REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 138 OF 2015

REPUBLIC……APPLICANT

VERSUS

CABINET SECRETARY FOR

EDUCATION SCIENCE & TECHNOLOGY….....RESPONDENT

EX-PARTE

HIGHLANDS STATE COLLEGE LTD

JUDGEMENT

1. On 16th April, 2015, the 2nd Respondent, the Commission for University Education (CUE) published an advert in the Daily Nation newspaper titled **"Regulations Governing University Collaboration and Student Recruitment Agencies"** stating *inter alia:*

   "Any Local University which at the commencement of these regulations is providing programmes in collaboration with a local tertiary institution shall after a period of one year from the date of coming into operation of these Regulations, cease admissions of new students into the programmes under collaboration (effective date 12th June 2014)."

2. The Ex parte Applicant, Highlands State College Limited which was offering programmes in collaboration with Maasai Mara University was aggrieved by the said notice. According to the Applicant, the said University had acted upon the notice by stopping the issuance of admission letters to the Applicant.
3. Upon obtaining the leave of the Court to commence these judicial review proceedings, the Applicant filed the Notice of Motion application dated 5th May, 2015 praying for orders that:

   "1. The Honourable Court be pleased to grant to the Ex parte Applicant:

a. **AN ORDER OF CERTIORARI to remove to this Honourable Court the Universities Regulations 2014 and quash Rule 86(2) thereof; and**
b. **AN ORDER OF PROHIBITION to prohibit the Respondents, their agents, employees, servants, or all persons acting through them from implementing Rule 86(2) of the Universities Regulations 2014.**

2. The Applicant be awarded the costs of this application."

3. The Cabinet Secretary for Education, Science and Technology is the 1st Respondent and the Commission for University Education is the 2nd Respondent.

4. In short, the Applicant's case is that Regulation 86(2) of the Universities Regulations 2014 upon which the 2nd Respondent based its notice is *ultra vires* Section 60(d) of the Universities Act, 2012.

5. It is also the Applicant's case that the Universities Regulations, 2014 were passed without consultation with stakeholders and without due regard to the negative impact of the Regulations on tertiary institutions, students and staff.

6. The respondents opposed the application through the replying affidavit of Prof Jacob T Kaimenyi sworn on 1st July, 2015 and that of Dr. Florah K Karimi sworn on 5th June, 2015. Their starting point is that the Regulations were made by the 1st Respondent in exercise of powers granted to him by the Universities Act, 2012 after wide consultations.

7. The respondents also claim that the Applicant's case is statute barred as an application for leave to apply for an order of certiorari can only be made within six months from the date of the making of the impugned decision.

8. Looking at the pleadings before this court, it is clear that the first question to be answered is whether there is a proper application before this court. If there is a proper application before the court, the next question is whether Regulation 86 (2) of the Universities Regulations, 2014, upon which the 2nd Respondent's notice was based, is *ultra vires* the provisions of the Universities Act, 2012.

9. Is the Applicant's application time barred? Indeed an application for an order of certiorari should be brought within six months from the date of the decision being challenged. In the case before me it is not disputed that these proceedings were commenced over six months after the promulgation of the Universities Regulations, 2014. I would therefore agree with the respondents that the applicant cannot be heard to say that the Regulations were passed without consultation. In my view, a challenge based on lack of consultation could have only been brought within six months from the date the Regulations were inaugurated.

10. There is, however, another aspect of the Applicant's case to which the six months rule is not applicable. The Applicant challenges the legality of Regulation 86(2). An application to challenge the legality of a statutory provision has no time limits. A party adversely affected by such a provision can challenge it any time. In the circumstances of this case, the Applicant was adversely affected by Regulation 86(2) the moment the 2nd Respondent placed the advertisement in the newspaper. Even if the six months rule was applicable, then time started running from the date the notice was put in the newspaper. I therefore find that the application before this court is proper and valid.

11. Was the decision of the 2nd Respondent based on an illegal provision of the Universities Regulations, 2014? Regulation 86 (2) provides:

> **"(2) Any local university which at the commencement of these Regulations is providing programmes in collaboration with a local tertiary institution shall, after a period of one year from the date of the coming into operation of these regulations, cease admissions of new students into the programmes under collaboration."**

12. On the other hand Section 60(d) of the Universities Act provides:

> **"A University Council shall have the necessary powers for the proper performance of its**

functions under this Act and in particular, without prejudice to the generality of the foregoing, a university shall have powers to—

(a)……

(d) enter into association, collaboration or linkages with other bodies or organizations within or outside Kenya as the university may consider desirable or appropriate and in furtherance of the purpose for which the university is established."

13. A reading of the two provisions clearly shows that Regulation 86(2) was intended to override the substantive provision in 60 (d).

14. Section 24(2) of the Statutory Instruments Act, 2013 states that:

"A statutory instrument shall not be inconsistent with the provisions of the enabling legislation or of any Act, and the statutory instrument shall be void to the extent of the inconsistency."

A Cabinet Secretary cannot through regulations or rules overthrow the legislative intent of Parliament. A regulation that is inconsistent with a provision of an Act of Parliament is void to the extent of such inconsistency. The decision of the 2nd Respondent is illegal as it was based on a void provision to wit Regulation 86(2).

15. No legal action can spring from an illegality. The directive to local universities to cease any collaboration with other institutions was based on a void provision in the Universities Regulations, 2014. Such directive cannot therefore be allowed to stand.

16. In the circumstances of this case Regulation 86(2) of the Universities Regulation, 2014 is removed into this Court and quashed. As the decision has been quashed, there is nothing the respondents can implement. Thus issuance of an order prohibiting the respondents from implementing a regulation that has already been quashed by this court is superfluous. The prayer for an order of prohibition is thus rejected and dismissed.

17. Each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 23rd day of Dec 2015

W. KORIR,

JUDGE OF THE HIGH COURT