REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1297 Of 2005

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REPUBLIC :……………..…………………......................................………… APPELLANT

VERSUS

THE SENATE EXAMINATION DISCIPLINARY COMMITTEE:………………RESPONDENT

THE UNIVERSITY OF NAIROBI:……………...INTERESTED PARTY

EX PARTE

SHADRACK MUCHEMI MBAU:…………...…….. APPLICANT

JUDGEMENT

The Applicant, Shadrack Muchemi Mbau, a 4th year student in the Faculty of Commerce at the University of Nairobi was expelled from the University by a letter dated 25th July,2005 on the ground that he had been found guilty by the Senate Examination Disciplinary Committee of cheating in a University Examination.

Being aggrieved with the said decision the applicant after obtaining the requisite leave filed this Notice of Motion dated 12th September,2005 under the provisions of Order 53, Rules 3(1) of the Civil Procedure Rules seeking the following orders:-

1. An order of certiorari to remove into the High Court for the purpose of its being quashed the decision made by the Vice Chancellor of the University of Nairobi and the Senate on 25th July, expelling Shadrack Muchemi Mbau from the University of Nairobi.

2. An order of mandamus to remove into the High Court directed to the University of Nairobi to immediately admit Shadrack Muchemi Mbau to the University of Nairobi.

3. Costs of the Application be provided for.

The Applicant sets out 5 grounds upon which the reliefs are sought in the statutory statement dated 2nd September 2005. These are:-

(i) The vice-challencellor acted ultravires his powers as provided under the University Act Cap. 210 and under the University statutes (statute No.(iv) (d) 5 (ii).

(ii) The Applicant was denied a right to be heard by the Vice-chancellor and the University Council.

(iii) The Displinary Committee acted unfairly in acting partially.

(iv) The Disciplinary Committee took into account irrelevant matters and also failed to take into account relevant matters in arriving at their decision recommending the Applicant's expulsion.

(v) The Displinary Committee did not give notice or supply the Applicant with the alleged unauthorized material before the hearing thus conducted its enquiry in an intimidating manner.

In his verifying Affidavit, the applicant stated that in the year 2001, he completed the Kenya National Examinations for the Kenya certificate of Secondary Education and attained Grade B. He successfully applied to be admitted to the University of Nairobi to pursue a course in Commerce and was admitted by a letter dated 26th June, 2002. The Course was to commence on 1st July, 2002. The Applicant further stated that since his admission he has diligently studied and sat for his examinations upto the 4th year 1st semester examinations and his father has been paying his fees promptly.

The Applicant deponed that by a letter dated 29th April,2005 he was summoned to appear before the University Senate Examinations Disciplinary Committee on allegations of having cheated in an examination. The letter reads as follows:-

" Mr. Shadrack Muchemi Mbau

P.O.BOX 6754 – 003000

NAIROBI

25th April,2005

Dear Mr. Mbau,

CHEATING IN UNIVERSITY EXAMINATIONS

You are required to appear before the Senate Examinations Disciplinary Committee on 3rd May, 2005 at 9:30 a.m. in the Council Chamber. You are charged with cheating in a University Examination DFI 303. Financial Institutions and markets on 18th December,2004. You were caught with unauthorized material relevant to the examination. Further, you wrote answers (Question are, e and Question two b) on examination question paper belonging to another student, Beatrice Waithera Kamau

– D 33/8208/2001 to enable her cheat in the same examination contrary to rules and regulations governing the conduct of University Examinations.

Cheating in a University is a serious offence and is punishable by expulsion, if proven. It is in your own interest to appear before the committee and make your defence, otherwise the committee will deliberate and proceed to make decision with or without you.

Yours sincerely

F.K. ARAIGUA (MR)

SENIOR ASSISTANT REGISTRAR

EXAMINATIONS.

C.C.

Dean Faculty of Commerce."

