



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Misc. Civ. Appli. 962 of 2007

ANNE RAMA1ST APPLICANT

FREDRICK M. KAMETI.....2ND APPLICANT

PETER KAMURU.....3RD APPLICANT

ELUID OWINO WAGURA.....4TH APPLICANT

TUBMAN OTIENO.....5TH APPLICANT

RODAH BILLIOCH.....6TH APPLICANT

EVANS ESESE.....7TH APPLICANT

ALFRED KIPNGURAT.....8TH APPLICANT

F.A. MITIAMBO.....9TH APPLICANT

P.J. MOROGO.....10TH APPLICANT

NELSON KWEYA.....11TH APPLICANT

LOISE NGUGI.....12TH APPLICANT

FAITH SHIKWE.....13TH APPLICANT

JACKSON MWAURA.....14TH APPLICANT

VINCENT MULIVA.....15TH APPLICANT

ROSE MARIENGA.....16TH APPLICANT

PETER MWANGI.....17TH APPLICANT

REGINA GACHERU.....18TH APPLICANT

WANJIKU KABIRU.....	19 TH APPLICANT
JEMMIMAH NAMOD.....	20 TH APPLICANT
WINNIE MURIUKI.....	21 ST APPLICANT
FAITH MWENGA.....	22 ND APPLICANT
CHARLES MWANGI.....	23 RD APPLICANT
MARY NYAMBURA.....	24 TH APPLICANT
GEORGE WAITHAKA.....	25 TH APPLICANT
BEN DOLLA.....	26 TH APPLICANT
FLORENCE GUANTAI.....	27 TH APPLICANT
JUSTIN KIARIE.....	28 TH APPLICANT
ALICE KOECH.....	29 TH APPLICANT
REUBEN MAYAKA.....	30 TH APPLICANT
FREDRICK MUTHYA.....	31 ST APPLICANT
SUSAN KAIRIMA.....	32 ND APPLICANT
WILLIAM WAMBIA OWINO.....	33 RD APPLICANT
ZEPHANIA K. NJERU.....	34 TH APPLICANT
WILSON KOLIPEY.....	35 TH APPLICANT
JOYCE SANDE.....	36 TH APPLICANT
MAURICE NYAKITI.....	37 TH APPLICANT
CAROLINE MAHASI.....	38 TH APPLICANT
GEORGE NYAMAO.....	39 TH APPLICANT
ANDREW KIMANI.....	40 TH APPLICANT
THOMAS OFWA.....	41 ST APPLICANT
EVA NJIRAINI.....	42 ND APPLICANT
JOSEPH TOO.....	43 RD APPLICANT
GILBERT ATIKA.....	44 TH APPLICANT

CHARLES NYAWARA.....	45 TH APPLICANT
SETH AGALA MASAYA.....	46 TH APPLICANT
JOSEPH OMESA.....	47 TH APPLICANT
DORCAS JESANG.....	48 TH APPLICANT
JOSEPH KIPYEGON.....	49 TH APPLICANT
DAVID MICHOTI.....	50 TH APPLICANT
GEORGE KABUE.....	51 ST APPLICANT
LOISE NJOKI NGIGE.....	52 ND APPLICANT
EDWINA OMBADO.....	53 RD APPLICANT
MARY KAMINCHA.....	54 TH APPLICANT
CHARLES MWANIKI.....	55 TH APPLICANT
DAVID GAITUNGU.....	56 TH APPLICANT
VERONICAH GICHUKI.....	57 TH APPLICANT
PATRICK NDUE.....	58 TH APPLICANT
EMMANUEL MWAZIGE.....	59 TH APPLICANT
JULIUS MBUVI.....	60 TH APPLICANT
CAROLINE KADIKINYI.....	61 ST APPLICANT
KIOKO JOSHUA MUTISO.....	62 ND APPLICANT
JAMES ANDAKO OTIENO.....	63 RD APPLICANT
DOREEN ODHIAMBO.....	64 TH APPLICANT
ABSOLOM M. MWANIKI.....	65 TH APPLICANT
PETER NYAMBEGA ONDIEK.....	66 TH APPLICANT
JOEL KEMEI.....	67 TH APPLICANT
ELIJAH OMARE.....	68 TH APPLICANT
STEPHEN MBUGUA.....	69 TH APPLICANT
JUSTUS WAFULA.....	70 TH APPLICANT

VERSUS

KENYATTA UNIVERSITY1ST RESPONDENT

REGIONAL INSTITUTE OF

BUSINESS MANAGEMENT2ND RESPONDENT

RULING

An application by way of Judicial Review was filed and tabled in court under Certificate of Urgency, during the court vacation. The ex-parte applicants, represented by Mr. Otiende Amolo sought leave of the court, to ***“bring Judicial Review Proceedings against the Respondents therein by way of Orders of mandamus and prohibition and certiorari”***.

