REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1118 OF 2003

LEMPAA VINCENT SUYIANKA ……..……..1ST PLAINTIFF

NYANDURO GEORGE NICODEMUS ……..…….. 2ND PLAINTIFF

WAHOME ISAAC THUKU …… 3RD PLAINTIFF

MAINA CHARLES ……..……..…… 4TH PLAINTIFF

OTIENO GEORGE ……..……..5TH PLAINTIFF

VERSUS

KENYATTA UNIVERSITY ……..……1ST DEFENDANT

GEORGE ESHIWANI ……...…..…….2ND DEFENDANT

JOHN SHIUNDU ……...…… 3RD DEFENDANT

RULING

1. The Background

In the background to the instant interlocutory matter is a suit filed by plaint, on 3rd November, 2003. The essential claim in the suit is that the plaintiffs were wrongfully suspended from their courses of study at Kenyatta University, and their constitutional and legal rights were thereby denied; and so they seek reparations. To that claim, the defendants filed their statement of defence on 4th December, 2003; they deny all allegations of denial of due process and of fundamental freedoms on their part.

Even as the suit remained pending, the defendants, on 20th January, 2004 filed their Chamber Summons application dated 13th January, 2004. This application was made by virtue of Order VI rule 13 of the Civil Procedure Rules, and was praying that the plaint be struck out with costs to the defendants for non-compliance with Order VI rule 3.

Before the defendants' application could be set down for hearing, the plaintiffs, on 3rd March, 2004 filed their Notice of Motion dated 27th February, 2004. This application is made under sections 60, 71, 74, 77(8), 77(9), 77(10), 78, 79(1), 80 and 82 of the Constitution, as well as rules 10(a) and (b) of the Constitution of Kenya (Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 and section 3A of the Civil Procedure Act (Cap. 21). The plaintiffs' prayer is that –

"the defence dated 3rd December, 2003 and filed in Court on 4th December, 2003 be struck out as not disclosing any or any reasonable defence to the plaintiffs' claim and is merely calculated to deny the plaintiffs a fair hearing within a reasonable time";

or in the alternative,

"the defence dated 3rd December and filed in Court on 4th December, 2003 be struck out as being frivolous, vexatious and calculated to embarrass or delay the trial".

The plaintiffs pray that judgment be entered in their favour as prayed in the plaint, and the suit be fixed for assessment of damages. They also pray for costs.

When the two applications came up before me on 22nd March, 2004 a consent order was made consolidation them for purposes of hearing. Hearing began on 29th April, 2004, when learned counsel, *Ms. Yieke* represented the defendants while learned counsel, *Mr. Imanayara* represented the plaintiffs.

2. Submissions

Ms Yieke submitted that the plaint disclosed no cause of action and did not comply with Order VI, rule 3 of the Civil Procedure Code. The said rule thus provides:

"3.(1)….. every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits."

The contention here was that the plaint was in bad form, for prolixity and inclusion of material that was in its very nature evidentiary.

Counsel submitted that the complaint of the plaintiffs, who were students at the defendant University, was that certain disciplinary proceedings had gone against them; but this could not qualify as a cause of action. *Ms Yieke* contended that a genuine cause of action could only sound in a situation such as: breach of contract; tortuous acts; debt recovery; or harm to property – and the plaintiffs had not disclosed any of these and so they had no cause of action.

Such a listing of causes of action, with due respect, could not possibly lay down the entire range of legal foundations upon which a plaintiff may move the Court. Existing causes of action would appear to be more numerous; and in any case, the range cannot be limited on the basis of hypotheses.

Counsel made reference to the Kenyatta University Act (Cap. 210 C), which describes itself as –

"An Act of Parliament to establish the Kenyatta University and to provide for the control, government and administration thereof; and for connected purposes".

She submitted that this Act grants to the University sub-legislative powers to administer itself, and by virtue thereof the University is empowered to make by-laws taking various forms. Counsel submitted that the University is independent and bears no sectarian affiliations. She stated that Kenyatta University, in exercise of its duly conferred powers, resolves disputes in a quasi-judicial manner and, in particular, does not condemn any of its members without first giving a hearing. This contention was followed with the submission that the plaintiffs if genuinely aggrieved, should have sought orders of *judicial review* against Kenyatta University, rather than proceed by plaint. Counsel was in effect arguing that the plaintiff had no recourse, as it would not *now* be possible to proceed by judicial review since the student-plaintiffs had already gone through their course at the University and graduated.