The applicant also stated that after sitting for his 4th year 1st semester examinations, he received a letter by normal post dated 25th July,2005 informing him that he had been expelled from the University. The letter read as follows:-

"

"Mr. Shadrack Muchemi Mbau,

P. O. BOX 6754 – 00300

NAIROBI

Dear Mr. Mbau,

SENATE EXAMINATION DISCIPLINARY COMMITTEE

Reference is made to the above committee meeting held on 16th May,2005 which considered your case of cheating in a University Examination DFI 303: Financial Institutions and markets.

The Senate Examination Disciplinary Committee found you guilty of cheating in the University Examination. You were caught with unauthorized material relevant to the examination in the examination room. The Committee therefore recommended to the Vice-Chancellor that you be expelled from the University. That recommendation Vice-Chancellor on behalf of Senate, and you are therefore expelled from the University.

Yours sincerely,

S. MBALU (MR.)

ACADEMIC REGISTRAR

C.C.

Dean, Faculty of Commerce

Secretary, H.E.L.B.

Director, S.W.A.

Chief Medical Officer,

Deputy Registrar, Admissions. "

The Applicant contends that the Respondent, the University of Nairobi acted unfairly and in breach of its rules having not accorded him a fair hearing thus depriving him of his career opportunity. The Applicant denies he committed the offence leveled against him. He says that his father who is a policeman has been struggling to pay his fees and support the family and the expulsion will be a big blow to the family.

On its part, the Respondent did not file any Replying Affidavit and relied on the facts and documents presented by the Applicant in his application. This means that the facts are substantially agreed on by the parties, as they appear on record. The Respondent, however, filed a list of Preliminary objections. At the hearing counsel for the Respondent, Mr. Kipkorir and counsel for the Applicant Mr. Wandago agreed that the said preliminary objections would be argued as part of the Respondent's grounds of opposition in its submissions.

The said grounds raised were:-

1. That the prayer for certiorari cannot issue in the circumstances set out by the Applicant.

2. That the certiorari Order cannot issue as the Respondents' powers respecting conduct of students' examinations is not subject to outside supervision.

3. That, the order of mandamus cannot issue as the alleged violations of the Applicant's right are not provided for in the University of Nairobi Act, cap.210 nor the subsidiary legislation, the University of Nairobi statutes, 1991.

4. That, the Order of mandamus cannot issue as the decision whether or not to expel a student for examinations irregularities is the sole discretion of the vice chancellor.

5. That both the orders of certiorari and mandamus cannot issue against the Respondent's actions made to pursuant to its statutory powers and duties.

6. That the statutory statement is fatally defective.

7. That the Applicant has totally failed to lay a basis for his claim.

8. That the orders sought are not maintainable.

I have considered the Notice of Motion dated 12th September,2005, the statutory statement and the verifying Affidavit sworn by the Applicant. I have also considered the submissions by counsel and the authorities cited. Mr. Kipkorir, argued Ground 6 at the commencement of his submissions, quite correctly since it raises a point of law of preliminary nature. The said ground stated that the statutory statement is fatally defective. During submissions it became clear that this contention is made on the basis that the statutory statement substantially contains statements of fact and therefore evidence. It was argued for the Respondent that the statement under the provisions of Order 53, Civil Procedure Rules must restrict itself to the name, description of the applicant, the reliefs sought and the grounds relied upon (Rule 1 (2)). In this case, the statement contains 28 lengthy paragraphs headed – "B. The facts Relied Upon." The Respondent claims that the statement is a nullity on this ground. It is further submitted that the verifying Affidavit is brief and, therefore, in effect does not contain all the facts relied upon. These are purportedly set out in the statement in breach of the provisions of law.

