



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

**Misc Civ Appli 712 of 2005**

**REPUBLIC.....APPLICANT**

**VERSUS**

**EGERTON UNIVERSITY.....RESPONDENT**

**EX-PARTE**

**ROBERT KIPKEMOI KOSKEY**

**RULING**

The applicant filed a notice of motion under **Order LIII rule 3(1) and (2)** of the **Civil Procedure Rules** and **Section 8(1)(2)** of the **Law Reform Act**. He sought for an order of *certiorari* to remove into this court for purposes of quashing, a decision of the Senate of the Egerton University, which was communicated to him by the Registrar (Academic Affairs), vide a letter dated 4<sup>th</sup> July 2005, which discontinued and/or expelled the applicant from the University. He also sought for an order of *mandamus* to compel the respondent to re-admit him into the University for purposes of graduation.

In his affidavit in support of the said application, the applicant deposed that he was enrolled as a student in the Faculty of Education (Science) at Egerton University and was taking a course of study towards attainment of a Bachelor of Education (Science) Degree. He further deposed that he completed his four year degree course and cleared from the University and was issued with a Clearance Form dated 6<sup>th</sup> March 2005. The Registrar (Academic Affairs) hereinafter referred to as “*the Registrar*” also certified the applicant’s completion of his studies and issued him a completion certificate dated 31<sup>st</sup> March 2005. The applicant was, however, accused of examination malpractice which he was said to have committed on 21<sup>st</sup> October 2003. He was summoned to appear before the Faculty of Science Students Disciplinary Committee that was held on 29<sup>th</sup> October 2003. He received the notice although he said that the same was addressed to one Mr. Omondi and he attended the committee meeting and made his representations. He lamented that the decision of the committee had not been communicated to him todate.

He further deposed that on 16<sup>th</sup> March 2004, he received a letter dated 16<sup>th</sup> March 2004 which summoned him to another hearing of the aforesaid committee that was to be held on the same day, the 16<sup>th</sup> March 2004 at 9.00 a.m. He said that he received the letter at 2.00 p.m., sometime after the meeting went on in his absence. Upon receipt of the said notice, the applicant met the chairman of the disciplinary committee

and was informed that the hearing went on in his absence. The applicant explained that he received the letter summoning him for the said meeting after the finalisation of the meeting of the Disciplinary Committee and that he was sitting for a chemistry examination between 8.30 a.m. and 11.30 a.m. on the material day and only became aware of the notice after the end of the said examination. He said that the notice had been slipped through the underside of the door to his room in his absence.

The applicant remonstrated that on the 25<sup>th</sup> March 2005, he received a letter dated 15<sup>th</sup> March 2005, written by the Registrar which advised him that he had been expelled from the University. The letter stated that on 2<sup>nd</sup> September 2004 the applicant appeared before the Faculty of Science Students Disciplinary Committee regarding the aforesaid examination malpractice and that after the committee's deliberations, he was found guilty of the offence of examination malpractice. It had therefore been recommended that the applicant be expelled from the University. The recommendation was approved by the Senate on 3<sup>rd</sup> March 2005 and therefore he was no longer a student of the University.

The applicant deposed that he was never notified of the Disciplinary Committee meeting of 2<sup>nd</sup> September 2004 and that he never appeared before the said committee on the said date. Upon receipt of the expulsion letter, the applicant preferred an appeal to the Senate vide a letter dated 30<sup>th</sup> March 2005 which he addressed to the Secretary, Egerton University Senate. In his said appeal, the applicant gave an explanation of what transpired in the examination room on 21<sup>st</sup> October 2003 when he was alleged to have engaged in examination cheating. It is important to set out briefly what he stated therein:-

He said that he attempted a mathematics question and he got stuck and decided to tackle another question altogether which required a logarithm table which he did not have. While in that state, the Invigilator went over and asked him why he was not concentrating and before he could answer, the Invigilator pulled the applicant's answer sheet and the same got torn. He said that the Invigilator checked the answer sheet and found nothing and went outside to make a phone call to the chairman of Mathematics Department, Dr. Ali, who in turn informed a Mr. Mwangi. The two then went and asked the applicant if he had any written material in the examination room and he told them that he had none. The applicant said that Dr. Ali and the Invigilator insisted that he had the material and that he possibly chewed it up when the Invigilator went out to make the phone call. The applicant said that he was compelled to write a statement admitting that he was in possession of unlawful written material in the examination room and that he had to make such a statement before he could be allowed to continue with the examination.

