



**Ongere & another v Mulabe & 3 others (Judicial Review Miscellaneous Application E026 of 2025) [2025] KEHC 2797 (KLR) (Judicial Review) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E026 OF 2025  
RE ABURILI, J  
MARCH 13, 2025**

**BETWEEN**

**FELIX ONCHERA ONGERE ..... 1<sup>ST</sup> APPLICANT  
TAMARA WACHIRA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DR JOASH K MULABE ..... 1<sup>ST</sup> RESPONDENT  
THE DEAN OF STUDENTS, MULTI MEDIA UNIVERSITY . 2<sup>ND</sup> RESPONDENT  
ELECTORAL COMMISSION, MULTIMEDIA UNIVERSITY 3<sup>RD</sup> RESPONDENT  
ELECTORAL APPEALS COMMITTEE, MULTIMEDIA UNIVERSITY .... 4<sup>TH</sup>  
RESPONDENT**

**RULING**

1. Vide a chamber summons dated 5<sup>th</sup> march 2025, the applicants herein Felix Onchera Ongere and Tamara Wachira seek leave of court to apply for judicial review orders of Certiorari to bring into this court for purposes of quashing and to quash the decision of the Electoral Appeals Committee, Multimedia University communicated vide letter dated 3<sup>rd</sup> February, 2025 disqualifying the applicants from contesting in the students' Council scheduled for 6<sup>th</sup> march 2025.
2. The applicants also sought for leave to apply for judicial review orders of mandamus to compel the Dean of Students, Electoral Commission and the Chairperson Electoral Appeals Committee, Multimedia University, to permit the applicants to contest and have their names included in the ballot in the Students' Council Elections Scheduled for 6<sup>th</sup> march, 2025. The applicants also prayed for costs of the application.



3. The application which was premised on the provisions of Order 53 Rules (1-4) of the Civil Procedure Rules and section 9 of the Law Reform Act was predicated on the grounds contained in the Statutory statement and verifying affidavit sworn by both applicants on 5<sup>th</sup> March 2025.
4. In summary, the applicants assert and depose that they are students of the Multimedia University and that they were duly nominated by the University's Electoral Commission on 28<sup>th</sup> January 2025 to vie as running mates for the student leadership of Chairman and the vice Chairman of the MUKSA Students' Council.
5. That on 3<sup>rd</sup> February, 2025, they received a letter communicating the decision of the Multimedia Appeals Committee to the effect that they had been disqualified from vying for the said position to be elected on account that the applicants had not abided by Article 6(3)(a)(ii) of MUKSA Constitution, which Article only provides for nomination by at least 300 ordinary members but does not mention that the nominees must append their signatures anywhere, which yardstick the respondents used to disqualify the applicants because one of the nominees, Shirvil Ochieng did not sign the nomination list annexed. Further, that the Applicants' appeal was dismissed despite the student in question being available and willing to clarify the issue.
6. The applicants were aggrieved by their disqualification because the Article on nomination does not talk about signatures of those nominating hence, they were denied natural justice and their legitimate expectation. They claim that the disqualification is ultra vires the MUKSA Constitution, an error of law and abuse of power. They annexed copies of the nomination timetable, the memo on qualifications for nomination, the list of candidates as nominated, letter dated 3/2/2025 communicating their disqualification, the Constitution and demand notice issued following the disqualification
7. The respondents opposed the application by filing grounds of opposition dated 7<sup>th</sup> March 2025 contending that the application is misconceived, incompetent and an abuse of court process as it seeks leave to apply yet the proposed notice of motion is not annexed as mandated by law hence the applicants seek to file what does not exist.
8. It was further contended that the application is overtaken by events since the elections being challenged were conducted on 6<sup>th</sup> march, 2025 hence this court cannot issue orders in vain. That issuing the orders sought would cause substantial hardship and prejudice to the respondents as enforcement thereof will be untenable since the substratum thereof no longer exists. The court was urged to be guided by the provisions of Rule 27 (3) € of the Fair Administrative Action Rules.
9. Additionally, the respondents contended that the application fails to identify specific administrative action or decision as a subject of the application for interim relief; that the said application for interim orders is therefore vague, imprecise and lack the requisite specificity to warrant this court's intervention contrary to Rule 13 of the Fair Administrative Action Rules; that the particulars of illegality on the part of the respondents have not been set out as provided for in Section 7 of the Fair Administrative Action Act; that the applicant had come to court last minute contrary to Rule 27 (3) (b) of the Fair Administrative Action Rules; that the chamber summons does not provide a prayer for stay of swearing in of the elected officials hence in violation of Rule 13 of the Fair Administration Action Rules.
10. The respondents urged this court to dismiss the application with costs.
11. The application was argued orally with the parties' counsel reiterating their respective clients' pleadings and affidavit which I need no reproduced here as I have already reproduced the pleadings and affidavits in the preceding paragraphs. They however relied on various decisions on the threshold for leave and whether such leave if granted will serve any purpose. The cases of Multiline Services Ltd vs Nairobi City



County; Republic vs. County Council of Kwale *ex parte* Kondo & 57 Others – Mombasa HCMCA 387/1996; Patel Ravji Rayi & Another vs AG & 3 Others [2021] eKLR; Republic vs National Safety Authority & 10 Others [2014] eKLR and Enos Edago vs Tembo Sacco Ltd [2020] eKLR were relied on in the arguments.

