



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 54 of 2009

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI
IN THE MATTER OF THE KENYATTA UNIVERSITY ACT, CHAPTER 210C, LAWS OF
KENYA**

BETWEEN

THE

REPUBLIC.....APPLICANT

VERSUS

KENYATTA

UNIVERSITY.....RESPONDENT

EX PARTE

GLADYS NYAMBURA NJOGU

RULING

Gladys Nyambura Njogu, the ex parte applicant, hereinafter referred to as the “**the applicant**”, filed an application dated 22nd February, 2009 seeking the following orders:

“1. An order of certiorari to remove to the High court and quash the proceedings and decision of the respondent’s Student Disciplinary Committee of 13th March, 2007 discontinuing the applicant from studying at the respondent with immediate effect.

- 2. An order of certiorari to remove to the High Court and quash the proceedings and decision of the respondent and its Appeals Committee of 20th March, 2008 upholding the Students Disciplinary Committee decision of 13th March, 2007 discontinuing the applicant from studying at the respondent with immediate effect.**
- 3. The costs of this application be borne by the respondent.”**

The application was made on grounds, inter alia, that:

- (a) The respondent’s Students Disciplinary Committee and the Appeals Committee as constituted are non-existent bodies under the Kenyatta University Act, Cap 210 (c) Laws of Kenya hence incapable of deliberating or taking any disciplinary action against the applicant relating to alleged examination irregularities or at all.**
- (b) The respondent’s Students Disciplinary Committee and Appeals Committee as constituted have no jurisdiction to deliberate, try and take any disciplinary action against the applicant relating to the alleged examination irregularities or at all.**
- (c) The said bodies acted ultra vires the provisions of the Kenyatta University Act.**
- (d) The respondent’s notice of the outcome of the deliberations of the Students Disciplinary Committee and the Appeals Committee as constituted is improperly executed and therefore ultra vires the provisions of the Kenyatta University Act.**
- (e) The applicant was not formally informed of any charges against her.**
- (f) The applicant was not accorded any opportunity to adequately prepare her defence.**
- (g) The applicant was not accorded a fair trial.**

In her affidavit in support of the application, the applicant stated that she was enrolled as an undergraduate student at the respondent’s university on 14th August, 2005 for Bachelor of Education (Arts) Degree Programme. Immediately upon registration the applicant attended all lectures, tutorials and other academic activities and successfully completed the 1st and 2nd years of study as well as 3rd year first semester.

On 8th February, 2008 the applicant reported at the university to register for the second semester of her third year of study and paid the requisite fees of Kshs.57,050/=. Thereafter she registered for her course units namely English and English Literature. She then proceeded to the School of Education for online registration. She was however unable to register and decided to enquire from the administration why her registration was unsuccessful. the Finance and Administration Officer referred her to the Registrar in charge of Self Sponsored Programme who informed her that she had been discontinued from studying at the university. When she enquired the reason for discontinuation the Registrar asked her to check with him later so that he could make appropriate enquiry. Later on, the Registrar gave her a letter dated 15th

May, 2007 addressed to her through Post Office Box Number 3172-00100, Nairobi. The letter stated that she had been discontinued from studying at the university with immediate effect for allegedly engaging in examination irregularities.

The applicant stated that the postal address which she had given to the university at the time of registration is Post Office Box Number 1372-00506, Nairobi but not the aforesaid one. The applicant said that she sat for the examination in unit UCU 101, Development Studies, on 7th June, 2006 and the same ended without any incident being reported. The examination was marked and modulated and the results thereof released to her unconditionally. She further stated that on or about 12th of March, 2007 while at home during vacation she received a telephone call from one of her relatives who informed her that the respondent had constituted a Student Disciplinary Committee which was scheduled to sit on 13th March, 2007 to charge and try students including herself for various disciplinary related cases. When she went to the university she was ushered into a room where the proceedings of the Student Disciplinary Committee has had been constituted were taking place. While inside the room the applicant learned that she had to answer the charges of examination irregularities in unit UCU 101 aforesaid.

