



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**IN THE MATTER OF ARTICLE 22(1), 23(1) 25(c) (1) AND 50(1) OF THE CONSTITUTION OF KENYA 2010**

**CIVIL CASE NO. 20 OF 2015**

**NELLIUS NYAMBURA IRUNGU.....PLAINTIFF**

**VERSUS**

**EGERTON UNIVERSITY.....DEFENDANT**

**JUDGEMENT**

**Background and pleadings**

1. The plaintiff Nelliuss Nyambura Irungu was at all material times a student at the Defendant's Egerton University having been admitted therein to study for a Bachelor of Science (BSC) Degree course (options – Biochemistry and Zoology in August 2006.

On the 3<sup>rd</sup> April 2009 the student was summoned by the University Disciplinary Committee to answer to allegations contained in a letter by the Deputy Registrar (Academic Affairs) dated the 2<sup>nd</sup> April 2009 that on diverse dates, jointly with named others

1. Acquired illegal admission for one Edith Mumbi in the Faculty of Science for a Degree course admission S11/20198/06

2. That on 14<sup>th</sup> April 2008, between 8.00p.m.and 10.00p.m. Jointly with two others stole certain items from one Edith Mumbi being T.V, DVD iron box clothing, money and other.

3. The letter further stated that the offences contravened the University's Regulations governing the Students Association Conduct and Discipline.

This letter required her to appear before the students Disciplinary Committee on the 3<sup>rd</sup> April 2009 to answer to the charges. She was further reminded that she had a right to bring witnesses.

4. Dutifully the plaintiff appeared before the Committee, answered to the charges but by a letter dated 11<sup>th</sup> October 2010, the student was expelled, on the ground of aiding a person to gain illegal admission to the University. Her right to appeal to the Appeals Committee was explained to her.

5. The plaintiff appealed to the Appeals Committee that sat on the 15<sup>th</sup> December 2010 and rejected the appeal. By a letter dated the 17<sup>th</sup> January 2011, the decision was communicated to the plaintiff, and being informed that hence forth, she was no longer a student of the University.

At the time of the expulsion, the plaintiff was in her last year of study.

6. It is upon the above backdrop that the plaintiff filed this suit on the 8<sup>th</sup> April 2015, by a plaint dated the 27<sup>th</sup> March 2015, against the University.

**7. By the plaint**, the plaintiff reiterated the above and stated that Rules of Natural Justice were not followed during the hearings and the Appeals Committee failed to consider the complainants evidence that exonerated her and thus urged the decision to expel her was unjust, irregular and illegal, and had caused her mental trauma and anguish and denied her constitutional rights provided under the law.

8. The plaintiff thus sought orders that:

- a) A declaration that the expulsion of the plaintiff from the defendant is null, illegal and void and goes against her constitutional rights
- b) An order that the defendant be compelled to issue to the plaintiff with a degree certificate having successfully completed her undergraduate degree course for the Bachelor of Science (BSC) in Biochemistry/Zoology.
- (c) General damages for psychological torture the plaintiff had undergone from time of expulsion to date.
- (d) Costs of the suit.

Together with the plaint, the plaintiff filed her statement as well as her documents.

9. In its statement of defence, Egerton University took issue with the plaint stating that it is bad in law, incurably defective and sought its striking out. The defendant further denied all the allegations by the plaintiff and put her to strict proof.

In the alternative, the University accused the plaintiff for breach of the University rules, statutes, and regulations upon which it expelled her and prayed for dismissal of the suit with costs.

#### 10. ISSUE NO. 1

At the onset, it is important to settle the 1<sup>st</sup> issue raised by the defendant whether the plaintiff's suit is bad in law and incompetent.

This suit is by a plaint. The plaintiff admits that it ought to have been brought to court by way of a Judicial Review Application (JR) against the Senate decision to expel the plaintiff from the university. Reasons for failure to adhere to JR format is stated as inability of the plaintiff who was jobless to afford legal representation within six(6) months the timelines upon which a JR application ought to be filed.

Citing **Article 165(3) (9) Constitution of Kenya**, it is submitted that this court has jurisdiction to determine questions of violations of constitutional rights of an individual even when timelines have not been complied with.

11. The defendant agrees with the plaintiff that a Judicial Review application is the legal mode by which the senate decision ought to have been challenged, and not by way of a plaint, and cites the elaborate procedure provided under **Order 53 Civil Procedure Rules** that includes obtaining leave to institute a Judicial Review proceedings upon which a Notice of Motion is filed. Stating that the above procedure was not followed, the defendant has urged that the suit by plaint is thus untenable, unsupportable, unjustified, defective and ill-founded, and therefore fatally defective. It is further the defendant's submission that a court ought to be properly moved under the respective statutes providing procedure on how to go about achievement of certain reliefs.