Ms Yieke challenged the position of the plaintiffs for not responding to the defendants' Chamber

Summons of 13th January, 2004 and preferring instead to file the Notice of Motion of 27th February, 2004. This is an intriguing point which needs to be resolved at this point. From a technical standpoint, the defendant's complaint would be a valid one. They were the first to move the Court for interlocutory relief; they did so by filing the said Chamber Summons; there was no reply. What is the legal position, considering that the plaintiffs' Notice of Motion came only later, being filed on 3rd March, 2004?

On pure technicality, the defendants would be the winner at that point in time; except that their Chamber Summons never came up for hearing until it was joined in the hearing list by the plaintiffs' Notice of Motion of 27th February, 2004; and then, on 22nd March, 2004 the order was made that the two applications be *consolidated*, so that in effect only *one* application was now before the Court. There was an inherent setting for the consolidation of the two applications : the defendants' Chamber Summons was praying for the striking out of the plaint, with judgment entered for the defendants; the plaintiffs' Notice of Motion was praying for the reverse. I would have held in these circumstances that interlocutory justice could only be attained by retaining both applications and hearing them together.

Counsel for the defendants contended that their statement of defence dated 3rd December, 2003 did carry triable issues which ought to proceed to full hearing and should not be struck out *in limine*. In support of this contention, counsel cited the Court of Appeal decision in ***Edgar Ogechi & 12 others v. University of Eastern Africa, Baraton***, Civil Appeal No. 130 of 1997 and the High Court decision, ***Geoffrey Sidika v. Kenyatta University***, HCCC No. 153 of 2003. Counsel remarked that both these decisions had taken note of the fact that the University has, reposed in it, sub-legislative powers by virtue of which it may lawfully conduct disciplinary proceedings against its students. Counsel contended that it is on the basis of such powers that the defendants had taken decisions, and that they had allowed the full play of natural justice in the process.

Mr. Imanyara for the plaintiffs stated the purpose of the suit as, *to obtain damages for breach by the defendant of fundamental rights guaranteed in the Constitution*. Learned counsel submitted that the plaintiffs had been suspended from the University while being denied the due process of the law, and that this denied them their right to education, with many adverse impacts on their other constitutional rights. He submitted too that the suspension of the plaintiffs following their participation in a peaceful demonstration, had amounted to an arrogation by Kenyatta University of judicial powers which were then applied wrongly to compromise the constitutional rights of the plaintiffs.

Counsel stated the ground for seeking the striking out of the statement of defence, as that *there were matters of fact which the defendants should have admitted, but when they failed to make the expected admissions the plaintiffs had on 8th December, 2003 requested further and better particulars*. Although the defendants had purported to give such particulars on 12th January, 2004 their response amounted to no more than *general statements*. They did not even answer the most basic questions, such as disclosing *when* the impugned disciplinary proceedings took place. Instead of furnishing further particulars, counsel contended, the defendants chose to file a Chamber Summons (of 13th January, 2004) seeking to strike out the plaint; and counsel submitted that the Chamber Summons was based on grounds which were untrue. Counsel noted that the *Chamber Summons had no supporting affidavit, but was instead grounded on grounds of opposition*, which claimed immunity for some of the officers on the basis that they were acting on behalf of the University. Counsel stated that the said officers had not been sued in their personal capacities but *in their official capacities*.

Counsel made a presentation of the main elements in the plaint. There had been public demonstrations in the streets of Nairobi on or about 3rd February, 1998, to protest tribal clashes which were then taking place in parts of the Rift Valley Province. Two days later there was a newspaper report that one ***Michael Muthumbi,*** a student at Kenyatta University, had been killed in the said clashes in the Rift Valley. This report led to a demonstration at the Kenyatta University campus, by the student community. The second defendant responded by closing the University campus and ordering all students to vacate; and he purported to act on behalf of the University Senate. He then, on the same day, made a press statement. Subsequently, on 15th February, 1998 the plaintiffs and five other students were mentioned in a media report to be required to report to the third defendant on 16th February, 1998 "without fail". The notice,

however, was not personally served on the students whose names were mentioned. There were media reports on 17th February, 1998 that the first defendant had "grilled" students over the demonstrations that had led to the closure of the University. On or about 21st February, 1998 the third defendant published a re-opening notice for the University, but indicated that some students "who have been advised otherwise" were not to report back. It was not indicated to the plaintiffs that they were in the excluded category of students; but they were kept out at the gate when they endeavoured to re-enter the University. They later learned from the media that they had been suspended from the University.