On certiorari, they sought leave to

“To bring before this court to investigate and quash the decision by the 1st Respondent dated 12th June 2007 requiring the applicants herein to pay additional fees to the 1st Respondent as a condition precedent to the applicants continuance with the Executive Masters in Business Administration Programme.”

On prohibition, they sought leave,

“To prohibit the Respondent whether by themselves, their servants, agents and or officer from arbitrarily and unlawfully demanding the payment of the additional tuition fees for the applicants.”

And on mandamus they sought leave,

“To compel the first Respondent to continue with the applicants’ academic programme for the Executive MBA including but not limited to the conduct of examination supervision and defence of the court work etc with a view to qualifying the applicants for the grant of their respective academic awards.”

I granted leave to the applicants to be heard during the court vacation as I was satisfied the matter was urgent. I further granted them leave to file application for Judicial Review, but I declined to order the leave to operate as ***“a stay”*** as was requested, and I directed that the application be served, so that I could hear all parties on that point.

The event records show that the Respondents were served, but only the 1st Respondent appeared and was represented by Mr. Majanja and Kamanda, but the Second Respondent did not appear.

Mr. Otiende Amolo took the court through the complaints of the applicants which made them come to court seeking leave for Judicial Review and an order for stay. These related to an advertisements placed by both Respondents in April 2004, inviting application for qualified persons for on MBA course for academic years 2004-2005.

The tuition fee was put at Kshs.200,000 and the total cost of the course, Kshs.250,000/=.

All the 70 applicants applied and paid fees.

That the 1st applicant, Kenyatta University directed where to pay fees and all the 70 applicant complied with the instructions, paid fees and started the course and are now in the final part of the course, and are due to be graded in December, 2007, however, the 1st Respondent altered this understanding and now sought to demand fresh payment of fees to be made directly to it and sent a blank for me for completion

to the applicants for that purpose. The Respondent made this decision unilaterally and the applicants are aggrieved by being asked to pay fees asked to pay fees twice. The applicants contend that the 1st Respondent's action by its letter of 12th June, 2007 to them has disabled them and made it impossible for them to defending their thesis.

The students further contend that they were not privy to whatever contractual or other arrangements were there between the 1st and second Respondents, and they pray the court to order that the leave granted do operate as a stay of the demand of additional fees, as they want to defend their thesis and qualify by December, 2007.

Mr. Majanja in response took up the issue of jurisdiction, and submitted that the application does not lie in law, as the application for stay must be dealt with at the stage of the ex-parte hearing for leave. He relied on 3 Court of Appeal decisions in **REPUBLIC V COMMISSIONER OF CO-OPERATIVES, EX-PARTE KIRINYAGA TEA GROWERS, SHAH V RESIDENT MAGISTRATE NAIROBI AND REPUBLIC V KENYA WILDLIFE SERVICES.**

He submitted further that Order LIII contemplates that a stay should be in respect of proceedings, not a decision already made.

He also drew the court's attention to the fact that the relationship between the applicants and the 1st Respondent is purely contractual. That Kenyatta University is not exercising a public duty, so a remedy of Judicial Review cannot be used.

Mr. Amolo in his final response submitted that the facts of this case are yet to be argued to enable the court to make a ruling.

On the point of jurisdiction, he submitted that the court exercised a discretion which can only be challenged or appeal, and finally, that the leave granted by court was in terms of prayer 3 of the Chamber Summons application dated 23rd August, 2007, and that this is a response to the point raised of ***"a stay sought is of a decision already made and not in proceedings."***

In considering the arguments of both Learned Counsel, I will start by just re-producing the order I made on 30th August 2007. It reads,

"I will admit this matter for hearing during the court vacation and grant leave to file application for Judicial Review, but I decline to order the leave to operate as a stay, and I direct that the application for stay be served and heard inter-partes on 11.9.2007."

