REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 11 OF 2016

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

AND

IN THE MATTER OF ARTICLE 165 (6) AND (7) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 10, 22, 23, 43 (1), 47 AND 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE REGISTRAR ACADEMIC AFFAIRS OF DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY

AND

IN THE MATTER OF A DECISION BY THE DISCIPLINARY COMMITTEE OF DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY

AND

IN THE MATTER OF COMMON EXAMINATION REGULATIONS, SECTION 3.3 (V)

BETWEEN

AGUTU WYCLIFFE NELLY.....APPLICANT

AND

OFFICE OF THE REGISTRAR ACADEMIC AFFAIRS DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY DEKUT)…..Respondent

RULING

The applicant moved this honourable court by way of a chamber summons expressed under the provisions of Order **53** Rule **1 (1), (2)** and **(4)** of the Civil Procedure Rules 2010, the Law Reform Act[1] dated 14th June 2016 seeking orders *inter alia :-*

a. That *this application be certified as urgent and be heard at the earliest opportunity.*

b. That *the applicant* ***Agutu Wycliffee Nelly*** *be granted leave to apply for an order of certiorari to bring to the High Court for purposes of quashing the decisions of the Respondent vide letters ref: DeKUT/EXM/ED/9 dated 8th February 2016 and 25th April 2016, respectively cancelling results for BSM 2403 Courtroom Psychology, suspending the applicant for one (1) academic year to resume studies in September 2016, to sit unit as supplementary when next offered, graduating with a pass and being given a "stern warning".*

c. That *the applicant* ***Agutu Wycliffe Nelly*** *be granted leave to apply for an order of mandamus compelling the Respondent, The Registrar Academic Affairs, Dedan Kimathi University of Technology to reinstate the results for BSM 2403 Courtroom Psychology.*

d. ***That*** *the leave so granted herein do operate as stay against enforcing the decision of the Respondent until the determination of the intended substantive judicial proceedings herein.*

e. That *the costs of this application be provided for.*

The application is premised on the grounds stated on the annexed statement and verifying affidavit. The applicant is 4th year student pursuing Bachelor of Science in Criminology and Security Management at the University's Nairobi campus. The applicant describes herself as a bright student whose previous academic transcripts are consistent with an average of grade of 2nd class upper degree. The applicant avers that on 15th December 2015, it was alleged that the she was found in possession of unauthorized material, namely, "paper with handwritten notes in the examination venue" and she was directed to record a statement. The applicant was invited to appear before the University Examination Disciplinary Committee on 1st February 2016 to answer charges of violating rules and regulations governing the conduct and discipline of students, that is "University Regulations Section 3.3 (v) which states that "all students shall apply diligently to the course of study approved by the DeKUT senate and for which they are registered and in particular shall....not engage in plagiarism, cheating or any other academic irregularities which undermine the academic stature of the University."

The applicant also states that she received a letter dated 8th February 2016 informing her that the committee was convinced that she violated the examination regulations because she was found in possession of unauthorized material (hand written notes) in the examination venue, hence the decision complained of was rendered. She appealed against the said decision, but subsequently, she received communication that her appeal had been rejected. It is the applicants case that prior to attending the said hearing, she was directed to pay 60% of the tuition fees and also clear the balance before the hearing date. The applicant maintains that the disciplinary process was unfair both in procedure and in substance because a one Dr. Kaguta who was the accuser was among the committee members and further he never recorded a statement, that he has never been shown the invigilators report, that Mr. Musyoka's report was used yet he was not at the examination venue, and that the alleged unauthorized material was found under her desk and that same could have belonged to any other student.

The applicant avers that she was not supplied with the evidence against her in advance to enable her to prepare for her defence and states that the respondent were under a duty to act fairly, reasonably and that she is entitled to a fair administrative action and that the report violated article 47 of the constitution. She claims that the rules of natural justice were violated.

The applicant also states that the regulations create four sentences for one offence, hence the sentence are irregular. She also claims that her right to education under article 43 of the constitution has been violated.

On 15th June 2016 the applicants counsel appeared before Hon. Ngaag J. *ex parte* and the learned judge granted the applicant leave in terms of prayers **(2) & (3)** of the said application. No order was made on whether or not the leave granted would operate as a stay of the impugned decision.

The importance of obtaining leave in a judicial review application was well captured in the words of **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale& Another Ex-parte Kondo*

& 57 others[2] where he stated:-

> *" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."*

Guidance can be obtained from the decision in *Meixner & Another vs A.G,*[3] where it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case.

