REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 229 OF 2019

REPUBLIC.....APPLICANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

AND

SAMUEL OUMA KAOGA.....*EX PARTE* APPLICANT

JUDGMENT

The Parties

1. The applicant, Samuel Ouma Kaoga is an adult of sound mind. He was at all material times relevant to this case a *bona fide* student of the University of Nairobi.

2. The Respondent, the University of Nairobi is a Public University established under the provisions of the Universities Act.[1]

Factual matrix

3. The applicant states that he is a *bona fide* student at the University of Nairobi, and, having paid his fees he is entitled to health services as per the University's Health Services contained in the Student Information Handbook. He states that under the University Health Services, the University provides students with both outpatient and inpatient services, and, for both services there is a provision for referral to Kenyatta National Hospital in respect of which the University settles the hospital bills incurred in the event of such referrals. He states that in July 2019, he fell ill and sought treatment at the Respondent's facility as per the University Health Services, and, upon examination the Respondent referred him for specialized treatment at the Kenyatta National Hospital. He states that upon being examined, he was informed that his condition required corrective surgery, but, he was advised first to finish his end of semester examinations. Additionally, he states that he was informed that the Doctor who could perform the surgery was out of the country and he would only be back from 23rd July 2018, and, that, the earliest available appointment was on 24th July 2018.

4. The applicant states that upon completing his examinations, he presented himself at the Kenyatta National Hospital on 23rd July 2018, and, he was admitted to await for the surgery the following day, and after the surgery, he developed complications necessitating a further surgery which was to be done on 3rd August 2018. He states that the two surgeries and the attendant medical attention costed Ksh. 1,318,313/=, out of which the National Hospital Medical Insurance settled Ksh. 480,000/= being the bill he incurred at the private wing leaving a balance of Ksh. 854,323/= incurred at the public wing which was to be settled by the Respondent.

5. He states that to secure his release from the Hospital, his uncle charged his title as security for the repayment. He says that he wrote to the Respondent on 31st August 2018 asking them to pay the said sum, but the Respondent wrote on 21st September 2018 declining to pay.

Legal foundation of the application

6. The applicant's case is that the refusal to pay the said bill is procedurally unfair, unlawful, discriminative, unreasonable and unconstitutional in so far as it was made through discriminative application of the University Health Services and in breach of the rules of natural justice and Article 47 of the Constitution and in excess of jurisdiction.

7. He also states that his legitimate expectation to have his medical bill settled by the Respondent in accordance with the University Health

Services policy has been abused by the Respondent's discriminatory and selective application of the University Health Service Policy in an unlawful, unreasonable, unfair and capricious manner.

8. He further states that the impugned decision was arrived at and made in contravention of his legitimate expectation that he will not be discriminated against through selective application of the University Health Service Policy when he had paid school fees just like any other students would access the service or that he would be deprived of his right to health and access to medical attention without adherence to the due process.

9. He also states that the impugned decision is arbitrary, unfair and that there are no reasons or grounds to warrant the decision. Lastly, he states that this court has jurisdiction under Article 165 (6) & (7) of the Constitution to make such orders or give any directions appropriate to ensure the fair administration of justice.

10. The rest of the grounds cited in the substantive application are essentially legal submissions and authorities as opposed to pleadings. Their correct place is by way of closing submissions as opposed to being introduced by way of pleadings. I see no need to rehash them here.

Reliefs sought

11. The applicant prays for:-

> *a. **An order** of **certiorari** to bring to this honourable court the Respondent's decision made by the Deputy Vice Chancellor (A&F) on 21st September 2018 for purposes of quashing the same.*
>
> *b. An order of **Mandamus** to compel the Respondent to pay to Kenyatta National Hospital on behalf of the ex parte applicant Ksh. 854,323/= being the balance of the applicant's medical bills.*
>
> *c. That the costs of the suit be provided.*

Respondent's Replying Affidavit

12. **Doreen Asimba**, the Respondent's Acting Chief Medical Officer, Health Services, swore the Replying Affidavit dated 30th August 2019 in opposition to the application. She averred that the applicant as a student at the Respondent's institution is entitled to Healthcare strictly as per the Respondent's Health Service Policy as contained in the Academic Handbook. She deposed that the said Healthcare policy covers only basic care but not specialized care as provided in the Students Handbook. In addition, she deposed that the Handbook provides that the Healthcare remains by and large the responsibility of the parents/guardian or sponsor as the case may be, and, that, at no point did the University undertake to settle any medical bills for specialized treatment for any student.