The Senate considered the applicant's appeal without calling him to make any representations before it and rejected the same. The decision of the Senate was communicated to the applicant vide a letter dated 4<sup>th</sup> July 2005. It is that decision that is the subject matter of these judicial review proceedings. The applicant's main contention is that the Senate rejected his appeal when it was evident that he had not been summoned to attend the disciplinary committee meeting of 2<sup>nd</sup> September 2004. He alleged that there was breach of a cardinal principle of natural justice which required that he be accorded a fair hearing and be given an opportunity to state his case.

The applicant further claimed that the respondent lacked authority to expel him and cited **Section 7.2** of the **Examination Code of Conduct and Discipline** which is found in the **Egerton University Statute XXIV**. He stated that the worst that the respondent could do if he was guilty of examination malpractice was to discontinue or suspend him for a period of upto three years. He further stated that the disciplinary mechanism of the respondent as set out in the said statute disregarded principles of natural justice as they did not accord an accused student a fair hearing and a right of appeal to an independent and impartial tribunal. I will revert to the provisions of the aforesaid statute later.

The respondent filed a replying affidavit and a further affidavit in response to the applicant's affidavit. Both affidavits were sworn by Professor Nephath Justus Kathuri, the Registrar (Academic Affairs). He deposed that on 21<sup>st</sup> October 2003, the applicant, while sitting for his mathematics 313 CAT 1, was suspected to have committed serious examination malpractices in that he brought into the examination room unauthorised material relevant to the examination he was sitting for and covered up the said examination malpractice by destroying the unauthorized material after it had been discovered. For the

said reasons, the respondent set in motion appropriate disciplinary steps as against the applicant. He further stated that according to **Egerton University Statute XXIX**, a student found guilty of examination malpractice as stated hereinabove was liable to discontinuation or expulsion from the University. That following the applicant's examination malpractice, a report was duly made by the Invigilator to the Faculty of Science Disciplinary committee through the Dean, Faculty of Science which investigated the allegation and forwarded its recommendations to the University Senate via the Faculty of Science Board. The applicant was summoned to appear before the Faculty Disciplinary Committee and give his submissions on the issue and he did so. Professor Kathuri further stated that the Disciplinary Committee made its recommendations to the Faculty Board and the applicant was summoned on several occasions to appear before the said Board but had failed to do so. The Faculty Board made its recommendations to the Senate and the Senate, having considered the said recommendations and the applicant's appeal, rejected the same and resolved to expel the applicant from the University. The deponent annexed to his affidavit a letter dated 15<sup>th</sup> March 2005, which was addressed to the applicant. It stated that on 2<sup>nd</sup> September 2004, the applicant appeared before the Faculty of Science Students Disciplinary Committee regarding the examination malpractice and after deliberations, the applicant was found guilty as charged and it was recommended that he be expelled from the University. However, the applicant denied having been summoned by the Faculty of Science Students Disciplinary Committee on 2<sup>nd</sup> September 2004.

The Registrar also annexed minutes of the said Disciplinary Committee Meeting held on 16<sup>th</sup> March 2004. The said minutes showed that the committee considered the applicant's issue and was satisfied that the applicant was guilty of examination malpractice and recommended his discontinuation. Its decision was based on the representations that were made by the applicant, the Invigilator and the Chairman of Mathematics Department, Dr. Ali, during the meeting held on 29<sup>th</sup> October 2003. The applicant admitted that he had attended that first meeting and was given an opportunity to be heard and had explained his case. There were also minutes of the Faculty of Science Board meeting held on 2<sup>nd</sup> February 2005, where it was resolved that the Senate was to decide on the fate of the applicant and one other student, a Mr. Omondi, who had also been found guilty of examination malpractice. Minutes of the Senate meeting held on 3<sup>rd</sup> March 2005, which were also annexed to the further affidavit of Professor Kathuri showed that the Senate reached a unanimous decision that the applicant be discontinued from the University as per its **Statute XXIX D.3.1(a)**. Before it arrived at the said decision, the Senate also considered the representations that were made by the applicant when he appeared before the Faculty of Science Students Disciplinary Committee, the evidence that was adduced against him by Mr. Otieno, Invigilator, and Dr. Ali, Chairman, Mathematics Department. In light of the above, the respondent stated that it had not breached the rules of natural justice.