The first step in the judicial review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring judicial review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*. At the leave stage an applicant must show that he/she has **'sufficient interest'** in[4]the matter otherwise known as *locus standi*. In other words, the applicant must demonstrate that he/she is affected in some way by the decision being challenged. An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success. The application must be concerned with a public law matter, i.e. the action must be based on some rule of public law. The decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function.

Thus, at the leave stage, the applicant has the burden of demonstrating that the decision is *illegal, unfair* and *irrational* as discussed above. The applicant must persuade the court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground in seeking judicial review exists which merits full investigation at a full hearing.[5]

The substantive application now the subject of this ruling was filed on 28th June 2016 and the grounds relied upon are essentially as enumerated above.

The Respondent filed a replying affidavit on 20th July 2016 sworn by a one **Nelius Mwangi** the Legal Officer, Dedan Kimathi University of Technology who averred *inter alia* that the Respondents office is not a legal entity capable of being sued, that the application is misconceived and incompetent, that the applicant, a fourth year student undertaking criminology and security management course at Nairobi campus was on 15th December 2015 caught with exam irregularities by a one **Peter N. Musyoki**, an invigilator accompanied by **Dr. Joyce Kaguta**, the chairman of the Department of Criminology and Security Management. It is alleged that the applicant was found in possession of handwritten notes in the examination venue while sitting for exams, which notes were of material relevant to the particular examination paper. The said notes were annexed to the said affidavit. He also annexed a statement written by the applicant stating that the notes were found lying under a chair she was using and wrote that she had no intention of using the notes since he was familiar with the examination regulations. He also averred that the applicant admitted having the notes. She was invited for a disciplinary hearing in writing was invited for a disciplinary hearing whose composition was in conformity with the statutes and a verdict was arrived at and communicated to the applicant who appealed against the said decision, that the appeal

was considered and the decision was communicated to the applicant. He averred that the relevant procedure was adhered to.

In a further affidavit filed on 2nd August 2016, the applicant denies that she admitted being in possession of the said materials.

In his submissions, counsel for the *ex parte* applicant strongly urged the court to find that the Respondent acted *ultra vires* in arriving at the decision in question. The Respondents counsel urged the court to find that the applicant does not deserve the orders sought.

I find that the issue for determination is *whether or not the applicant has demonstrated sufficient grounds to entitle her to the reliefs sought.*

Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' This raises the question *"what is a Judicial Review*? Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfill their function of administering justice according to law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

Judicial review is not the same as an appeal. An appeal exists when a statute provides that a decision can be appealed to a court. In an appeal a judge will more clearly review the merits of the earlier decision. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

As was held in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[6]*:-

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

The court has discretion to examine all the circumstances of the case and satisfy itself that the substantive

grounds for review are serious enough.[7] As **Sedley J** put it in *R vs Somerset CC Ex parte Dixon(COD)* [8]:-

> *"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."*

Broadly, in order to succeed, the applicant will need to show either:-

> *a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*
>
> *b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano**[9]*** this court had the occasion to discuss supervision of administrative decision making process, that is, did the public body act in a lawful manner in deciding the way it did and in the above decision I emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> **a. Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal".** Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.
>
> **b. Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.
>
> **c. Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute **'irrationality"** or **'perversity'** on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd* vs *Wednesbury Corporation*[10]:-
>
> > *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

The onus is on the applicant to establish irrationality or perversity. I am afraid from the material presented before me, this onus has not been discharged.

Broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of *Pastoli vs Kabale District Local Government Council and Others*[11] where it was held as follows:-

> *"in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted …illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. ……..…**irrationality** is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards……..…..**procedural impropriety** is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness*

may be in non-observance of the rules of natural justice……It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument…..”

The grounds upon which the court can exercise its judicial review jurisdiction are incapable of exhaustive listing.[12] I also find useful guidance in the words of **Nyamu J** in *Republic vs The Commissioner of Lands Ex Parte Lake Flowers Ltd***[13]**where he held as follows:-

“Availability of other remedies is no bar to the granting of the judicial relief but can however be an important factor in exercising the discretion whether or not to grant the relief….The high court has the same power as the high court in England up to 1977 and much more because it has the exceptional heritage of a written constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a strait jacket….Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations…..Even on the principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them….Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case to case basis……”

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in **illegality, irrationality, impropriety** of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. [14] It has been said that the growth of judicial review can only be compared to the ever never ending categories of negligence after the celebrated case of *Donoghue vs Stevenson* in the last century.[15]

As was held in the case of *Sanghani Investments Ltd vs Officer in charge Nairobi Remand and allocation Prison,****[16]*** Section **8** of the Law Reform Act specifically sets out the orders that the High Court can issue in Judicial Review proceedings and the orders are Mandamus, Certiorari and Prohibition. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

Judicial review is primarily concerned with controlling the exercise by public bodies and statutory bodies on powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully. In *Nasieku Tarayia vs Board of Directors, AFC & another*[17] it was held that judicial review is an alternative remedy of last resort and where alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available for the court to grant.