In making the above order, I clearly brought myself within Order LIII, (1) R (2) and (4), though under Rule 2 I did not impose any terms as to costs, and under Rule 4 I did not direct that the grant of leave do operate as a stay, but I ordered ***"otherwise"*** by directing that the application for stay be served and heard inter-partes on a date I gave in court.

In so ordering, I exercised my inherent jurisdiction under Rule 4 of Order LIII(1) of the Civil Procedure Rules which provides,

"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Judge so direct, operate as a stay of the proceedings in question until the determination of the application, or until the Judge orders otherwise (the underlining is mine). I did not find that this Rule prohibits a court from dealing with the matter of leave and stay in the manner in which I dealt with it".

I also relied on the provisions of the Law Reform Act, Chapter 26 Laws of Kenya, as the High Court derives the jurisdiction to issue orders of mandamus, prohibition and certiorari from it. It is the substantive law, and provides for rules on the matter of leave and not stay at Section 9, otherwise the

procedure for the issuance of the orders of mandamus, prohibition and certiorari is found in Order LIII of the Civil Procedure Rules.

Further and most importantly, in exercising my discretion, I was guided by the Constitutional provision at Sec. 60(1) which establishes the High Court as,

“a court of record which shall have unlimited original jurisdiction in civil and criminal matters, and such other jurisdiction and powers as shall be conferred on it by this Constitution or any other law” (the above underlining is mine).

There is also Section 65(2), of the Constitution, and Section 84(2), of the Constitution goes further whilst giving powers to the High Court for protection of fundamental rights provides,

“the High Court shall have original jurisdiction

(a) to hear and determine an application made by a person in pursuance of sub-section 91).

(b) To determine any question arising in the case of a person which is referred to in sub-section 3, and may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 – 83 inclusive”.

The question of jurisdiction such as the one taken by Mr. Majanja in this application has been the subject of many decisions, both from this Court and the Court of Appeal. My research in this area has revealed two recent decisions of this court which have made significant legal developments on this point. One is the decision of Rawal, J in **REPUBLIC vs CHIEF MAGISTRATE’S COURT, NAIROBI & ANOTHER EX-PARTE HINESH K. CHUTLASAMA**, delivered on 2nd February 2007.

A similar point of jurisdiction was raised before her as a preliminary point, and two of the same cases relied on, these were;- **REPUBLIC vs COMMISSIONER OF CO-OPERATIVES ex parte KIRINYAGA TEA GROWERS and SHAH vs RESIDENT MAGISTRATE, NAIROBI**,

The Learned Judge after considering several decisions both from this court, the Court of Appeal as well as other jurisdictions as appear in her Ruling, said the following:-

“With utmost humility, I am of the opinion, from the facts of the two cases relied on and observed by me hereinbefore that the observations made by the Court of Appeal in the aforesaid two cases were not made on the issues which were directly before the court for determination. At the risk of being repetitive or immodest, the orders made by Aluoch, J were not under attack before or for direct determination by the Court of Appeal. Thus in my understanding, there is no decision of the Court of Appeal on this issue. I must hasten to state that the observations made by the Court do deserve and exert the highest respect and I have to consider them as highly persuasive authorities...”.

Though decided by a Judge of concurrent jurisdiction, I am persuaded by this finding and I have decided to follow and adopt it.

As regards the 3rd authority of **REPUBLIC vs KENYA WILDLIFE SERVICE**, I noted that the Court of Appeal in dealing with the matter of stay being argued inter partes at a later date after the grant of leave, referred to its **“decisions”** in **R vs COMMISSIONER FOR CO-OPERATIVES & ANOTHER, and SHAH vs RESIDENT MAGISTRATE**, which two decisions **“were not made on the issues which were directly before the court”** as per Rawal, J, it follows that the authority of **REPUBLIC vs KENYA WILDLIFE SERVICES**, too, cannot be binding on this court but is of high persuasive value. I say this with utmost respect to the Court of Appeal.

