



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 671 of 2008**

**IN THE MATTER OF AN APPLICATION BY FRANK MUTEMBEI KINYUA FOR LEAVE TO**  
**APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF JOMO KENYATTA UNIVERISTY OF AGRICULTURE AND**  
**TECHNOLOGY STATUTES, 1994**

**FRANK MUTEMBEI KINYUA..... APPLICANT**

**V E R S U S**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY.....RESPONDENT**

**R U L I N G**

This is a Chamber Summons dated 3<sup>rd</sup> November, 2008 filed by Mbugwa, Atundo & Macharia advocates on behalf of the ex-parte applicant **FRANK MUTEMBEI KINYUA**. The application was filed under Order 53 rules 1 (1), (2), (3) and (4) of the Civil Procedure Rules and Section 8 of the Law Reform Act. The application was filed as an exparte application. However, on 3<sup>rd</sup> November, 2008, Hon. Justice Nyamu ordered that the application be served for inter-partes hearing. The learned Judge also certified the application as urgent and dispensed with the requirement for prior service on the Registrar.

The substantive orders sought in the application are that-

*Ø The applicant be granted leave to apply for an order of certiorari against the Vice-Chancellor and/or the Senate's University Student/Disciplinary Committee of the Jomo Kenyatta University of Agriculture and Technology to bring to the court and quash the decision contained in a letter dated 14<sup>th</sup> August, 2008 by the respondent to suspend the Applicant from the University for two (2) academic years namely (2008/2009 and 2009/2010) and the decision to expel the Applicant from the University Hostels upon resumption of studies.*

*Ø The Applicant be granted leave to apply for an order of mandamus compelling the respondent to re-admit the Applicant to continue with his normal studies.*

*Ø Such leave so granted do operate as a stay of the decision reached and made by the Vice-Chancellor and/or the Senate University Student Disciplinary Committee to suspend the Applicant from the University for two (2) academic years and in the meantime the Applicant continue with his normal studies.*

The application was filed with a **STATUTORY STATEMENT** as well as a **VERIFYING AFFIDAVIT**.

The application was served as ordered by the court. The respondent did not file any response but M/s Lutta & Company advocates filed a notice of appointment of advocates, for the respondent. On the hearing date, Mr. Chege appeared for the respondent and informed the court that though their client (**the respondent**) was served, the advocates had not been given adequate instructions. Counsel requested to be excused from participating in the Chamber Summons proceedings and stated that they would await service of the orders to be made by the court. He was so excused as requested.

The application therefore, proceeded to hearing in the absence of counsel for the respondent.

Mr. Mbugwa for the applicant submitted that the respondent was given an opportunity to respond, but they had failed to do so. Therefore, the application was unopposed. Counsel submitted that there were student protests on 6<sup>th</sup> August, 2008, and that on 14<sup>th</sup> August, 2008 the applicant was summoned by the University Security Officer and handed over to the police. On 15<sup>th</sup> August, 2008 he was charged with arson. The criminal proceedings came up in court on 11/9/2008 and 3/10/2008, and on both occasions the complainant failed to attend court. On 3/10/2008, the prosecutor applied that the applicant be discharged because the respondent was uncooperative.

In the meantime, counsel for the applicant argued, on 1/9/2008 the applicant received a letter dated 13/8/2008 signed by the Registrar Academic suspending the applicant, though the said Registrar did not have power to so suspend. Counsel also submitted that on 10/9/2008, the applicant received a letter which date required him to appear before the Disciplinary Committee on 12/9/2008, and which letter also required him to have put in written submissions on 8/9/2008, which date was already past. Though the applicant appeared before the Disciplinary Committee he was neither allowed time to call witnesses or put in his written submissions. In addition, the applicant later received a letter dated 14/8/2008, which informed him that he had attended the Disciplinary Committee meeting on 11<sup>th</sup> September, 2008 at which meeting the decision to be challenged herein was taken, while in fact the ex-parte applicant did not attend a meeting of the Disciplinary Committee on 11/9/2008 as alleged. Counsel urged that leave be granted to file judicial review proceedings.

On stay, counsel argued that if stay orders are not granted the applicant will not be able to sit for his 4<sup>th</sup> year exams. Counsel argued that the applicant had taken the earliest opportunity to come to court after obtaining copies of proceedings from the Thika court, regarding the withdrawal of the criminal proceedings which were instituted against him. Counsel also submitted that the applicant had appealed against the decision made by the Disciplinary Committee, but no response had so far been received.

I have considered the application, documents filed and the submissions of counsel for the applicant. The respondents were given an opportunity to appear in court and put their side of the story. They were served. An advocate (**M/s Lutta & Company**) came on record for them. Mr. Chege who appeared on the hearing date, stated that counsel was not given any instructions to participate in the hearing of the Chamber Summons. The application is therefore unopposed.

Having considered the application and the facts before me, I am of the view that the applicant has established a sufficient interest in the subject matter of complaint. The applicant has also demonstrated a *prima facie* arguable case. I will grant him leave to file judicial review proceedings.

The applicant has asked that the leave granted do operate as stay of the disciplinary decision made against him. I have anxiously considered this request. Under Order 53 rule 1(4) of the Civil Procedure Rules, this court has discretion to grant stay orders in applications for leave to file judicial review proceedings for certiorari and prohibition. I expected the respondents, who were served and given an opportunity to participate in the Chamber Summons application, to respond to the allegations made by the applicant. This would have enabled me consider both sides in determining whether or not to grant stay orders. As things stand, the request for stay orders is also unopposed. I appreciate that discipline is very important in academic and other institutions. Doing the best I can in the circumstances of this case, I will

have to grant stay orders, as in my view, if stay is not granted the applicant is likely to suffer great prejudice.

Consequently, and for the above reasons, I order as follows-

**1. Leave is granted to the applicant to file judicial review proceedings for certiorari and mandamus. The substantive motion will be filed and served within seven (7) days from today, otherwise the leave granted will automatically lapse.**

**2. The leave granted will operate as a stay of the decision to suspend and expel the applicant communicated to him by the letter dated 14<sup>th</sup> August, 2008, until the hearing and determination of the Judicial review proceedings herein, unless the stay orders are otherwise hereafter varied by this court. Provided that the Notice of Motion is filed and served within seven (7) days from today, otherwise the stay orders hereby granted will automatically lapse.**

**3. Costs will follow the decision in the judicial review proceedings.**

Dated and delivered at Nairobi this 12<sup>th</sup> day of November, 2008.

**George Dulu**

**Judge.**

**In the presence of-**

Mr. Mbugua for applicant