REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 213 OF 2004

GLADSTOME KITHOME MUYANGA

& 11 OTHERS……..….APPLICANTS

VERSUS

MASENO UNIVERSITY …..……..……. RESPONDENT

RULING

By its Notice of Motion of the 4/3/2004 the Appellant/Respondents seeks orders, pursuant to the Chambers Summons herein in which leave to file a Judicial Review application in this matter was granted be set aside and that the order of the 27/2/2004 staying the decision of the Respondent to this Judicial Review be set aside.

The grounds are contained in the Application and supported by the affidavit of Professor Philip Aduma sworn on the 4th March, 2004.

The first ground is that the application for leave to file this Judicial Review is defective as it is in form in correct in that the Chamber Summons shows the Republic as the Applicant. Mr. Wasuna relied on the case of Farmers *Bus Service & Others V. The Transport Licensing Board [1959] E.A. 779 in* which the Learned Court of Appeal set out the form of an application for Judicial Review.

Order 53 rule 1 and 2 provides as follows"

> (1) No application for an order to mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.
>
> (2) An application for such leave as aforesaid shall be made ex-parte to a Judge in chamber, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The Judge, may in granting leave impose such terms as to costs and as to giving security as he thinks fit."

The person who makes the application is the person who wishes to obtain an order of Judicial Review. This is, in this case, the persons who are aggrieved at the decision of the Maseno University.

In the statement the names of these applicants are set out However the Chamber summons shows that the applicant is the Republic. This is of course is in correct. The position is that when leave has been granted to file an application for Judicial Review the same is made by a Notice of Motion in which the Republic is named as a party to the suit and the party whose decision is being challenged or against which

mandamus orders are sought is named as a Respondent and those for whose benefit the judicial proceedings is brought are named as applicants. This, the applicant has correctly done in it's the Notice of Motion filed herein.

The procedure on the application for leave herein is defective and in my view is not capable at this stage of being cured.

Mr. Wasuna also sought to set aside the order of Leonala J., granted on the 27/2/2004 in which he ordered an order 3 that "

> Leave so granted do operate as a stay in terms of prayer 3 hereof

and In Order 6 that

> "The Respondent has leave to challenge order 3 about if it wishes to do so"

The remedy the applicants sought in the Chambers summons was for

> **"An Order of Certiorari to call up, bring into the High Court and to quash the decisions of the University Students' disciplinary Committee of the Respondent (hereinafter "the Disciplinary Committee) contained in the Respondent's letter to the Applicants dated 25th November, 2003 expelling, suspending the respective Applicants from the Respondent University and/or levying fines against the respective Applicant"**

I cannot with respect see how the remedy sought can be stayed. The decision of the Respondent was to expel or suspend the Applicants. This decision remains in force until a Judge of the High Court issues an order quashing it.

The Applicants have already been either expelled or suspended so that until an order is made to reinstate them that is the position they now find themselves in. Unless on order is made ordering the Respondent to take the applicants back in the University. I do not see how a stay can assist them. Put another way the Respondents have done something, which is a fait accompli and is not on going and therefore cannot be stayed.

Be that as it may the Respondents have not re-admitted the applicant's back into the University and it is submitted by Mr. Mureithi for the Applicants that the Respondent is in contempt of the Court order. I will deal with this later.

Mr. Wasuna submitted that the stay order should be set aside on the grounds set out in his application grounds 4 (i) to (x)

As the order of Lenaola J permitted the Respondent to challenge the stay order the matters raised are pertinent in deciding whether to grant a stay or not assuming that is capable of being effective.

Mr. Mureithi in opposition challenged Mr. Wasuna's right to bring the application on behalf of the Respondents, as he says Mr. Wasuna is not properly in record as envisaged by O.3 rule 8 that states as follows

> **" Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and provision of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."**

In this matter the proceedings were served on the Respondent directly therefore it is necessary for notice of the Appointment of Mr. Wasuna to be given. This notice should be served in accordance with the rule

7. In my view however this is an irregularity, which can be cured, and I order that Mr. Wasuna files forthwith a notice of appointment to regularize his position in these proceedings.

Mr. Mureithi further submitted that as the Respondents were in contempt of the court order for stay they should not be heard until they purge their contempt. He relied on the case of the Pharmacy and Poisons Board V Sipri Pharmaceutical Ltd and the Republic Civil Application No Nairobi 103 of 1998 in which it was held.

> "An applicant who has disobeyed the order of the Superior Court is in contempt and will not be entitled to be heard"

As I have already stated I can find no order ordering the Respondent to take back and reinstate the expelled and suspended applicant and as such I do find that the Respondents are in breach of the court's Order. In the result I allow the Respondent's application. There is no reason why the Applicants should not file a fresh Chamber Summons seeking the same relief as the order sought to impugned is not yet six months old.

Bearing in mind that the Applicants are notoriously poor I will make no order as to costs.

Dated and delivered at Nairobi this 16th day of March 2004

P.J. RANSLEY

JUDGE