Since she was totally unprepared and having no prior notice, the applicant requested for time to study and/or acquaint herself with the charges that had been preferred against her and also to prepare her defence but the request was not granted. After the proceedings she returned to her home and at the end of the vacation reported back to the university and went about learning activities with no word from the administration regarding the outcome of the Student Disciplinary Committee proceedings. The applicant informally learnt of the decision of the Student Disciplinary Committee almost a year later in February 2008 when her online registration for 3rd year second semester was rejected.

Upon receipt of the university's letter dated 15th May, 2007, the applicant lodged an appeal to the Vice Chancellor against the decision of the Student Disciplinary Committee but the appeal was unsuccessful.

The applicant now states that the Students Disciplinary Committee and the Appeals Committee are non-existent bodies under the Kenyatta University Act hence incapable of deliberating or taking any disciplinary action against her. She further stated that the respondent's notice of the outcome of the deliberations of the Students Disciplinary Committee and the Appeals Committee as constituted is improper and therefore *ultra vires* the provisions of the Kenyatta University Act. In her view, the entire decision and proceedings of the Students Disciplinary Committee and the Appeals Committee were a sham and a travesty of natural justice.

The respondent filed a replying affidavit sworn by **Professor John Okumu**, the Deputy Vice Chancellor, Academic. He stated that the application for orders of certiorari ought not to be granted since it had been filed outside the six months statutory period. The impugned decisions being those of the Students Disciplinary Committee and the Appeals Committee were made on 13th March, 2007 and 20th March, 2008 respectively. The applicant's application was however filed in February, 2009. The application is therefore time barred and leave to apply for the orders of certiorari ought not to have been granted, he stated.

Without prejudice to the foregoing, Prof. Okumu stated that the respondent acted in a proper manner and followed the applicable rules and procedures governing a situation where a student is found to have been involved in examination irregularities. He said that when the applicant was sitting the examination unit UCU 101 on 7th June, 2006 she was involved in examination irregularities, in particular, the applicant was found with notes relevant to the said unit on her arm and palm during the examination. He annexed to his affidavit a photograph of the applicant showing the writings on her arm and palm. The examination

invigilator made a record to that effect which was annexed to the respondent's affidavit. There is also a chit signed by the applicant on the same date at 4 p.m. which reads as follows:

“On 7.6.2006 while sitting for my UCU 101 (DS Exam) I was accused of cheating in the exam room. I had no mwakenya but immediately after we were given the question papers I started scribbling some of the answers on my paper and some on my left hand”.

Pursuant to the said incident, the applicant was notified vide a letter dated 18th October, 2006 to appear before the Students Disciplinary Committee on 27th October, 2006. Prof. Okumu annexed to his affidavit a copy of the said letter and the minutes of the Disciplinary Committee held on 27th October 2006 and continued on 13th March, 2007. The decision of the disciplinary action was communicated to the applicant vide a letter dated 15th May, 2007 together with the reasons thereof. Thereafter the applicant appealed to the Vice Chancellor against the decision of the Disciplinary Committee. The Appeals Committee considered her appeal but rejected the same. He defended the decision reached by the respondent saying that it was arrived at with due consideration of the facts and the relevant law. He added that the Students Disciplinary Committee and the Appeals Committee are provided for under **Section 14(2) (f) of the Kenyatta University Act**.

Counsel for the parties filed their respective submissions which I have carefully perused.

The court must reiterate that in judicial review proceedings it is not concerned with the merits of a decision but the decision making process. See **REPUBLIC v JUDICIAL SERVICE COMMISSION ex parte PARENO [2004] 1 KLR 203**.

The first issue for determination is whether the orders of certiorari sought by the applicant can be granted since the decisions sought to be quashed were made more than six months before the date of filing the application, contrary to the provisions of **Section 9(3) of the Law Reform Act** and **Order 53 rule 2 of the Civil Procedure Rules**.