### **Determination**

12. I have considered the application as argued, for and against. The issues for determination are:
- a) Whether the applicants should be granted leave to file for Judicial Review orders
  - b) Whether the leave should operate as stay

### **whether the applicants should be granted leave to file for judicial review orders of certiorari and mandamus**

13. The age-old rationale for the requirement that leave be sought and obtained under Order 53 (1) of the Civil Procedure Rules is to exclude frivolous, vexatious or applications which *prima facie* appear to be an abuse of the process of the Court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case.
14. The yardstick for the grant of leave was pronounced by the Court of Appeal in *Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8* as follows:
- “It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought.”[emphasis added]
15. The purpose of seeking leave therefore is to determine whether there is *prima facie* case that would warrant the hearing of the judicial review application to determine whether the orders sought should be granted.
16. In this case, the respondents contend that the application for leave to apply is overtaken by events since the elections took place on 6/3/2025 and that therefore there is nothing left for this court to determine. The applicants maintain that they are entitled to leave to apply and that the threshold for leave is low, not because they have an arguable case and that they have demonstrated that they are entitled to leave since *the Constitution* of the MUKSA does not provide for signatures of nominees to qualify for nomination to be elected to the Student Council. Further, that they have demonstrated that the decision by the Electoral Appeals Committee was unreasonable, irrational and illegal.



17. The decision upholding the disqualification of the applicants from vying for the Students' Council leadership was communicated to the applicants on 3<sup>rd</sup> February 2025. The application for leave to apply was filed in this court on 5<sup>th</sup> March 2025, on the eve of the scheduled elections being 6<sup>th</sup> March 2025. The applicants seek leave to apply for certiorari and mandamus, to quash the decision of the Electoral Appeals Committee made on 3<sup>rd</sup> February 2025 to disqualify them from contesting in the students' Council elections which were scheduled for 6<sup>th</sup> March 2025. Those elections, admittedly, took place as scheduled and I will shortly revert to the reasons for this court declining to grant any interim relief in the first instance.
18. It is important to note that Certiorari can still issue to quash the decision taken if the court finds that the administrative decision was illegal, unreasonable, irrational and procedurally unfair. It follows that should the court be persuaded that the disqualification of the applicants from participating in the elections was marred with procedural irregularities, was illegal or the decision was unreasonable, or irrational, this court can still bring that decision into this court for purposes of quashing and quash the same. I am fortified on this point by Halsbury's Laws of England, 4<sup>th</sup> Edition, page 150 at paragraph 147, where the authors state as follows regarding the nature of certiorari as a remedy:

“It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury”.
19. In the book; Public Law in East Africa published by Law Africa the author, Ssekaana Musa writes as follows at page 250;

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”
20. As earlier stated, certiorari can issue to quash an event that has taken place which in this case, is an election. However, in Halsbury's Laws of England, 4<sup>th</sup> Edition at page 158 paragraphs 163, the authors have stated as follows on certiorari that:

“Where grounds are made out upon which the court might grant the order, it will not do so where no benefit could arise from granting it.”
21. In this case, I observe that elections have taken place and what remains is the swearing in of the elected officials. Judicial review orders are discretionary orders and a party who is aggrieved by an administrative decision must challenge that decision immediately, not wait until the event which has been planned and resources expended on for them to approach the court. The applicants came to court at the last minute to try and have those elections halted. I am in agreement with Mr. Oanga counsel for the respondents that the leave to apply will not serve any purpose and I do not find any benefit arising from granting leave to apply for certiorari.
22. Accordingly, I find that prayer 2 of the application dated 5<sup>th</sup> March 2025 not merited. It is hereby declined.
23. On whether the second prayer for leave to apply for mandamus has been overtaken by events, the applicants sought for mandamus to compel the Dean of Students, the Electoral Commission and the



Chairperson of the Electoral Appeals Committee, Multimedia University to permit the applicants to contest and have their names included in the ballot in the Students' Council elections scheduled for 6<sup>th</sup> March 2025.