I have carefully perused the statement and agree that most of it contain statements of fact which is evidentiary in value. Part B contains 28 detailed paragraphs including the events and proceedings that purportedly took place before the Senate Examinations Displinary Committee on 3rd May 2005 and 16th May,2005. <u>in CIVIL APPEAL NO.45 OF 2000 COMMISSIONER GENERAL KENYA REVENUE</u>

AUTHORITY –VS- SILVANO ONEMA OWAKI T/A MARENGA FILING STATION the Court of Appeal observed:-

"That much is clear from some of the matters in the statement accompanying the application for leave, which the Judge in his ruling, despite the statement the statements purportedly of facts being worthless, appear to put a lot of faith in. The hearted Judge decided the application for judicial review on the basis of inadmissible matters.

We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(z) of Order L III. This position is confirmed by the following passage from the supreme court practice 1976 Vol.1 at paragraph 53/1/7:

"The application for leave, "By a statement" – The facts relied on should be stated in the affidavit (see R.V. Wandsworth JJ., Exp. Read (1942) IK.B.281).

"The statement" should contain nothing more than the name and description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."

On the basis of this decision, I do hold that it was improper for the Applicant to set out the facts of the case in the statement as he did in paragraphs 1 to 28. All of the said facts should have been contained in the verifying Affidavit. Does this render the statement defective and a nullity as submitted by the Respondent? The statutory statement herein in part A contains the name and Description of the Applicant. Part C contains the Relief's sought and part D contains the Grounds upon which the Reliefs are sought. It is clear that apart from part B, the statement contains the requisite components of a valid statement as envisaged by Rule 1 (2). The facts ought not have been set out and included in the statement. This was unnecessary and irregular.

Upon considerations it is my view that this inclusion by itself does not render the statement defective or nullity. This offending portion is severable from the document and can be struck out without invalidating it. If paragraphs 1 to 28 are struck out, what is left is a proper and otherwise valid statement as all the necessary ingredients of a statement are there and remain intact. In such a case, the inclusion of the facts and /or evidence are not per se fatal to the document. There was no attempt to introduce any exhibits through the statement as has happened in other cases which have come before this court.

In exercise of this court's inherent jurisdiction and discretion, I do hereby strike out paragraphs 1 to 28 of the statement to expunge the offending portions. There shall be no prejudice to the Respondent as this court shall now not look at, refer to or rely on the said facts now struck out.

Where does this leave us? The court must now look at the verifying Affidavit. Does the verifying Affidavit contain such facts to sufficiently and reasonably lay down the facts in support of the Applicant's case before the court? The verifying Affidavit herein contains 12 paragraphs which I have perused. The facts are nothing near what has been struck out and they are brief in comparison but through it are introduced all the material letters and documents referred to by the Applicant. There is no doubt that the facts in the verifying affidavit are quite limited and a substantial part of the Applicant's vital evidence went out with the struck out a paragraph of the statement. Those ought to have been in the verifying Affidavit. Certainly, the application becomes rather much weaker. However, upon evaluation and analysis, I am satisfied that the facts contained in the verifying Affidavit and the exhibits produced taken together, still present a reasonable set of evidence with a reasonable probative value. This court is able to know and understand the Applicants case and testimony. These facts and exhibits are adequate to present the Applicant's case for purposes of judicial review. The Applicant apart from attempting to use the affidavit to verify the facts in the statement, made further factual statements under oath which capture what took place, however, brief. The exhibits produced speak for themselves and contain evidence of the actions of the Respondent and the decisions made.

I, therefore, hold that this court can decide this application on the merits of the statements and the verifying affidavit to the extent of what they are worth in law and in fact. For purposes of consistency, and good order I propose to deal with the grounds in the statement upon which the relief's are sought which are or ought to be underpinned on the facts in the verifying Affidavit.

The Applicant claims that he was denied a right to be heard by the Vice-chancellor and the University council. In the letter dated 25th April,2005 which is fully set out hereinabove, the Respondent summoned the Applicant to appear before the Senate Examinations Disciplinary Committee on 3rd May,2005 at 9:30 a.m. in the council chambers. The charges against him and which he was to face was fully set out in the said letter. It concluded as follows:-

" ………………………………………………………………………………

cheating in a University examination is a serious offence and is punishable by expulsion, if proven. It is in your own interests to appear before the committee and make your defence, otherwise the committee will deliberate and proceed to make a decision with or without you."