When the respondent filed an application seeking to strike out the applicant's application for orders of certiorari, Wendo J, held that the application was premature and stated:

“It will therefore be upon the applicant to demonstrate that though the impugned decision was challenged after 6 months, it falls under the exception to Order 53 rule 2 Civil Procedure Rules. If a decision is a nullity, there is no decision at all and therefore it cannot be limited by the 6 months period. Besides, if a decision is a nullity or made without jurisdiction, then it would be unfair to shut out a person challenging it on the basis of the time limit. In this case, though the application for certiorari is made outside the 6 months period, the court has to hear the application and determine whether or not the decision is a nullity or made without jurisdiction”.

It is therefore necessary to determine whether the Students Disciplinary Committee and the Appeals Committee are duly constituted bodies with jurisdiction to take disciplinary action against students.

The applicant submitted that **Section 12 of the Kenyatta University Act** establishes the University Council which is empowered under **Section 23(1)** of the Act to make statutes generally for the government, control and administration of the University and for the better carrying into effect of the purposes of the Act. Further, under **Section 23(1) (d)**, the Council is empowered to make rules for the conduct of examinations. She further submitted that regulations governing the conduct of discipline of

students of the University are to be made by the Council after consultation with the Senate under **Section 13(1) (e)**. Under **Section 23(4)** of the Act, all statutes or regulations made by the Senate under the Act must be published in the Gazette. She therefore concluded that it is the Senate which is empowered under **Section 14** of the Act to discipline students in academic matters. The applicant thus submitted that the Students Disciplinary Committee is an alien body under the Act, and the same applies to the Appeals Committee. She added that decisions made by bodies which do not exist in law are a nullity and ought to be quashed. In her view, the decisions fall under the exception to **Order 53 rule 2** of the **Civil Procedure Rules**.

What is the court's view regarding the legal status of the two bodies? **Section 23(1)** of the Act provides that:

“In the performance of its functions under this Act, the Council shall, subject to this Act, make statutes generally for the government, control and administration of the University and for the better carrying into effect of the purposes of this Act”.

It is pursuant to that section that the statutes of the University are made, the respondent's counsel submitted, and statute XV, which relates to the senate provides for several senate committees. These committees are necessary because the senate cannot sit over every matter. One of such committees is the Students Disciplinary Committee. The court is satisfied that the Students Disciplinary Committee is not an alien body under the Act as submitted by the applicant's counsel. It is lawfully created.

What about the Appeals Committee? **Statute XIV** empowers the University Council to establish such committees with membership and with such terms of reference as it may deem fit. One of such committees is the **Students Board of Appeal**. This is therefore a lawful body under the Act.

Did the two bodies act *ultra vires*. I do not think so. The two bodies, being properly established as shown hereinabove, their decisions were not ultra vires. They had jurisdiction to determine the matter/appeal relating to the charges made against the applicant.

In view of the foregoing, I hold and find that the application for orders of certiorari was made outside the statutory time period of six months and therefore offend the provisions of **Section 9(3)** of the **Law Reform Act** and **Order 53 rule 2** of the **Civil Procedure Rules**. That is sufficient to dispose of the application.

But even if the applicant had come to court in good time I do not think that her application would have been successful. I say so because it was not sufficiently demonstrated that the Students Disciplinary Committee violated the principles of natural justice in any substantial manner that would have affected its decision. The applicant was given an opportunity to defend herself and proceedings to that effect were exhibited herein. Secondly, there is also sufficient evidence that the disciplinary committee considered the defence that was advanced by the applicant before it arrived at its decision. This court cannot substitute its decision or that of the disciplinary committee. The disciplinary committee considered the statement made by the invigilator, the photograph taken of the applicant's palms and arm showing various writings and the brief statement that was recorded by the applicant on the examination day. Having done so it arrived at a decision to expel the applicant from the University pursuant to provisions of **Statute XXI**. The applicant was given an opportunity to appeal against that decision which she did but the appeal was unsuccessful.

For reasons stated hereinabove, this application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Khayega for the Ex Parte Applicant

Mr. Mogere for the Respondent