I have carefully evaluated the material before the court and I am not persuaded that the applicant has demonstrated sound grounds for the court to exercise its discretion in her favour and grant the reliefs sought. First, the *ex parte* applicant has not demonstrated that she did not understand the charges levelled against her nor did she demonstrate that she was not afforded an opportunity to rebut the allegations. She admitted in writing that the material were found under a chairs he was using. The examination offences and applicable penalties have not been shown to be unreasonable nor has it been demonstrate that the decision in question is tainted with illegality. The entire process has not been shown to be tainted with an illegality to warrant this court to quash it.

A University is an academic community whose fundamental purpose is the pursuit of knowledge. Like all other communities, the University can function properly only if its members adhere to clearly established goals and values. Essential to the fundamental purpose of the University is the commitment

to the principles of truth and academic honesty. Accordingly, University regulations such as those governing examinations as in the present case and attendant offences and penalties are designed to ensure that the principle of academic honesty is upheld. While all members of the University share this responsibility, the such strict regulations are designed so that special responsibility for upholding the principle of academic honesty lies with the students so as to avoid academic dishonesty and safe guard integrity of academic programs.

Academic dishonesty is a corrosive force in the academic life of a university and is an evil that must be fought zealously. It jeopardizes the quality of education and depreciates the genuine achievements of others. It is, without reservation, a responsibility of all members of the campus community to actively deter it. Apathy or acquiescence in the presence of academic dishonesty is not a neutral act. Histories of institutions demonstrate that a *laissez*

-faire response will reinforce, perpetuate, and enlarge the scope of such misconduct. Institutional reputations for academic dishonesty are regrettable aspects of modern education. These reputations become self-fulfilling and grow, unless vigorously challenged by upholding and enforcing the relevant regulations.

The challenged decision has not been shown to be unlawful or malicious. The court cannot stop a lawful process. It can only intervene if is shown to be an abuse of the process, illegal or baseless or if it is prompted by ulterior motives or any such other motives other than furtherance of the law, relevant regulations and public interest. The applicant has not alleged or proved any of the ingredients of a malicious or illegal process as stated herein or even violation of the University regulations. The alleged breach of the Fair Administrative Action Act has in my view not been proved.

Also, it has not been shown that the Respondent acted illegally. The Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law or regulations. The alleged allegations of unfairness have not been proved. It has not been proved or even alleged that the Respondent acted outside their powers or their decision was arrived at after taking into account irrelevant or extraneous matters. The applicant has not demonstrated that he did not engage in the alleged activities.

An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent.

As stated earlier, the grant of leave to file judicial review proceedings as well as the ultimate grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicant has not satisfied the threshold for this court to grant orders sought. The effect is that the orders sought are hereby refused and the application dated 27thJune 2016 is hereby dismissed with costs to the Respondent.

Orders accordingly

Signed, Dated at **Nyeri** this **24th** day of **November** 2016

John M. Mativo

Judge

Signed, Dated and Delivered at Nyeri this 24thday of November 2016

Hon. Justice Jairus Ngaah

Judge

---

[1] Cap 26, Laws of Kenya

[2] Mombasa HCMISC APP No 384 of 1996

[3]{2005} 1 KLR 189

[4] See R vs Panl for Takeovers and Mergers ex p Datafin {1987}I Q B 815

[5] R vs Legal Aid Board Ex p Hughes {1992} Adm. L. Rep. 623}

[6] [2014] eKLR

[7] See R vs Inland Revenue Commissioner ex p National Federation of Self -Employed and Small Businesses {1982}AC 617

[8]{1997} Q.B.D. 323

[9] JR No 17 B of 2015

[10] {1948} 1 K. B. 223, H.L.

[11] {2008} 2EA 300

[12] See JR NO. 112 of 2011, High Court, NBI, Seventh day Adventist church , applicant and PS Ministry of NBI Metropolitan Dev

[13] HC MISC App No 1235 of 1998

[14] See Ondunga J in J R 112 of 2011 cited above in note 3

[15] Ibid

[16] {2007} 1 EA 354

[17] {2012}eKLR