The plaintiffs plead that, at no time prior to the said suspension, were they given any, or any reasonable or sufficient opportunity to make representations regarding their intended suspension. They plead that the decision to suspend them and thereby prevent them from pursuing their degree courses was illegal, arbitrary, and intended to undermine their constitutional rights. They plead that they were denied due process and other fundamental freedoms and rights contained in Chapter V of the Constitution.

These pleas are fleshed out in the affidavit of *Lempaa Vincent Suyianka* dated 27th February, 2004 in support of the Notice of Motion of the same date. This affidavit is to be taken together with the grounds stated in support of the Notice of Motion. In those grounds it is stated as follows:-

> (a) the defence filed in the suit does not disclose any or any reasonable or sufficient answer to the plaint, and is merely calculated to delay, embarrass and delay the conduct of a fair hearing within a reasonable time;
>
> (b) the defence does not disclose any, or any sufficient grounds to warrant the grant of the prayer for dismissal of the plaint with costs;
>
> (c) the contents of the various paragraphs of the defence do not answer the specific averments contained in the paragraphs of the plaint;
>
> (d) the defence filed is scandalous, frivolous, vexatious and an abuse of the process of the Court and is otherwise calculated to delay or embarrass the fair trial of the suit;
>
> (e) the particulars filed by the defendants in response to the plaintiffs' request for particulars are merely vexatious and/or scandalous and/or frivolous.

Learned counsel, Mr. Imanyara stated that the election made by the plaintiffs to move the Court by virtue of the fundamental rights provisions of the Constitution, was in no way a departure from the rules of procedure, especially since *section 84 of the Constitution empowered the Court to issue any writ*. He cited in support of this proposition the High Court's decision in ***Dominic Arony Amolo v. The Hon. The Attorney-General***, Misc. Application No. 494 of 2003. In that case the following passage appears in the decision of the Honourable Mr. Justice Hayanga (at p.5):

> **"Here, the fundamental rights are themselves in the Constitution and the Constitution says that any inconsistent provision of any law is void to the extent of its inconsistency. Is barring access or limiting time in an Act a feature of inconsistency? Here unless the Constitution itself limits the prosecution of those rights no statute should by implication bar it. Here the law of limitation has not reserved for itself the liberty to circumvent the prosecution of these fundamental rights".**

The same principle of expansiveness in the interpretation of the Constitution, in relation to the enforcement of constitutional rights, is found in the decision of the High Court Constitutional Bench in *Jackson Ekaru Nakusa v. Paul K. Tororei & 2 others*, E.P. No. 4 of 2003. In that matter the three-judge Bench cited with approval from the statements of M.V. Peaslee in *Constitutions of the World:*

> **"The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time".**

Their Lordships then remarked:

> "**Society is not static. It keeps on changing. Interpretation of the Constitution must keep pace with changing societal circumstances to give meaning to what is intended".**

The learned judges further remarked:

> **"Even if it be at the risk of appearing intransigent 'sentinels' of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional rights".**

Counsel submitted that the participation by the plaintiffs in demonstrations against public wrongs and violations of the human rights of local people in the Rift Valley, was in every respect proper, and the plaintiffs were entitled to express themselves in this way; so that it would be a violation of their rights if they were deprived of their University education, or the same interrupted, merely because of the fact of their public stand on such happenings in the Rift Valley. In this regard counsel relied on the High Court Constitutional Bench decision in ***Kenya Bankers Association v. Minister for Finance & The Attorney-General***, Miscellaneous Civil Application No. 908 of 2001. This decision still underlines the expanded frame to which matters constitutional belong, and the more unrestricted character of such claims as can lawfully be made by an applicant where constitutional issues are involved. The following passage in the judgment is relevant:

> **"Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the Court to seek judicial intervention to ensure that the sanctity of the Constitution…. is protected ……. We state with a firm conviction that, as part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary rule of Anglo-saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from."**

Counsel argued that the participation of the plaintiffs in the demonstrations against violence in the Rift Valley was a public gesture to be upheld. And he quoted the legal context of that public concern as lying in the appointment by H.E. The President of a Judicial Commission to inquire into the tribal clashes in Kenya (***Gazette Notice*** No. 3312 of 1st July, 1998).