The Applicant in his verifying Affidavit does not depone or state whether he complied with the summons and appeared by the Senate Examination Disciplinary Committee. He does not state what took place on 3rd May,2005 and how the committee conducted itself. In his submissions, counsel for the Applicant stated from the Bar that the Applicant did not have the proceedings of the committee meeting since he was not supplied with these by the Respondent. He stated that the proceedings were in the hands of the Respondent and they ought to have supplied them to the court. This is a statement of fact and was not contained in the verifying Affidavit. This court cannot allow the Applicant's counsel to make statements of fact or give evidence. The Applicant had the opportunity and right to do so in his affidavit, he did not. Neither did he outline the events that took place at the meeting step by step, how the proceedings went and the conduct of the members of the committee, if any hearing of any kind took place etc. The verifying Affidavit was bare of this yet even in the absence of the proceedings, the court could possibly have decided the issue on a balance of probability. The court would have considered the explanation for the absence of the proceedings.

In the absence of statements in this regard, the court is unable to know what actually took place at the hearing. What this court can determine which I hereby do on a balance of probability is that the Applicant was summoned to appear before the Disciplinary Committee on 3rd May,2005, charges were framed and given to him and he was given an opportunity to defend himself. I do hereby hold that the Applicant was heard and his right in this regard was not denied.

The Applicant claims that the Disciplinary Committee acted unfairly in acting partially, that it took into account irrelevant matters and also failed to take into account relevant matters in arriving at their decision recommending the Applicant's expulsion. Further, it is alleged that the Disciplinary committee did not give notice or supply the Applicant with the alleged unauthorized material before the hearing thus conducted its inquiry in any intimidating manner. Sadly, the Applicant did not support any of these allegations with any facts or evidence. There is nothing in the verifying Affidavit to give credence or support to any of these allegations. The court has no knowledge of the facts that could have supported these allegations. As was referred to in the OWAKI CASE

Viscount Caldecote C.J. said inter alia :-

"………………………………………………………

and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit……"

In the light of the foregoing, I hold that in the absence of any facts or evidence to support the aforesaid allegations, I find no violation or breaches by the Respondents of the Applicant's rights as alleged. This

leaves the ground of law that the Vice-chancellor acted ultra vires his powers as provided under the University Act, cap 210 and under the University statutes (statute No. IV (d) 5 (II).The Applicant submitted that:-

· He was expelled by the Vice -Chancellor on recommendations of the Senate Examination Disciplinary Committee.

· The Disciplinary Authority is vested in the Vice-chancellor acting on behalf of the University Council and NOT the Senate.

· The Senate Examination Disciplinary Committee has no original jurisdiction to hear disciplinary matters.

· The Committee's functions is investigative for purposes of collecting evidence.

· The Vice chancellor could not in law sub-delegate the power to discipline to the Senate Examination's Displinary Committee or the Senate itself.

· The Applicant was not given an opportunity to be heard by the vice-chancellor who is the disciplinary authority.

In response to the said submissions, the Respondent also relies on provisions of the University of Nairobi Act and the University statutes made there -under. The University of Nairobi Act, chapter 210 of the Laws of Kenya, provides for inter alia establishment of the University and its control/government and administration. Section 24 of the said Act empowers the Council to make statutes generally for the government, control and administration of the University. Section 24 (1) (h) provides as follows:-

" 24 (1) in performance of its functions under the 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, and in particular for:-

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) Providing for or prescribing anything which, under this Act, may be provided for or prescribed by the statutes."