12. **Article 22 of The Constitution** grants every person the right to move to Court for enforcement of fundamental rights and freedoms in the **Bills of Rights – Mumo Matemu –vs- Trustees Society of Human Rights Alliance – Civil Appeal No.290 of 2012 (2013) e KLR**.

By a long string of Judicial decisions, it is trite that where a party seeks to challenge a decision by a body or a person that infringe rights under public law must as a general rule proceed by way of Judicial Review, and not by a plaint, whether for a declaration or an injunction or otherwise. Among these are **Kimani Ruth Waithera and 4 Others –vs- Egerton University and 2 Others, Nakuru HCCC No. 219 of 2009, JR Appln. No. of 448 of 2018 Republic –vs- Kenya Revenue Authority to Exparte KeyCorp Real Advisory Ltd 2019) e KLR, Resley V. The City Council of Nairobi (2016) 2 EA 311**.

13. In the case **Republic –vs- University of Nairobi Exparte Lazaro Wakoli Kunani & 2 Others (2017) e KLR**, citing **Pastoli –vs- Kabale District Local Government Council & Others (2008) 2EA 300** the court rendered that

“When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences for failure to observe its prescriptions.

The court must therefore formulate their own criteria for determination whether the procedural rules are to be regarded as mandatory, in which disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the derivation is to be excused as a mere irregularity)...in assessing the importance of the provision, particular regard maybe had to its significance as a protection of an individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute ...Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as mere irregularity ... if no substantial prejudice been suffered ..... or if a serious public inconvenience would be caused by holding them to be mandatory....”

14. In a nutshell, the court continued that

“...the above principles indicate that to determine whether the legislature intended a particular provision of statute to be mandatory the court must consider the whole scope and purpose of the statute...”

15. I agree with the learned judges pronouncements above, and further state that a party ought to take the necessary steps accorded to the party to be heard, including statutory procedural imperatives, and if this is not done, it is upon that party who has failed to utilise the opportunity to give sufficient reasons for the failure.

16. **Article 47 Constitution of Kenya** gives every party a right to administrative action and decision that is expeditious, efficient, lawful, reasonable and procedurally fair.

Considering the above imperatives, would it be fair and just to lock out the plaintiff from challenging an unfair and unjust administrative action (as she so states) due to procedural flaw?

17. **A judicial review application, viz-a-viz, a plaint.**

Other than the time limitation of six (6) months, the plaint states the plaintiffs claim and the defendant has filed its defence to challenge the claims. **Article 159(2) (d) (e) Constitution of Kenya** is plain and clear that justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of this Constitution shall be protected and promoted.

It is also trite that reliance on this **Article 159(2) (d) of the Constitution** should not be applied to cure all procedure flaws but upon plausible reasons shown and consideration of substantive justice – **Christopher Odhiambo Karan –vs- David Ouma Ochieng & 2 Others (2018) e KLR**.

18. The explanation given by the plaintiff that she could not afford legal representation soon after the defendant's decision as she was traumatised and jobless may not be sufficient enough to persuade the court to rule in her favour, but substantive justice dictates otherwise. My considered opinion is that taking the above drastic action and shutting out the plaintiff from the seat of justice, by denying her an opportunity to be heard, due to primary procedural flaws, by lack of form, would be going against the very purpose and objectives of both the **Constitution and Fair Administrative Action Act, 2015**, as well the cited Constitutional imperatives and draconian.

19. In **Ridgeways International Ltd –vs- Dasahe Investments Limited & 8 Other (2018) e KLR**, the plaintiff challenged administrative actions by way of plaint. The court declined to strike out the suit for lack of form and proceeded to hear it upon the plaint, holding that striking out the plaint, is draconian and ought to be exercised in very clear and extreme cases.

20. In **Caroline Kibiwott & 4 Others –vs- Moi University & 2 Others (2012) e KLR**, the plaintiffs challenged administrative decisions of a statutory body the University, on grounds of breach of rules of natural justice, by way of a plaint. The court allowed the plaintiffs case to proceed on the plaint.

21. Further in **Githunguri Dairy Farmers Co-operative Society Ltd –vs- County Council of Kiambu and Kenya Dairy Board (2015) e KLR**, the court rendered that

“... It is no longer possible to create clear distinction between the grounds upon which a Judicial Review remedies can be granted from those on which remedies in respect of violation of the Constitution can be granted .... the grounds cut across both. Accordingly it may not be easy to rationalise the procedures under the distinct two legal regimes – Constitutional Petition viz-a-viz Judicial Review, and one may well question the legal basis for maintaining the same distinction.”

22. What comes out clearly, and ought to be the way in my view, is that challenges to administrative actions by any statutory bodies, legal persons and or bodies, may well be instituted by way of Judicial Review as well as by plaint especially where timelines set under Order 53 of Civil Procedure Rules can not be met for sufficient reasons. See also **Order 51 rule 10(2) Civil Procedure Rules**.