Counsel went further to urge acceptance of the perfect constitutionality of that which the plaintiffs, along with other students, had done to demonstrate their abhorrence of the tribal clashes which had caused so much injury to people and undermined their constitutional rights intermittently, right through from the time of the advent of the plural political-party system in 1991. He cited the following passage from the decision of the U.S Chief Justice in *Miranda v. Arizona*, 384 U.S 436; 16L.ed. wnd 694 (1966):

> **"Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachment on individual liberty. They knew that ….. illegitimate and unconstitutional practices get their footing….. by silent approaches and slight deviations from legal modes of procedure".**

The picture presented is that *a clear wrong had been committed by the defendants against the plaintiffs, a wrong transcending the sphere of merely technical breaches and assuming the plane of major injuries to constitutional rights; that the defendants have placed hardly anything on the table as an indication of the remotest possible recompense; and that the defence claims are merely an abuse of court process. A case is made for judicial review by way of plaint constructed around constitutional rights;* and this approach is not to be viewed as novel, as it has been used before. In *Marete v. Attorney-General* [1987] KLR 690, the

plaintiff, who had worked with the Ministry of Agriculture and Livestock Development for 13 years was accused of disloyal behaviour, in the aftermath of an attempt by a section of Kenya's armed forces to overthrow the government on 1st August, 1982 and was purportedly dismissed even though he was not allowed to leave his station. *The High Court held this to be a contravention by the state of the protective provisions of the constitution, and awarded damages. Shields, J* on that occasion remarked:

> **"The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in section 84……"**

Similarly in ***Ramesh Lawrence Maharaj v. Attorney-General of Trinidad and Tobago*** (No.2) [1979] A.C. 387 (P.C.) damages were awarded for breaches of the constitution. The pertinent principle is stated in the editorial note (p.390):

> **"For loss of liberty which has already been regained the only redress is damages: the appellant is not seeking punitive damages but compensation for the loss of his liberty only."**

The first defendant's Deputy Vice-Chancellor (Academic) on 22nd March 2004 swore a replying affidavit to the affidavit in support of the plaintiffs' Notice of Motion. He averred, in part, as follows:

> (i) the first defendant had conducted investigations to determine the cause of the riots, and had identified the plaintiffs "to have participated in the demonstrations";
>
> (ii) the University then appointed a Student Disciplinary Committee in accordance with the University statutes to hear the charges against those involved;
>
> (iii) each accused student was served with a notice inviting him to appear before the Student Disciplinary Committee;
>
> (iv) the Committee held a series of meetings before which the plaintiffs were given an opportunity to defend themselves, but they failed to exonerate themselves from blame;
>
> (v) the Committee carefully considered each case and came to the conclusion "that disciplinary action be taken against each of the students as provided for in the Statutes and Regulations of the University";
>
> (vi) the decision of the Committee was communicated to each of the plaintiffs;
>
> (vii) the Vice-Chancellor then appointed a special Appeals Committee and invited the plaintiffs to appear before this Committee;
>
> (viii) "the University Senate and Disciplinary Committee are Committees that carry out thorough and careful investigations and accord all parties involved a fair and just hearing. Both students and staff are well represented and the Committees are held in high esteem";
>
> (ix) "in pursuance [of] the decision of the University Disciplinary Committees the University re-admitted the plaintiffs and … has allowed them uninterrupted studies and have since graduated";
>
> (x) the University is a stranger to the tribal clashes in respect of which the students are claimed to have demonstrated;

Those averments have been disputed in material particulars, by counsel for the plaintiffs. Whereas the deponent claims that the plaintiffs have no genuine complaint, the detailed documentation annexed to the affidavits shows a clear basis of grievance. One of the annexures to the Deputy Vice-Chancellor's affidavit is the Committee Report (page 41 of the defendant's bundle of documents). It is there stated, with respect to two of the students appearing before the Committee (*Otiato Wafula* and *Kimotho Robert*):

> **"Dr. Embeywa further informed the Committee that there were two other KUSA officials whose judgment he felt was flawed given the role they were playing as elected KUSA officials in the second strike in which students blocked Thika Road. These students are *Otiato Wafula* and *Kimotho Robert*".**