In a further supporting affidavit that was sworn by the applicant, he stated that the respondent had not annexed to his affidavit the **Statute** which it referred to as **XXIX** which he was alleged to have breached. He further stated that the respondent failed to state the specific dates on which he purportedly appeared before the Faculty Disciplinary Committee. He further stated that the Senate approved his discontinuation and not expulsion. He therefore urged the court to grant the orders of certiorari and mandamus in terms of the notice of motion. Mrs Wanderi for the applicant and Mr. Gachui for the respondent made brief submissions in support of their respective client's cases. Regrettably, none of them cited any case law or text in support of their submissions.

I have carefully considered the affidavits that were filed by both parties as well as the submissions made by their respective counsel. I have also considered the provisions of the **Egerton University Act** and the **Rules** made thereunder and in particular **Egerton University Statute XXIV** which was annexed to the applicant's affidavit as annexure '**RKK8**'. These are the Rules and Regulations for the undergraduate Degree and Diploma Programmes.

**Section 7.2** of the aforesaid **Rules** and **Regulations** deals with disciplinary procedures and penalties. Sub-section (a) provides as follows:-

***“Any cases of cheating or malpractice in University Examinations shall be immediately reported, in writing, by the Invigilators through the Chief Internal Examiner (Chairman of Department), to the***

***Dean of the Faculty where the student is registered for investigations by the Faculty student Disciplinary Committee which should include submissions by the student involved, the Invigilators, and the Examiners.”***

**Sub-section (c)** thereof states that the findings of the Faculty Student Disciplinary Committee investigating the case should be reported, through the Dean, to the Faculty Board of Examiners and the recommendations thereafter should be forwarded to the Senate. Under **sub-section (d)**, where the Senate is satisfied that the alleged offences were committed, the accused student “***shall be discontinued or suspended for a period of upto three years, or warned depending on the gravity of the offence***”. Discontinued students are allowed to appeal within a period of one year to the Senate. **Section D.3.1(a)** of the same statute defines Examination malpractice to include copying or reading from another candidate’s script or from any unauthorised source and bringing into the examination room any unauthorised materials relevant to the examination. The **Section** further states that such academic malpractices “***are considered serious and any student guilty of committing them shall be liable to discontinuation or expulsion from the University***”.

From the depositions made by the applicant, it is not in dispute that he was alleged to have engaged in examination malpractice on 21<sup>st</sup> October 2003. The Invigilator, Mr. Omondi, made a report to Dr. Ali, the Chairman of Mathematics Department and subsequently a report was made to the Dean of the Faculty of Science. Investigations were conducted by the Faculty Student Disciplinary Committee. The said committee considered the submissions which the applicant made on 29<sup>th</sup> October 2003. According to the provisions of **sub-section (c)** as stated hereinabove, the applicant was not required to make any representations to the Faculty Board of Examiners before it made its recommendations to the Senate. Even though the applicant deposed that on 16<sup>th</sup> March 2004, he received another letter dated 16<sup>th</sup> March 2004, summoning him to appear before the Faculty of Science Students Disciplinary Committee on 16<sup>th</sup> March 2004, the said letter was actually dated 10<sup>th</sup> March 2004. It was not clear why he was required to appear before the said committee again, having earlier attended the committee on 29<sup>th</sup> October 2003 when he made his representations.

According to the minutes of the Faculty of Science Students Disciplinary Committee Meeting that was held on 16<sup>th</sup> March 2004, it was reported that the Invigilator noticed that the applicant appeared to be nervous and on checking he was found to be in possession of notes which were written in pencil on a plain paper. When the Invigilator tried to retrieve the paper, the applicant restrained him by holding his hand and that attracted the attention of other students so he left to go and inform Dr. Ali, the Chairman of Mathematics Department. The applicant later wrote a statement admitting that he had chewed the paper on which he was alleged to have written some notes. Dr. Ali indicated that the applicant approached him severally asking for forgiveness but he was informed that the matter had been forwarded to the Dean of the Faculty.

Although the Senate indicated that the applicant breached **Egerton University Statute XXIX D3.1(a)**, the respondent did not annex a copy of the said Statute. I believe this was a typographical error and it was intended to be **XXIV D3.1(a)**. However, for purposes of judicial review, what is important for this court to consider is whether the disciplinary procedure as laid down in **Egerton University Statute XXIV Section 7.2** on pages 8 and 9 of the said statute was followed. It is not the function of this court to probe into the accuracy, truth or otherwise of the allegations of examination malpractice that were alleged by the respondent against the applicant. The court is interested in knowing whether the rules of natural justice were observed by the respondent in the conduct of its investigations as against the applicant. It has been held that Judicial Review is not an appeal from a decision, but a review of the manner in which the decision was made, see ***CHIEF CONSTABLE OF THE NORTH WALES POLICE VS EVANS [1982] 1 WLR 1155***. I find that the applicant was given an opportunity to be heard by the disciplinary committee. As was held in case of ***BOARD OF EDUCATION VS RICE [1911] AC 179***, a person who is facing accusations such as the one that the applicant herein faced has to be given an opportunity to be heard. That can be done orally or in writing. The applicant said that the Senate could not consider his appeal fairly since it was going to consider an appeal against its own decision and that was contrary to the rules of natural justice. But I do not agree with him. The Senate is a creature of the **Egerton University**