13. M/s Asimba deposed that the University Health Services offered are only basic outpatient and inpatient services while the student in session, and, that, for inpatient services, the Respondent only refers students to Kenyatta National Hospital for admission into the general ward and never refers them to a private ward and that even when it makes such a referral there is no undertaking for the payment of the medical bill by the Respondent and the bill is at all times sent in the name of and borne by the student.

14. She further deposed that the Respondent joined the University with a history of pelvic dislocation and as such the injuries necessitating the hip replacement and corrective surgery did not occur while the applicant was in the Respondent's school and or session. She also deposed that the Respondent never referred the applicant to Kenyatta National Hospital for specialized treatment, but, for an ordinary referral without any undertaking to pay the medical bill. She also averred that the applicant went back to the Kenyatta National Hospital days later without the knowledge and or authority of the Respondent in violation of the Respondent's health care policy.

15. She reiterated that at no point did the Respondent ever undertake to settle or offset any medical bill for the applicant for any specialized medical service without the Respondent's knowledge. She also averred that the applicant never notified the Respondent of any special procedure or treatment preferred and if the Respondent was informed it would have advised the applicant to obtain financial help from his parents, guardian/family who according to the Respondent's health policy are primarily responsible for the health of the applicant.

16. M/s Asimba also averred that the University only offers basic medical health services which are only available to students during regular school sessions and the services obtained by the applicant was neither basic nor were they obtained during regular school sessions as provided by the students handbook.

17. She averred that the applicant's decision to seek the services at Kenyatta National Hospital was not communicated to the Respondent and that the said services cannot be termed as basic healthcare, hence, the Respondent is not bound to pay the same.

18. She deposed that the expenses incurred were not in accordance with the University's Health Policy because when the University issued a referral note to Kenyatta National Hospital, it was not notified of the admission for surgery or prolonged stay in hospital. She also states that the admission was done without the Respondent's authority or knowledge and also the admission was done in the private wing. Further she stated that the services obtained were specialized in nature contrary to the Respondents health policy which only provides basic services, hence, the services obtained were outside the scope permissible under the policy. She also averred that the Respondent never provided an undertaking or guaranteed the payment.

19. M/s Asimba denied the alleged discrimination and averred that the Judicial Review orders sought are undeserved and added that the Respondent's actions are reasonable and no legitimate expectation can arise in the circumstances.

20. Lastly, she averred that the instant application is *res judicata* and an abuse of court process since the applicant had filed a previous suit being JR No. 205 of 2019, hence, the applicant has come to court with unclean hands and without disclosing material facts.

Applicant's further affidavit

21. The applicant swore the further affidavit dated 23rd September 2019 in which he essentially reiterated his earlier affidavit and averred that each student subscribes to the health policy and thus the Respondent assumes the responsibility "similar to that of health insurance cover providers." He averred that at the point of referral the Respondent did not inform him of the conditions or scope of the referral but only sent him for medical care at the Kenyatta National Hospital.

22. He deposed that the comments on the letter annexed to his application give him the impression that as long as the referral occurred during the session, then the Respondent ought to pay his medical bill.

23. He also averred that he withdrew the earlier suit after listening to courts sentiments that his earlier suit was convoluted and also after consulting the Respondent's counsel's advocate. He deposed that he withdrew the said suit before the Respondent could file any pleadings in response thereto and before leave was granted to file substantive application.

Applicant's advocates' submissions

24. The applicant's counsel argued that the applicant was covered by the University Health Services. He argued that the initial referral was done by the University after which the applicant scheduled the appointment. He relied on Article 43 (1) (a) of the Constitution for the proposition that the applicant is entitled to the highest standard of health. He also argued that the refusal to pay amounts to discrimination to the applicant.