In exercise of its powers under section 24 of the Act, the council made the University of Nairobi statutes 1991. Statute 23, deals with University Examinations and provides inter alia that:-

"1. University Examinations shall be conducted under the control of the Senate.

2.

3.

3.

4. In the event of alleged examination irregularity, Senate shall appoint a committee which shall investigate the alleged irregularity. Any person involved in the alleged irregularity shall be required to appear before the committee in person. The chairman shall then report the findings of the committee to the Vice-Chancellor who, on behalf of the Senate, shall decide what further action may be taken."

It is the view of this court after hearing this counsels' submissions, that the Senate Examinations Disciplinary Committee was established under this provision – statute 23 (6). It is also the basis on which the Senate summoned the Applicant to appear before the said Committee. After hearing the case regarding the Applicant, the committee made its findings and referred it to the Vice-Chancellor. The committee after its deliberations and findings made recommendations to the vice-chancellor for the expulsion of the Applicant from the University.

The Applicant contends that the decision to expel him was made by the Senate Examination Disciplinary Committee and not by the vice-chancellor as required by the statutes. The Applicant claims that after the findings of the committee, he should have been called to appear before the vice –chancellor and be heard on the said findings before the Vice chancellor made his final decision on the matter.

I have considered the said arguments and the authorities cited. I do agree that the functions of the committee is investigative and fact-finding. However, I see nothing illegal, unlawful or improper for such a quasi – judicial body to make observations and recommendations after its findings when making a report to the relevant authority, in this case the vice chancellor. Once they make this findings and recommendations, their functions and role stops there. The final decision is that of the Vice chancellor. Such a decision is made strictly independently and without any direction. He may accept the findings and recommendations or he may reject them. He may also reach a different decision from that recommended. The recommendations are not binding on him. This is as it should be.

I do not agree, that after the Vice- chancellor received the report of the findings of the committee he was under a duty to hear the Applicant whether in person or in writing before making his decision. From reading statute 24 (6), the vice chancellor would be entitled to do so if in his discretion and wisdom he decided to do so. However, there is nothing in the said provision that suggests or makes it a requirement that there should be a hearing by the Vice-chancellor. If such a requirement existed or was envisaged the statute should have expressed it positively and clearly. I am of the view that the Applicant has misconstructed the provisions herein.

I therefore, do hereby hold that the Vice-chancellor was perfectly entitled to accept the recommendations of the committee and to expel the Applicant from the University. Neither the Senate nor the vice chancellor acted Ultra vires the Act and statutes. The Applicant referred to the Regulations governing the organization, conduct and Discipline of students and in particular Regulation IV at P.638 of the statute. This court finds that the said Regulations relate to the general discipline of students and do not concern examination irregularities which is specifically and separately provided for under section 24(6). Under Regulation IV, referred to above, there are specific and prescribed Disciplinary offences, procedures and the committees or tribunals which have jurisdiction to deal with them. An appellate procedure is also stipulated. Examination irregularities are not included in the said list of Disciplinary offences. It is my view that such irregularities are deemed to be extremely serious and grave that they are dealt with at the Senate level at the first instance before it is referred to the Vice-chancellor on behalf of the University Council itself, the highest administrative institution in the University.

In conclusion, I do hereby find and hold that the Applicant has not proved his case against the Respondent and the application herein is not sustainable. I do hereby dismiss the Notice of Motion dated 12th September,2005. This is a very sad and unfortunate case and the court sympathizes with the Applicant who was in his very last semester to complete his degree after 4 years at the University. The charges he faced were definitely quite serious and the University must have been aggrieved deeply for it to give the

highest penalty of expulsion. The Court feels for the Applicant and his parents. Due to this and the fact that the University, is a public body funded by the Kenyan tax-payer and also that the Applicant has already suffered enough, I do hereby order that each party bears his own costs.

DATED AND DELIVERERD AT NAIROBI ON THIS DAY OF 17TH MARCH, 2006

MOHAMMED K. IBRAHIM

JUDGE