24. It is now conceded that the elections took place on 6<sup>th</sup> March, 2025. The question is, how will those names be included in the ballot which elections have already been conducted? what will mandamus order do? How will compelling the respondents to permit the applicants to contest remedy the situation noting that the event has already taken place?
25. Without belaboring that point, I find that prima facie, mandamus would not issue in vain to compel performance of a duty or to do something which is incapable of being done. The prayer for leave to apply for mandamus is therefore declined.
26. I would have stopped here but assuming leave to apply was granted, would the court be justified in ordering that the leave so granted do operate as stay of the now swearing in process scheduled for 14<sup>th</sup> March, 2025?
27. The applicants have orally prayed for stay of the swearing in of the elected officials until the substantive application if leave is granted to apply, is filed, heard and determined.
28. I have perused the chamber summons subject of this ruling. There is no prayer made that if leave is granted to operate as stay of any of the administrative actions/ decisions taken by the respondents as challenged.
29. Rule 13 of the Fair Administrative Action Rules, 2024 provides for interim orders and mandates that:
  13. Interim orders
    - (1) Where an applicant intends to seek interim orders in a judicial review application to prohibit the respondent from taking a specific administrative action or decision, or requiring the respondent to act in a certain way, the prayer for the interim relief shall be included as one of the reliefs in the originating motion.
    - (2) Where the applicant seeks that the judicial review application be heard urgently, the originating motion shall be accompanied by a certificate of urgency setting out the grounds under which the urgency is based.
30. Under Rule 14 of the same Rules, on interlocutory orders-
  14. Interlocutory orders
    - (1) The applicant may, during the pendency of judicial review proceedings under these Rules, apply for interlocutory orders.
    - (2) An application under sub-rule (1) shall be made as soon as the event giving rise to such application arises.
    - (3) Where the applicant seeks the application under sub-rule (1) be heard urgently, the application shall be accompanied by a certificate of urgency setting out the grounds under which the urgency is based.
    - (4) An application under this rule may be made orally or, subject to the discretion of the court, by way of notice of motion



31. I observe that the applicant approached this court under Order 53 of the Civil Procedure Rules and not the *Fair Administrative Action Act*. However, the applicants challenge administrative actions which is within the jurisdiction of this court and therefore the *Fair Administrative Action Act* and Rules apply.
32. The applicants seek for stay by way of an oral application which is still covered under rule 14 (4). Additionally, Order 53 of the Civil Procedure Rules does not make it mandatory that a prayer for stay be made part of the application for leave. The Rule provides:
- 53 (3) The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
- (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise
33. Rule 53 (3) and (4) leaves the issue of stay to the discretion of the Judge to deduce from the nature of the application, whereas Rule 13 of the Fair Administrative Action Rules mandates that the prayer for stay or grant of an interim relief must be part of the Originating Motion. Furthermore, a stay would not issue if it will not serve any useful purpose or if it will heavily prejudice the respondents for example, where heavy investment and expenditure has already gone into preparations for elections or where innocent parties are involved and those parties have no opportunity to be heard in the matter. On this point, the case of *Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College* [2000] eKLR is instructive that:

“Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in.”

34. In *Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 Maraga, J* (as he then was) expressed himself as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is



however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

35. The decision whether or not to grant a stay pursuant to leave granted is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

36. In *Mirugi Kariuki v Attorney General* Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 the court held:

“The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is now settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay, as was held in *George Philip M Wekulo vs. The Law Society of Kenya & Another* Kakamega HCMISCA No. 29 of 2005.

In *Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College* [2000] eKLR the court held that:

“Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in.”

37. In this case, the applicants did not make any prayer for stay even for the court to denote a stay as contemplated in Order 53 of the Civil procedure Rules. They left it to the court. What that means is that the discretion of the Judge is what matters here. However, having found that the applicants came to court at the last minute, over one month had elapsed since the decision they are challenging was communicated to them, and elections having taken place now pending swearing in of the elected officials, this court is not inclined to grant any stay to stop the swearing in of the elected students, noting that there was no prayer for prohibition and that the stay will not serve any useful purpose other than inconvenience the respondents and the students who were elected not being parties to these proceedings as interested parties.

38. From the prayers sought, it is apparent that the applicants were seeking for certiorari to quash the decision to disqualify them from vying in elections to the Students’ Council and mandamus to compel the respondents to have the applicants’ names included in the ballot.

39. As stated earlier, the elections already took place hence the question of inclusion in the ballot does not arise. Again, the proceedings were instituted at the last minute and therefore the court having declined to grant initial stay, a stay granted now will not serve any purpose. I reiterate that judicial review proceedings must be brought expeditiously and inordinate delay as espoused in the *Fair Administrative Action Act* and Rules, see Rules 14(2) and 27(3) (b) ousts the discretion of the court to grant the discretionary orders sought. I find that a stay is not merited. It is declined.



40. For all those reasons, I find on the whole, that the applicants have not satisfied this court that they have a prima facie case for determination by this court if leave is granted or that they are deserving of the stay of swearing in of the elected students.
41. The application dated 5<sup>th</sup> March 2025 is found to be devoid of merit. It is dismissed with no orders as to costs, noting that the applicants are students.
42. This file is closed.

**DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2025**

**R.E. ABURILI**

**JUDGE**