**Act** and its composition and powers are clearly set out in the Act and it was duly mandated to take the decision which it did upon consideration of recommendations made to it by the Faculty Board of Examiners. The Senate has been given power to consider appeals made by discontinued students. The Senate considered the appeal and by a letter dated 4<sup>th</sup> July 2005, the Registrar informed the applicant that the Senate had not seen any new evidence that had been brought up by the applicant. I equally do not agree that the Senate had no power to expel the applicant from the University. **Sub-section (d) of Section 7.2 of Egerton University Statute XXIV** gives power to the Senate to discontinue a student if the Senate is satisfied that the student committed an offence of cheating or examination malpractice. In my view, in the context of this matter, there is no difference between discontinuation and expulsion.

In **NYONGESA & 4 OTHERS VS EGERTON UNIVERSITY COLLEGE [1990] KLR 692**, the appellants, who were students of the respondent University, appealed against the High Court decision refusing to issue an order of **mandamus** against the University to compel it to release their results for Diploma Examinations which they had sat for and to be awarded the relevant certificates. The University justified the disciplinary action which it had taken against the appellants contending that they were lawfully expelled before the end of the academic year and were thus not entitled to results or the award of certificates. The University further stated that the appellants undermined the authority of the institution by staging an unlawful strike which led to postponement of terminal examinations for first and second year students. It further stated that the Registrar wrote to each of the appellants to inform them about their alleged misconduct and to convey the decision of the Disciplinary Committee and of the Board that the appellants had been expelled from the college. However, the appellant students had not been given an opportunity to be heard. The Court of Appeal held that each of the appellants was required to have been given an opportunity to be heard so that they could state their respective cases before the decision was arrived at. There was therefore, a failure of natural justice.

The facts in the present case are different from those cited in the aforesaid decision because in this matter the applicant was given an opportunity to state his case before the Disciplinary Committee and his appeal to the Senate was also considered. In **NYONGESA & 4 OTHERS VS EGERTON UNIVERSITY COLLEGE** (supra), Nyarangi JA held as follows:-

*“Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”*

I would borrow the words of Nyarangi JA and equally state that in this matter it would be improper for this court to interfere with the decision that was reached by the respondent as it has not sufficiently been shown that there was any breach of the rules of natural justice. Having so held, I must state that one issue that I found rather disturbing was that although the examination malpractice that ultimately caused the expulsion of the applicant from the respondent University was committed on 21<sup>st</sup> October 2003, and the applicant was summoned before the Disciplinary Committee on 29<sup>th</sup> October 2003, the final decision by the Senate was not taken until 3<sup>rd</sup> March 2005, almost two years later. That delay was not explained by the respondent. In response to that issue, the respondent’s advocate submitted that although admittedly there was some considerable delay in discontinuing the applicant, the respondent was justified in doing so and could even have rescinded any Degree which may have been issued to the applicant, having come to the conclusion that the applicant had committed an examination malpractice. He referred the court to the provisions of **Statute XXIV Section D.3.2(g)** dealing with disciplinary procedures and penalties. The same states that:-

*“The University may rescind any Degree or Diploma awarded to a graduate who, while registered in a particular programme, committed an academic offence which if it had been detected before graduation, would have resulted in expulsion. Notification of a rescinded Degree or Diploma shall be communicated to all relevant parties.”*

In my view, it is desirable that disciplinary matters, which may have such serious consequences as discontinuation of studies, be dealt with expeditiously by the respondent. I am, however, alive to the fact that the disciplinary procedure as outlined in **Statute XXIV Section 7(2)** may take some considerable period of time before a final decision is arrived at.

In conclusion, I find that the respondent did not breach the rules of natural justice and there is no proper basis upon which this court can grant the orders that were sought by the applicant. The applicant's application is therefore dismissed with costs.

DATED, SIGNED and DELIVERED at Nakuru this 17<sup>th</sup> day of November 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence of Mrs. Wanderi for the applicant and Mr. Gachuhi for the respondent.

**D. MUSINGA**

JUDGE