25. Counsel further submitted that that the refusal to pay is unreasonable, unfair, un procedural, discriminative and violates the applicant's right to legitimate expectation that being a member of the University, the Respondent would settle his bill without subjecting him to other conditions. He submitted that the impugned decision is reviewable under section 7(2) of the Fair Administrative Action Act[2] (herein after referred to as the FAA Act). He argued that the Respondent failed to take into account the comments on the applicant's letter annexed to the applicant's application.

26. Additionally, the applicant's counsel submitted that the Respondent took into account irrelevant considerations that the referrals are only made to the public wing. He argued that the bills incurred in the private wing is not being claimed. He relied on *Municipal Council o Mombasa v Republic*[3]for the proposition that in judicial review, the court is only concerned with decision making process. He faulted the Respondent for failing to afford the applicant the opportunity to explain the reason for the initial delay which he argued is a violation of Article 47 of the Constitution and section 4 (2) of the FAA Act. To buttress his argument, he cited *Halsbury's Laws of England*[4] and *Onyango Oloo v Attorney General*.[5] He also relied on *Republic v Kenya Airports Authority ex parte Seo & Sons Limited*[6] for the proposition that where a party is denied an opportunity to be heard prior to making a decision, the decision would be quashed without looking into whether it was wrong or right. He also cited *Simon Gakuo v Kenyatta University & 2 Others*[7] for the holding that the right to be heard should not be interpreted to mean adversarial hearing or anything close to a court room situation.

27. In support for the doctrine of legitimate expectation, counsel relied on *Kenya Revenue & 2 Others v Darasa Investments Limited*.[8] He also relied on *Republic v Public Procurement Administrative Review Board & another ex parte SGS Kenya limited*[9] for the holding that judicial review is a supervision of public authorities involving a challenge to the legal and procedural validity of the decision. Additionally, he cited *Halsbury's Laws of England*[10] for the proposition that a person may have legitimate expectation of being treated in certain way by an administrative authority even though he has no legal right in private law to receive such treatment. He also cited *Constitutional and Administrative Law: Text with Material*[11] for the observation that legitimate expectation refers to the principle of good administration or administrative fairness that in a public authority leads a person or body to expect that the public authority will, in future continue to act in a way either in which it has regularly or even always acted in the past or on the basis of a past promise or statement which represents how it proposes to act.

28. In addition, the applicant's counsel submitted that the application qualifies for the grant of the orders sought. To buttress this position, he cited *Council of Civil Unions v Minister for Civil Service*,[12] *Kenya National Examinations Council v Republic*[13]and *Mirugi Kariuki v Attorney General*.[14]

29. On *res judicata*, he argued that upon filing JR No. 205 of 2019, after listening to the court's advice that the case contained contested issues of fact which are outside the province of judicial review jurisdiction, he withdrew the case and filed the instant application. He argued that the withdrawal did not prejudice any party. Citing section 7 of the Civil Procedure Act,[15] he argued that *res judicata* is inapplicable in this case and implored this court to uphold the spirit of Article 159 of the Constitution.

30. Lastly, he cited *Jasbir Singh Rai and 3 others v Tarcochan Singh Rai & 4 Others*,[16] *Republic v Communication Authority of Kenya and Another ex parte Legal Advice Centre AKA Kituo Cha Sheria*[17] and section 27 of the Civil Procedure Act[18] and urged the court to award the applicant the costs of this suit.

Respondent's advocate's submissions

31. The Respondent's counsel submitted that the applicant is not entitled to the orders sought at all. He argued that the University Student's handbook provided clearly that the University Health Services will provide basic medical services while the student is in session and that the applicant's specialized surgery did not qualify to be covered under the University Health Services. He further argued that the surgeries were done outside the school sessions, hence, the cost was payable under the University Health Services. He also submitted that the hip replacement and corrective surgery were not basic, hence, they were outside the borders of the services.

32. On the argument that the referral was unconditional, he argued that the applicant ought to have read the provisions of the Handbook.