As already stated in this Ruling, I exercised my discretion under Order LIII R(1) 4, of the Civil

Procedure Rules, the Law Reform Act, and the Constitution, as did Rawal, J in her said Ruling when she pointed out that Order LIII of the Civil Procedure Rules are made in pursuance of the provisions of Section 9 of the Law Reform Act, Cap 26 Laws of Kenya. In interpreting that section, the Learned Judge stated at page 16 of her Ruling that Section 9, particularly 9(b),

“does not make any provisions or does not make any mention as regards the procedure which includes the procedure concerning the said leave to operate as a stay. This sub-rule (1)(4) of Order LIII, can be said to have been made without any support from an Act of Parliament, however in my view, this may not be relevant,..... But I can safely say that even in the absence of the said sub-rule, there cannot be any impediments on the part of the court to grant the remedy of stay”.

The Learned Judge went further to say,

“Be that as it may what I intend to observe is that any restrictions on the inherent power of the court to grant appropriate orders deemed fit has to be sourced from the Constitution and an Act of Parliament cannot stifle that. However, I have observed that the language of sub-rule 1(4) does not in any event hinder the court’s jurisdiction to make an order that it shall adjourn the hearing of the application for stay to the inter partes hearing. What the court can do at the ex parte stage, it can do at the inter partes hearing”.

The Judge’s consideration above was supported by the observations made in the case of **ROSAFRIC LTD & 3 OTHERS – vs – THE MINISTER OF FINANCE MISC. C.A. NO. 1392 OF 2001** (unreported, that **“there is nothing in Order LIII of the Civil Procedure Rules which stultifies this court’s unlimited, original and inherent jurisdiction”**). This decision emphasized that the court should welcome the opportunity to be assisted by the opposite party at any early stage. I adopt the finding in the **Rosafric case**.

A second recent case that has dealt with the jurisdictional issue, is also a case from the High Court, a Ruling of Nambuye, J dated 24th September, 2007, i.e. **REPUBLIC vs PRINCIPAL MAGISTRATE’S COURT, BUSIA LAW COURTS**.

Here again, though a decision of a court of concurrent jurisdiction, I am persuaded by it and have decided to follow it on the issue of jurisdiction and prejudice. The Learned Judge **“agreed with Rawal, J as regards the principles of law that should guide the Judge faced with a similar situation”**, but went further to consider several other decisions of this Court and the Court of Appeal on the issue of jurisdiction and prejudice. On **SHAH vs RESIDENT MAGISTRATE**, particularly the Learned Judge said,

“What is lacking in that decision is guidance as to what criteria a judge would use to exercise his/her discretion to defer the whole matter to be heard inter partes and not to exercise her discretion to grant leave in the 1st instance and then defer the issue of leave to operate as a stay to be canvassed inter partes, more so when the underlying reason in the instances is the same, namely to alert the other side of the procedure to avoid surprise, get the respondent’s opinion and then give a fair ruling for ends of justice to both parties. This little observation is not meant to criticize the Court of Appeal’s decision, but just to point out possible lacunas to be filed by the Court of Appeal at an appropriate time in order to sharpen the tools of trade for the superior court in this area of law”.

The ruling of Nambuye, J also discusses at length the issue of **“prejudice”**, if at all caused to any party, by the court exercising discretion in granting leave and directing that the matter of stay to be heard inter partes. She found none.

I adopt the Learned Judge’s findings on the exercise of this court’s inherent and unlimited discretion in handling the jurisdictional issue on the matter of hearing the application of leave and stay, separately, I also adopt her finding on prejudice.

None of the parties before me complained that they were prejudiced by the order I made directing that the matter of stay be argued inter partes after I had granted leave ex parte.

From the points I have considered in this inter parte hearing for stay, I am satisfied that I had jurisdiction which I exercised in the manner I did, and I proceed to order the leave I granted ex parte to operate as a stay. This would no doubt affect the letter of 12th June 2007 written to the applicants by the 1st respondent. The letter which the applicants wish to challenge in their pursuit for an order of Certiorari.

The applicants are now at liberty to file a substantive application by way of Notice of Motion, for Judicial Review within the next 21 days. This should be heard in the relevant Division of the High Court.

Dated at Nairobi this 12th October, 2007

JOYCE ALUOCH

JUDGE