On pages 43 - 44 the following observations are made by the Committee:

> **"In all the Disciplinary Committee sittings, the Student's Chairperson and the Dean are supposed to be present. These are the only justified extra members on such a sitting. The Committee was informed that in this case the Committee was extremely huge; the reason being that those Chairpersons and Deans whose students had been interviewed did not leave the office. They sat in the disciplinary sessions of other students. In this way the committee grew larger everyday.**
>
> **"The Appeals Committee noted that due to the observed flaw, the judgment [entered against] the students was also largely flawed. This is because of the *crowd* of people [passing judgment against] students who did not belong to their department or Faculty. If any of the students took the University to Court, there was a high likelihood that the University would be on the losing end."**

Such disciplinary proceedings, learned counsel submitted, were largely flawed and could not do justice to the plaintiffs. In this regard counsel referred to this Court's ruling in ***M.C. Suba & 11 others v. Egerton University***, Misc. Application No. 157 of 1996 in which several relevant passages appear. Taken from ***Daniel Nyongesa & Others v. Egerton University College,*** C.A. No. 90 of 1989 is a passage in the judgment of ***Nyarangi, J.A.:***

> **"Courts are very loth 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 …. It is the duty of Courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that Courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character."**

In the *Suba case*, a passage in ***Kanda v. Government of Malaya*** [1962] A.C. 322 (P.C.) at p. 337 is also quoted:

> **"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him".**

In the *Suba* case itself the Honourable ***Mr. Justice Msagha*** remarked:

> "**Having found that the rules of natural justice were not complied with, I do not consider it necessary to belabour…. the other points canvassed during the hearing."**

I think it is quite obvious, as learned counsel has shown, that the committee of which the Deputy Vice-Chancellor speaks glowingly as the guarantor of fairness and natural justice to students who stand accused, is *not a structured body*; it has *no size or shape defined in any regulation*; it is a *casual conclave conducted by a changing, walk-in-walk-out membership*. This is the factual position as is acknowledged in the committee's own minutes.

Learned counsel was also concerned about the mode of service which preceded the hearing sessions conducted by the first defendant's committees. He demonstrated his contention with specific examples:

(i) On page 24 of the defendants' bundle there is a letter addressed to the first plaintiff at P.O. Box 139, Nairigi Enkare, and dated *10th February, 2004*. This letter states no charges, though it summons the addressee to appear before a disciplinary committee, and he is required to appear only three days later, on 13th February, 2004. Another letter bearing the same date, 10th February, 2004 and concerning the same first plaintiff is addressed to "Dear Parent", presumably the parent of the first plaintiff; though it carries no address. Was it posted to any place at all? It says: "This is to inform you that your son *Vincent Lempaa Suyianka* has been summoned to appear before the Student Disciplinary Committee of Kenyatta University on *Friday, 13th February, 1998* at 8.00 a.m. Please ensure that he avails himself without fail. *Note that the Committee will proceed with or without his presence."*

(ii) The same position is replicated for *all* the plaintiffs : pages 27, 28 and 29 of the defendants' bundle, in respect of the second plaintiff; pages 29, 30 in the case of the third plaintiff; pages 31,32 in the case of the fourth plaintiff; pages 33, 34 in the case at the fifth plaintiff.

Counsel submitted that no proper service of the said correspondence was effected, as only the shortest amount of time remained before the appointed day of the meeting of the disciplinary committee, while the addresses on the letters show that they were to be posted to quite distant up-country postal stations. In these circumstances, learned counsel submitted that there was no proper service, and there was no opportunity created for the plaintiffs to be heard; and consequently the stage had not at all been set for the play of the rules of natural justice.

Counsel submitted that the first defendant, when faced with the claims set out in paragraph 26 of the plaint of 3rd November, 2003 alleging clear breaches of the rules of natural justice, responded with the bare denials, as follows (para. 11 of the statement of defence dated 3rd December, 2003):

> **"The defendants deny all the allegations of denial of due process and fundamental freedoms as alleged in paragraph 26 of the plaint, including the particulars set out therein and put the plaintiffs to strict proof thereof".**

Counsel contended that the mode of identification of the plaintiffs as students meriting disciplinary action was irregular and unfair, since they had been just part of a large gathering of students staging a demonstration. *Only one characteristic marked the plaintiff from the other demonstrating students: they happened to be those in the leadership of the student organization*.

