



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL TAX DIVISION)

MISC CIVIL APPLI 54 OF 2009

IN THE MATTER FOR AN APPLICATION FOR JUDICIALA REVIEW ORDERS OF CERTIORARI

IN THE MATTER OF THE KENYATTA UNIVERSITY ACT, CAP 210 C, LAWS OF KENYA

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

THE KENYATTA UNIVERSITY..... RESPONDENT

EX PARTE: GLADYS NYAMBURA NJOGU

RULING

By a notice of motion dated 2/2/09, the ex parte Applicant, Gladys Nyambura Njogu moved this court under Order 53 Rule 3 Civil Procedure Rules seeking the following Judicial Review orders:

Certiorari to remove into the High Court and quash the proceedings and decision of the Respondent’s Student Disciplinary Committee of 13/3/07 discontinuing the Applicant from studying at the Respondent with immediate effect.

- 1. An order of certiorari to remove to the High court and quash proceeding and decision of the Respondent and its Appeals Committee Student’s Disciplinary Committee decision of 13.3.07 discontinuing the Applicant from studying at the Respondent’s Institution with immediate effect.*

The Applicant was a student at the Respondent’s institution when her studies were suddenly discontinued. She has challenged that decision to discontinue her education at the said Institution. In reply, the Respondent has filed the notice of motion dated 8/5/09 pursuant to S 8 and 9 of the Law Reform Act, Order L and LIII Rule 2 of the Civil Procedure Rules in which the Respondent seeks an order that the notice of motion dated 20/2/09 be struck out and costs of the whole proceedings be awarded to the Respondent. It is supported by an affidavit sworn by Dr. F. Koga on 8/5/09 and grounds found in the body of the application. That is the application that is before me for determination today. It was

opposed and the ex parte Applicant filed a replying affidavit dated 2/10/09.

The main ground upon which this application is brought is that the notice of motion was brought outside the 6 months period allowed under Order 53 Rule 2 Civil Procedure Rules. Rule 2 requires that an application for an order of certiorari seeking to quash a decision be brought within 6 months of the making of the decision. That the two decisions sought to be quashed by an order of certiorari were made on 13/3/07 and 20/3/08 respectively and the application for leave was made on 26/1/09, way after the six months period had lapsed.

In opposing the application, it was contended that the Applicant had earlier filed an application HMSC 701/08 in which they sought extension of time to file a Judicial Review application (CMMI – are the proceedings), but J. Nyamu dismissed the said application contending that he had no jurisdiction to grant the orders but advised that if the ground for filing the application was want of jurisdiction, then they could file it out of time and that is why they have filed the present application. That when the court granted leave, it was satisfied that there was an arguable case. The Applicant denied that this matter is time barred.

S 9 (3) of the Law Reform Act which is replicated in order 53 Rule 2 reads as follows:-

“9 (3) in the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject of appeal, and time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

Though many decisions e.g. ***AKO V SPECIAL DISTRICT COMMISSIONER KISUMU, MINSITER FOR LAND AND SETTLEMENT – CA 29/1985*** had held that once an application for certiorari was not brought within 6 months, then the court had no jurisdiction to entertain the matter,; Nyamu Ibrahim and Makhandia JJJ were of a different view in the case of ex parte ***REP V JUDICIAL ENQUIRY INTO THE GOLDENBERG AFFAIR ex parte MWALULU, HMISC 1279/04***. The court held that the 6 months limitation only applies to judgments, orders, decrees, convictions or other proceedings of an inferior court and that the time limit under S 9 (3) (O 53 Rule (2)) does not include anything covered by the ultra vires rule or nullities or decisions made without jurisdiction. That court held that Order 53 R 2 only covers specific matters mentioned thereunder and that the marginal notes also confirms that. I am in agreement with the above decision because going by the earlier interpretation of the Rule 2, decisions which were nullities or made without jurisdiction and which parties were not aware of could not be challenged and many parties were locked out of the seat of justice. 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. I find the notice of motion to be premature and intends to shut out the Applicant for the seat of justice and cannot be allowed. The notice of motion dated 8/5/09 is hereby dismissed and the ex parte Applicant is free to prosecute

Her application to its conclusion. Costs of this notice of Motion to the ex parte Applicant.

Read and delivered at Nairobi this 14th day of October 2009.

R.P.V. WENDOH

JUDGE

Present:

Mr Kagoni for Ex parte/Respondent

Mr Mogere for Applicant/Respondent

Muturi – court Clerk