. The Applicant averred that SONU held its elections on 1st April 2016 wherein the Applicant contested and won the position of Secretary, Finance with votes in excess of 10,000 while her challenger had approximately 2,000 votes and she was duly sworn in as the duly elected Secretary,

Finance of the 2nd Respondent on 5th April 2016. Thereafter, she alleged that she assumed the office and have been undertaking her duties and responsibilities as such. However, on 5th April 2016, her main challenger, one **Ms. Pamela Gitobu** (hereinafter referred to as "the interested party") lodged a Petition with SONU's Election Petition Panel (hereinafter "the panel") challenging the Applicant's election and seeking her disqualification from contesting executive seat in 2016. Upon being served with the Petition, the Applicant did lodge her response with the panel on 11th April 2016 and the proceedings were held in one day on 11th April 2016 after which the panel delivered its decisions and orders which were served on the Applicant on 5th May 2016, a period of 24 days after the hearing had been concluded. By the said decision, the panel found by a majority that the Applicant was not qualified to run as a candidate under the SONU Constitution of the said position and proceeded to declare the said interested party the winner of the Secretary, Finance.

3. According to the Applicant, SONU's Constitution only obligates the panel to forward its decision to the speaker who would then proceed and declare the seat vacant as per the Constitution and once handed over, the panel becomes *functus officio.* It was the Applicant's position that the Constitution provides for by-election whenever the seat falls vacant by reasons stipulated under Article 27(1) of SONU's constitution one of which is pursuant to a successful petition.
4. The Applicant challenged the said decision on the ground that the same was in excess of jurisdiction in the sense that:

**a. The jurisdiction of the panel ceased at the point when it determined whether or not the petition was successful and has had the same transmitted to the speaker.**

**b. The panel instead abrogated the role of the speaker and the members of the 2nd Respondent who are the electorates in a by-election by proceedings to declare the petitioner as winner of the elections.**

**c. There is no provision in the 2nd Respondent's constitution giving the panel powers or even an iota of discretion to declare any person as winner for any position in the respondent's elections under whatever circumstances.**

**d. Article 22(12) of the 2ndRespondent's Constitution only provides one instances when any candidate can be declared winner being when the candidate attains the simple majority of the votes in an election or by-election.**

**e. Even then the declaration of the winner of any election is as per Article 22(13) reserved for the Chairman of the Commission in consultation with the Electoral Commission and NOT the panel under any circumstances.**

**f. The decision of the panel in declaring the Petitioner as the winner essentially means that the speaker and the electorates are prevented from conducting their genuine functions as provides by the constitution.**

5. The Applicant asserted that since Article 25(7) of the SONU's Constitution obligates the panel to determine petitions expeditiously, but within no more than 14 days after lodging the petition, the proceedings commenced on 11th April 2016 and the panel legally had a period up to 25th April 2016 to render their decision. However, in flagrant breach of this Article of the Constitution, it delivered their verdict on 5th May 2016, way outside the contemplated period.
6. It was contended that Article 25(2) of SONU's Constitution gives power to the Senate of the University to provide for the procedure for handling election petitions and the said provision and indeed the entire constitution does not grant the Elections Petition Panel power to equally provide a procedure for handling election petition.
7. It was contended by the Applicant that whereas the Senate has not provided rules of procedure as contemplated in the 2nd Respondent's constitution, the Panel acted without jurisdiction and outside their powers by proceeding to draft its own rules of procedure. To the Applicant, the panel

cannot abrogate and assume the powers reserved for the Senate and prior to the hearing of the petition, there was no express and documented request by the panel to the Senate to draft the rules of procedure and there is no evidence that the Senate outrightly and expressly refused to so draft the rules of procedure. To the Applicant, the panel's mandate as outlined in Article 25 (4-11) does not and cannot be read to include drafting its own rules of procedure and the same was done without jurisdiction.

8. The Applicant disclosed that after the decision was delivered, she had her counsel on record to bring to the attention of the Respondents the fact of existence of the dispute while calling for the invocation of the provisions of Article 35 of the 2nd Respondent's Constitution and made it clear that she was readily available to participate in any alternative dispute resolution mechanism if initiated by the Respondents but received no response.

**The Panel's Case**

9. In response to the Application, the panel filed a notice of preliminary objection in which it raised the following objections:

**1. That the honourable court does not have jurisdiction to hear and determine this application in view of Article 35 of the SONU Constitution which states as follows:-**

***1) All disputes regarding the interpretation and implementation of this Constitution shall, as provided by Article 159 of the Constitution of Republic of Kenya 2010, first be solved through the following:-***

***a. Good offices***

***b. Mediation***

***c. Conciliation***

***d. Negotiation***

***2) Where such methods as described above fail, parties shall proceed to arbitration.***

***3. For purposes of Section 2 above, there shall be Arbitrator who shall be appointed by the parliament from among members of the University staff on the recommendation of parliament, subject to the approval of the Vice Chancellor.***

**2. That Article 25(10) of the SONU Constitution 2015 further states that:-**

***"The decision of the panel shall be final and binding and shall be submitted to the speaker."***

**3. That this application is therefore fatally defective and should be struck out at the first instance with costs.**

10. It is these preliminary objections which are the subject of this ruling.

**The Pane's Submissions**

11. According to **Mr Abok**, learned Counsel for the said panel, Article 35(1) of the SONU Constitution limits the jurisdiction of the Court in matters relating to interpretation and implementation of the SONU Constitution. In this case, it was contended that the claim is premised on excess of jurisdiction by the panel which issue, in Counsel's view falls under the said Article since the Court was being called upon to look into the manner of the conduct of SONU elections. In support of this submission, **Mr Abok** relied on R vs. **University of Nairobi &**

**Another ex parte Mwangi Nderitu [2015] eKLR.**

12. It was submitted that no reason was advanced to explain why the alternative dispute resolution mechanism provided under the said Article could not be adhered to and in this respect reliance was placed on **Antony Munene Maina vs. University of Nairobi & Another [2015] eKLR**.
13. The panel therefore submitted that the preliminary objection be allowed and this application be struck out on the basis that the same was premature.