Counsel raised a further element showing a possible fundamental defect in the disciplinary proceedings which the first defendant's Deputy Vice-Chancellor has hailed as the vehicle of natural justice when students are subjected to disciplinary action.

It is stated in the replying affidavit of *Prof. J.J. Ongonga*, Deputy Vice-Chancellor (Academic) dated 22nd March, 2004 at paragraph 6:

> **"THAT the University then appointed a Student Disciplinary Committee in accordance with the University Statutes to hear the accusations against those involved".**

Then at paragraph 10 the deponent avers:

> **"THAT the decision of the Committee was communicated to each of the plaintiffs. Attached hereto are copies of the letters communicating the decision of the Disciplinary Committee….. The aggrieved students appealed to the Vice-Chancellor to re-examine the decision of the Disciplinary Committee".**

And finally the Deputy Vice-Chancellor deposes at paragraph 11:

> **"THAT as a result of this appeal, the Vice-Chancellor appointed a Special Appeals**

Committee and invited the plaintiffs to appear before the Appeals Committee. The Appeals Committee varied the decision of the Disciplinary [Committee] and the plaintiffs were re-admitted on the conditions set out in the declaration forms signed by each of the students."

Counsel points out, and correctly, with respect, that the Minutes which the deponent has annexed to his affidavit are clearly marked (page 40 in the serial numbering): "Minutes of [the] Student Disciplinary Appeals Committee" (dated 14th April, 1998). So the question arises: were there truly, as alleged, any *original hearings of the Student Disciplinary Committee* as claimed at paragraph 6 of the Deputy Vice-Chancellor's affidavit? From page 35 – 39 in the annexures to the replying affidavit there are "Minutes of [the] Student Disciplinary Appeals Committee" dated 15th April, 1998. The meeting was attended by : ***Prof. Romanus Okelo*** (Chairperson); ***Prof. F. Okatcha*** (Member); ***Father Phillips*** (Member); and ***Dr. Regina G.M Karega*** (Secretary). The first entry in these minutes reads:

"Professor Okelo noted that he had liaised with the DVC (Academic) for a replacement of Professor Julia Gitobu, but he has not yet been able to consult the Vice-Chancellor for a replacement."

And the third entry is: "***Fr. Phillips*** *will be on overseas leave from May 1998"*.

From the content of the Minutes, counsel doubted that there ever were any meetings at all of the Disciplinary Committee and of the Disciplinary Appeals Committee; and if there was no Disciplinary Committee meeting in the first place – let alone a regularly – constituted one - what kind of Disciplinary Appeals Committee could there be? And what kind of appeal could have been held at which the plaintiffs would have been able to present their case fairly? In the minutes, the verdict is stated: "The committee agreed that the initial punishment of three years' suspension stands" (p.39); yet other information (page 36) set out in the minutes raise doubts as to whether the Disciplinary Appeals Committee ever met and properly conducted its deliberations. Counsel remarked the fact that *no information has been given regarding the happening of the original Disciplinary Committee hearing, out of which an appeal hearing was then conducted.*

Counsel submitted that all the evidence showed an important *claim on merits, based on constitutional rights; and the defendants had placed hardly any credible pleading or material before the Court to justify any further delay in the disposal of the matters raising dispute.*

Learned counsel for the defendants, *Ms Yieke* still disputed the propriety of bringing these proceedings by *plaint*. She perceived the earlier case, ***M.C. Suba & 11 others v. Egerton University***, Misc. Application No. 157 of 1996, a judicial review matter, as representing the only correct procedure for resolving the issue in dispute. She moreover argued that all proceedings by plaint must have a *cause of action*, and that in the instant matter the cause of action was yet to be determined. I am not, however, in agreement with learned counsel that the plaintiffs have *no cause of action*. *There definitely is a cause of action founded on breaches of the plaintiffs' fundamental rights and freedoms, all culminating in denials of entitlements under sections 71, 74, 77, 78, 79, 80 and 82 of the Constitution and also in more material loss in terms of lost years of University education.*

Counsel urged that the defendants' case be not terminated *in limine*, but allowed to proceed to full hearing during which the details pertaining to the operation of the Student Disciplinary Committee and the Student Disciplinary Appeals Committee may be ventilated; better evidence adduced; the merits of the University's actions considered; the contentions issues properly canvassed.