33. Submitting on the alleged discrimination, the Respondent's counsel cited *Nyarangi & 3 Others v Attorney General*[19] for the proposition that the law only prohibits unfair discrimination and argued that the application does not meet the threshold for finding that there was discrimination. He also cited Githunguri *DairyFarmers Co-operative Society v The Attorney General Cabinet Secretary in charge of Treasury and Public Procurement Authority*[20] in which the court citing *Catholic Commission of Justice and Peace in Zimbambwe v Attorney General*[21] held that the burden of proof that a fundamental right of whatever nature has been breached is on he who asserts it, and, that, some evidence must be adduced to support the contention. He argued that the allegation of discrimination is baseless.

34. Submitting on the alleged breach of the right to legitimate expectation, he cited *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*[22] for the proposition that for an expectation to be legitimate, it must be founded upon a promise or practice by public authority, which is said to be bound to fulfil the expectation. He argued that no legitimate expectation can arise in this case.[23]

35. Counsel also cited *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*[24] and *Republic v Secretary County Public Board & Another ex parte Hulbai Gedi Abdille*[25] for the holding that the remedy of judicial review is concerned with reviewing not the merits and argued that the application challenges the merits of the decision rather than the procedure employed.[26] He submitted that the Respondent acted lawfully and that the decision was reasonable. Citing *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji*[27] and *Republic v Principal Secretary, Ministry of Internal Security & Another ex parte Schon Nooran & Another*[28] counsel argued that the applicant has not established the requirements/tests for the court to grant the order of *Mandamus.*

Applicant's advocate's replying submissions

36. In his submissions in reply, the applicant's counsel argued that the applicant is questioning the decision making process not the merits. He relied on *Pastoli v Kabale District Local Government Council and Others*[29]and Republic *v University of Nairobi ex parte Michael Jacobs Odhiambo & 7 others*[30] and argued that the application is merited.

Determination

37. The first issue for determination is whether this suit is *res judicata*. It is admitted that the applicant had filed JR No. 205 of 2019 which is similar to the instant application. The applicant's counsel argued that he withdrew it after the court's sentiments that it raised issues fit for a civil suit as opposed to a Judicial Review application. However, I have carefully perused JR No. 205 of 2019. There is nothing in the said file to show that it was withdrawn as alleged. Relevant to the issue before me is whether the doctrine of *res judicata* applies in the circumstances of this case.

38. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

39. JR No. 205 of 2015 was not heard and determined. In my view, doctrine of res judicata cannot apply in the circumstances of this case. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[31]

40. The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

41. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[32]

42. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning.[33] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[34] It can only be challenged by way of an appeal, and as the parties admit, there is a pending appeal.

43. Also known in the US as claim preclusion, *res judicata* is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

44. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act[35] and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-

existent, will bar a subsequent suit. The Conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.[36]

45. In *Gurbachan Singh Kalsi vs. Yowani Ekori*[37] the former East African Court of Appeal stated as follows:-

> *"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

46. Applying the tests discussed above to the facts of this case, I find and hold that the plea for res judicata fails.

47. The next issue is whether filing two identical suits amounts to abuse of court process. It is common ground that the two suits are founded on similar issues. The only difference is the omission of some two prayers in the instant case which are pleaded in JR No. 205 of 2019. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[38]

48. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[39]

49. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*
>
> ***(d)*** *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> ***(e)*** *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.****[40]***
>
> ***(f)*** *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> ***(g)*** *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
>
> ***(h)*** *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.****[41]***

50. Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous vexations and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[42] Abuse of court process create a factual scenario where a party is pursuing the same matter by two court process. In other words, the party by the two court process is involved in some gamble, a game of chance to get the best in the judicial process.[43]

51. It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

52. It is not open for the applicant herein to institute two Judicial Review proceedings arising from the same cause of action. The two processes are in law not available to the applicant. The applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as JR 205 OF 2019. The pursuit of the second process, constitutes and amounts to abuse of court/legal process."[44]

53. More fundamental is the omission by the applicant to mention the existence of JR No. 205 of 209 in the instant suit. I would be failing in my solemn duty if I do not mention that it is settled law that a person who approaches the court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.***[45]***

54. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[46]The applicant was under a solemn duty to bring to the attention of the court the above information and leave it to the court to determine the merits or otherwise of his case. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the applicant, but also to any additional facts which he would have known if he had made inquiries.

55. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[47] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[48]I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as JR No. 205 of 2019 referred to above, hence, it is an abuse of court process. The applicant had the option of amending the earlier application instead of filing a fresh suit.

56. The next issue discernible from the facts presented in this case is whether this is a civil suit disguised as a judicial review application. This is the question I posed to the applicant's counsel at a very early stage but despite its dispositive nature, counsel did not properly contextualize nd appreciate the import of the question. This is manifested by the steps he took. He proceeded to file the instant suit during the pendency of the earlier suit and just dropped some prayers which did not change the pith and substance of the case. The simple question I posed to the applicants counsel was whether judicial review deals with contested issues of facts.

57. The above position was ably addressed in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji****[49]***as follows:-

> "*…where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

58. The above excerpt captures the position with sufficient clarity. Judicial Review does not deal with contested issues of facts which requires parties to adduce evidence and be cross-examined. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 others*[50] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.[51]

59. The substance of the applicants case is that he had subscribed to the University Health Services and that as a consequence the hospital bills he incurred are payable under the University Health Services. In fact, the applicant's counsel drew a parallel with an insurance cover and proceed to argue the University continues to collect money from the students for the said cover. This is manifested by the fact that the applicant's counsel's submissions contained essentially factual assertions as opposed to legal submissions.

60. Essentially, the applicant's claim is hinged on the University Handbook which he claims as per its terms, the Respondent is obliged to pay his medical bill. The Respondent has taken a diametrically opposed position. It states that under the policy the said bill is not payable. It also argues that the applicant had a pre-existing condition which was not covered under the policy. The applicant argues that the Respondent referred him to Kenyatta National Hospital. This is contested. The Respondent states that even where it refers a patient, the primary responsibility to settle the bill remains on the student or the parent or guardian. The Respondent went further and argued that the cover does not cover pre-existing conditions.

61. Further, whereas the applicant maintained that the Respondent is bound to pay the said Bill since it made the referral, the Respondent maintains that it never undertook to pay and even where it makes a referral, it is not bound to pay. Further, the Respondent maintained that the applicant never notified it that it was going for specialized treatment which is not payable under the policy. Additionally, the applicant stated that even where the bill is payable it can only be paid during the school term and even then, the applicant states that it only pays for basic services. Further, the Respondent denies being informed about the admission.

62. The foregoing are some of the contested issues of fact I have distilled from the facts presented by the parties. To resolve the above issues, it will be necessary for the parties to adduce oral evidence and be cross-examined and re-examined. The parties' respective positions will stand or fall on the proper construction of the University Healthcare Services policy. Parties will be required to adduce evidence to establish the proper construction of the said document, its purport and effect and the intention of the parties. This can only be done by way of oral

evidence. It follows that the above issues can only be resolved by way of oral evidence.

63. As demonstrated in the above authorities, judicial review does not deal with contested issues of fact. It deals with the legality or otherwise of a decision. Judicial review applications deal with well-known settled and defined grounds. These are illegality, irrationality, ultra vires, and proportionality. Section 7 of the FAA Act expanded the grounds of judicial review. The applicant attempted to cite the said section. However, they are totally inapplicable in this case. This case falls outside the scope of judicial review jurisdiction. This case collapses on this ground.

64. Even the grounds cited have not been proved at all. For example, the applicant invites this court to find that his right to legitimate expectation has been violated. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First*, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second*, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

65. The first step in the analysis has both an objective and a subjective dimension. *First*, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[52] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

66. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[53] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

67. I have carefully applied the above legal tests to the facts of this case. The applicant's counsel has totally misconstrued and misapplied the doctrine of legitimate expectation. *First*, as stated above, this case is premised on contested issues of facts as opposed to the known common law and statutory grounds of judicial review. It is totally outside the province of judicial review. It is as civil dispute. The document upon which the applicant anchors his case is the Student's Handbook. That being the case the relationship is contractual and the respective party's case shall stand or fall on the construction of said document. The attempt to deploy the doctrine of legitimate expectation in this case is legally frail and unsustainable.