**Ex parte Applicant's Submissions**

14. In opposition the objections, the ex parte applicant through her learned counsel, **Mr Ogembo**, submitted that the dispute in this application does not arise from the decision of a quasi-judicial body. In learned Counsel's view, what was before the panel was an election dispute. It was submitted that the reason for not proceedings under Article 35 aforesaid was due to the fact that the SONU Constitution does not contemplate election disputes as disputes thereunder.
15. It was submitted that what arose from the hearing of the election was a ruling of the panel and that under Article 25(10) thereof such a decision is stated to be final and binding. Such a decision, it was submitted cannot be a dispute capable of being resolved under Article 35 since by dint of Article 25(1), a dispute contemplated under Article 35 can never arise thereafter.
16. It was submitted that the decision of the panel being quasi-judicial was amenable to judicial review. The question, it was submitted is whether Article 25(10) can bar a person from invoking the supervisory jurisdiction of the Court by way of judicial review. To the ex parte applicant, section 9(4) of the ***Fair Administrative Action Act*** (hereinafter referred to as "the Act") empowers the Court to handle other disputes in the interest of justice since the remedy under Article 35 is rendered illusory. In support of this submission the ex parte applicant relied on **R vs. Political Parties Tribunal & 2 Others exp Susan Kihika & 2 Others [2015] eKLR**,
17. It was submitted that the ouster clause cannot take away the Court's jurisdiction and that where there is no effective remedy, the Court ought to uphold Article 48 of the Constitution of Kenya. It was submitted that Article 35 of SONU Constitution leaves the applicant with no effective remedy in light of the finality clause. In this respect the applicant relied on **R vs. Kenya Revenue Authority exp Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR** and **R vs. Industrial Court of Kenya & Another exp Municipal Council of Thika [2013] eKLR**.
18. The ex parte applicant therefore urged the Court to assume the jurisdiction since she was not questioning the merits of the decision but the jurisdiction.

**Determinations**

19. After considering the foregoing this is the view I form of the matter.
20. The central question for determination in this ruling is whether in light of the provisions of Article 35 of the Constitution of SONU, this Court has jurisdiction to entertain the dispute the subject of these proceedings. The said provision provides as follows:

***1) All disputes regarding the interpretation and implementation of this Constitution shall, as provided by Article 159 of the Constitution of Republic of Kenya 2010, first be solved through the following:-***

- ***a. Good offices***
- ***b. Mediation***
- ***c. Conciliation***
- ***d. Negotiation***

***2) Where such methods as described above fail, parties shall proceed to arbitration.***

***3) For purposes of Section 2 above, there shall be Arbitrator who shall be appointed by the***

***parliament from among members of the University staff on the recommendation of parliament, subject to the approval of the Vice Chancellor.***

21. From the SONU Constitution, it is clear that one of the matters covered thereunder is the elections of its officials. In my view a dispute arising from the elections of SONU officials, whose elections must necessarily be conducted under SONU Constitution must be deemed to be a dispute regarding the implementation of the said Constitution. Accordingly where the dispute falls within the confines of the domestic constitution, the same ought to be resolved in accordance with the said provisions but subject to what the Court states herein below.
22. In this case, Article 25 however provides that:

***"The decision of the panel shall be final and binding and shall be submitted to the speaker."***

23. In this case, it is clear that what is under challenge is the decision of the panel which under the SONU Constitution is expressed to be final. 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) held, based on **Anisminic Ltd. vs. The Foreign Compensation Commission & Another [1969] 1 All ER 208**, 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.
24. 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."**

25. 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."**

26. 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)."**

27. 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.
28. 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.**
29. 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.**
30. 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 applicant contends that she cannot move the Panel in order to have her grievances solved for the simple reason that the SONU Constitution does not permit for a further forum for dispute resolution and her grievances do not fall within the jurisdiction of the Panel and this contention is not without merit. The court in the modern society in which we live cannot deny the Applicant 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 applicant has a right she must of necessity have the means to vindicate it and a remedy if she 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 she will be able to prove that her 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.**
31. 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".

32. 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 struck down as being unreasonable.
33. In this case, the purported remedy can nolonger avail the applicant since pursuant to Article 25(10) of the SONU Constitution the remedies thereunder have been exhausted. The applicant however contends that in purporting to arrive at the said final decision, the panel acted in excess of its jurisdiction. In those circumstances, it is only this Court that can investigate and determine the said allegations. To decline to entertain the issues raised herein based on want of jurisdiction by this Court would, in my view, render the ex parte applicants remediless.
34. Having considered the issues raised herein, it is my view that the so called alternative remedies are nolonger available to the ex parte applicant. As the issue of jurisdiction of the panel is in issue, it is my view and I hold that this Court has the necessary jurisdiction to entertain the issues in dispute herein.

**Order**

35. Accordingly, I hold that the preliminary objections are unmerited and the same are dismissed with costs to the applicant to be borne by the 1st Respondent.

**Dated at Nairobi this 20th day of June, 2016**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

***Mr Ogembo for the Applicant***

***Miss Abok for the Interested Party***

***Mr Babu Owino for the 2nd Respondent***

***Cc Mutisya***