Counsel relied on the decision in ***Geoffrey Sidika v. Kenyatta University*** HCCC No. 153 of 2003 to support the argument that the right of the plaintiffs to a particular award, at a given time, was dependent on the first defendant's statutory powers and hence they cannot insist on graduating at a time of their choosing. *Ms Yieke* contended that the first defendant had acted as a quasi-judicial body guided by stipulated statutory procedures. She contended that some of the foundations relied on by the plaintiffs constituted situations that the first defendant would not allow, by its duly authorized regulations – the same including student demonstrations; unlawful assemblies; etc.

In his final submission, *Mr. Imanyara* for the plaintiffs submitted that the statement of defence was a sham and could only serve to prolong injustice by prolonging the determination of the matters in dispute. He prayed that the defence be struck out, and the plaintiffs given an opportunity to proceed to the stage of assessment of damages. He submitted that all the written evidence on the record shows the defence case to have no basis, and as parole evidence would in all probability be no better than such written evidence, it would serve no purpose allowing the claims to go through full hearing.

3. Final Analysis and Orders

My broad lines of analysis have, I believe, already emerged in this ruling. From the applications and the prayers made, from the depositions and from the submissions of counsel, I think there will be no doubt that the plaintiffs have a weighty case anchored in constitutional rights which appear to have been denied. *There has to be an answer to the plaintiffs' claims*. For this reason I was unable to see the merits in the defendants' Chamber Summons application of 13th January, 2004 which sought to strike out the plaintiffs' plaint. Were I to strike out the plaint as prayed by the defendants, then judgment would have had to be given for the defence. But what are the merits of the defendants' statement of defence?

The defendants pleaded that they had not been aware of the happening of any public demonstrations in Nairobi, in protest against tribal clashes in the Rift Valley, and hence they saw no place for their students in such public demonstrations. The defendants assert that the plaintiffs had been properly informed of the disciplinary proceedings in which they were required to appear. They assert that they ensured due process during the disciplinary hearings. Otherwise, the *statement of defence contains hardly any substantive assertions addressing the claims in the plaint, assertions from which issues can be said to be joined in such a manner as to lead to a determination of rights and liabilities*. The statement of defence, moreover, *studiously avoids the crucial issues of entitlement of the plaintiffs attributed to the Constitution's guarantees*. Thus, whereas the plaintiffs assert specific breaches of their constitutional rights, the defendants remain silent in the face of such claims. The defendants profess ignorance of the broader environment of public consciousness which, in the early part of 1998, led to public demonstrations in which Kenyatta University students also participated. From that forum of student participation in the public demonstrations, the defendants named only the plaintiffs as culprits, subjected them to some judgment process and suspended them. All the evidence *shows serious failings in the said judgment process – in terms of the regularity of the deciding body and of the opportunity given for self-representation during the proceedings. Such a failure of the framework of natural justice notwithstanding, the plaintiffs were subjected to punishment, in such a way as to infringe on several aspects of their constitutional rights*. No effort has been made by the defendants to address these claims, in the pleadings as well as in the applications and the submissions before the Court.

There will be no basis, in these circumstances, for preserving the defendants' statement of defence, and it is in every respect fair, in my assessment, that the plaintiffs' claim be upheld at this threshold stage. The plaintiffs claim damages for breaches of their constitutional rights, with consequential material loss; they claim costs; and they claim interest on these items. They also pray for any such further order for securing the enforcement of their constitutional rights as the Court may deem it fit to grant.

I will make the following orders:

1. The defendants' application by Chamber Summons dated 13th January, 2004 is hereby dismissed with costs to the plaintiffs.

2. The plaintiffs' application by Notice of Motion dated 27th February, 2004 is allowed, and the plaintiffs' costs shall be borne by the defendants.

3. The defendants' statement of defence dated 3rd December, 2003 is hereby struck out, and judgment entered for the plaintiffs, with costs and interest payable from the date hereof.

4. This matter shall be brought before His Lordship the Chief Justice at his convenience, for mention and for directions for assessment of damages, if possible, in the Constitutional and

Judicial Review Division.

DATED and DELIVERED this 21st day of January, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiffs: Mr. Imanyara, instructed by M/s

Gitobu Imanyara & Co. Advocates

For the defendants : Ms Yieke, instructed by M/s

Lawrence Mungai & Co. Advocates