68. The applicant's counsel argued the applicant states his rights to natural justice were violated. True, section **4** of the FAA Act re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

69. Whether or not a person was given a fair hearing prior to a decision affecting him being depends on the circumstances and the type of the decision to be made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[54]

70. What does fairness require in the present case? The standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.[55]

71. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[56] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

72. I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[57] which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1)(2)** of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[58] Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

73. Upon applying the legal principles discussed above to the facts and circumstances of this case, I find that there is no iota of violation of the rules of natural justice. The applicant ought to file a civil suit and enforce the contractual rights allegedly flowing from the University Students Handbook. It was sufficient for the applicant to decline liability. Had the applicant filed a civil suit to enforce the alleged "Health Policy" the court could have determined the question of liability. As stated earlier, this being a judicial review jurisdiction, the court cannot determine contested issues of fact. Similarly, all the other allegations of alleged violation of constitutional rights are unsustainable.

74. The applicant prays for an order of *Mandamus*. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[59] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[60]

75. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[61]

76. The applicant's legal right to the said amount has not been determined by a court of competent jurisdiction. As stated earlier, liability is strenuously contested. It follows that the Respondent is not under a legal obligation to settle a disputed claim. Mandamus cannot issue in the circumstances of this case.

77. The *ex parte* applicants also seeks an order of *Certiorai. Certiorari* issues to quash a decision which has been arrived at illegally. The illegality of the refusal to pay whay to be is a disputed civil suit has not been proved.

Disposition

78. In view of my analysis and answers to the issues discussed above, the conclusion becomes irresistible that this Judicial Review application must fail. Consequently, I dismiss the *ex parte* applicants' Notice of Motion dated **7th** August 2019 is hereby dismissed with no orders as to costs.

Orders accordingly.

Dated, Signed and Delivered and Dated at Nairobi this 13th day of February 2020

John M. Mativo

Judge

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[1] Act No. 42 of 2012.

[2] Act No. 4 of 2015.

[3] {2002} e KLR.

[4] 5thEdition, Vol 61, page 539, para 639.

[5] {1986-1989} EA 456.

[6] {2018} e KLR.

[7] Misc APP No. 34 of 2009.

[8] {2018} e KLR.

[9] {2017} e KLR.

[10] 4th Edition, Vol 1 (1) at page 151, para 81.

[11]Pollard Partworth and Hughes, 4th Edition, page 583.

[12]{1985} EA at page 478, 479.

[13] Civil App No. 266 of 1996.

[14] Civil Appeal No. 70 of 1991.

[15] Cap 21, Laws of Kenya.

[16] {2014} e KLR.

[17] {2014} e KLR.

[18] Cap 21, Laws of Kenya.

[19] {2008} KLR 688.

[20] {2016} e KLR.

[21] {1993} 2 LRC (Const) 279.

[22] {2014} e KLR.

[23] Citing Republic v National Employment Authority and Middle East Consultancy Services Limited {2018} e KLR.

[24] {2008} e KLR.

[25] {2015} e KLR.

[26] Counsel also cited Republic v Kenya Revenue Authority ex parte Yaya Towers Limited {2008} e KLR and Sudan Investment Limited v Ministry of National Heritage & Culture and 3 Others, Municipal Council of Mombasa v Republic & Umoja Consultants Limited, CA 185 of 2011 and Republic v County Assembly of Kisumu & another ex parte Ann Atieno Adul {2017} e KLR.

[27] {1997} e KLR.

[28] {2018} e KLR.

[29] {2008]2 EA 300.

[30]{2016] e KLR.

[31] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[32]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[33] Ibid.

[34] Ibid.

[35] Cap 21, Laws of Kenya.

[36] See *Lotta vs. Tanaki* {2003} 2 EA 556.

[37] Civil Appeal No. 62 of 1958.

[38]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[39] *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[40] *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[41] (2007) 16 NWLR (319) 335.

[42] Oputa J.SC, in *Amaefule & other Vs The State.*

[43] *Agwusin vs Ojichie*

[44] Supra.

[45] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[46] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188.

[47]Ibid.

[48] Ibid.

[49] {2014} eKLR.

[50] {2016} e KLR.

[51] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[52] Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

[53] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

[54] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[55] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[56] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[57] {2015}eKLR

[58] Ibid.

[59] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[60]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[61] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).