23. I appreciate the very detailed and well researched submissions on the issue by learned Advocate Mr. Kisila Gor, but nevertheless find that the plaintiff ought to be allowed to ventilate her grievances before a court of law. The defence will too be considered, and all evidence on record as well as the submissions. That in my considered opinion, will be justice to both parties.

24. **OTHER ISSUES FOR DETERMINATION**

(2) Whether the plaintiff breached the University's statutes and regulations in respect of Students' Disciplinary in the hearing of the complaints leveled against the plaintiff

(3) Whether the University acted in accordance with its laid down rules, procedures and regulations in expelling the plaintiff.

(4) Whether the plaintiff is entitled to the declarations and reliefs sought in the plaint.

The above issues (2 and 3) above are intertwined. They shall be canvassed together.

25. The substantive statute governing the operations of the Defendant is the **Egerton University Act 1987**.

The **University Council** is mandated under **Section 22** to make statutes for governance, control and administration of the University and for better carrying into effect the purpose of the Act. Several committees are established to effect the above objectives.

26. Of relevance here is the Students' Disciplinary Committee which is mandated to interrogate and deal with all students disciplinary issues through hearing of complaints against the students. If a student is not satisfied with the verdict of the Committee, there is an appeal option to the Grievances Handling and Appeals Committee of the Council. A further appeal may be filed with the University Senate which reviews the disciplinary proceedings before the two committees below and make its own findings and conclusions.

27. In all the stages, a student is given an opportunity to present themselves before the committees and ventilate their grievances and call evidence and witnesses.

At the entry point of a student to the University, each student expressly agrees to be bound by the various University Statutes, Rules and Regulations during their period of study.

The plaintiff herein did not state that she did not agree to be bound by the rules and regulations under the University Statutes.

28. By a letter dated 2<sup>nd</sup> April 2009 the plaintiff was summoned by the Deputy Registrar (Academic Affairs) to answer to two charges against her

1) Obtaining illegal admission of one Edith Mumbi in the Faculty of Science course admission No. SII/20198/06, with two other students.

2) Stealing of household goods, money and food from the said Edith Mumbi on the 14<sup>th</sup> April 2008, particulars provided.

29. In the said letter, it was stated that the offences were in contravention of the University's Regulations governing the Students Association, conduct and Discipline under Section 7.9 and 7.12. She was invited to attend and appear before the Students Disciplinary Committee on the 3<sup>rd</sup> April 2009 and if she wished, could bring witnesses if any.

30. The plaintiff did not produce any of the minutes pursuant to the three Committees that she faults for failure to adhere to rules of natural justice while hearing her case and the sequel verdicts.

However, the defendant did file the following documents, and produced as exhibits the same in support of their defence.

1. A copy of the Report to Senate of Students Disciplinary Committee held on the 3<sup>rd</sup> April 2009

2. A copy of the minutes of Senate meeting held on the 11<sup>th</sup> June 2009

3. Copy of minutes of Council meeting held on 14<sup>th</sup> January 2011

4. Copy of minutes of the grievances handling and Appeals committed minutes held on the 15<sup>th</sup> December 2010.

31. In her evidence in chief, and adopting her statement filed on the 8<sup>th</sup> April 2015 as her evidence in chief, and the proceedings for the day as evidenced by the Minutes, show that the plaintiff was in third year of her study and that she presented her defence to the committee. That evidence is on record.

The record further shows that the Complainant Edith Mumbi too presented her evidence before the committee.

None of the two students called any witnesses.

32. Upon the evidence, the committee made its observations that

(1) The plaintiff was a liar

(2) That the plaintiff and the other two had threatened Edith's mother when she reported the complaint to the Registrar, Academics.

(3) That Ms. Irungu was not selling the TV with Monchama at Njokeno

(4) That she misled Edith instead of advising her

(5) that she exploited her innocence morally and financially.

33. **The committee's verdict**, upon consideration of all available evidence was that the plaintiff was guilty of both the offences as charged and recommended that the plaintiff be expelled from the University.

34. **Minutes of the Senate Appeals Committee that sat on the 11<sup>th</sup> June 2009**. It received and discussed Disciplinary cases presented to it by the students Disciplinary Committee, including the plaintiffs.

The plaintiff testified, presented, and explained her appeal to this committee. At this time she was in year 4.

Her testimony was that she had already completed her studies and awaiting graduation and produced some clearance forms from the various departments of the university – PExt 4 and 5.

It was her evidence that she had expectations of graduating in December 2010 – PExt 5.

35. On the allegations of stealing it was her evidence that she was not charged in a court of law though arrested and detained in cells for a night, but the other two students were charged, convicted and placed on two years probation in **Nakuru Criminal Case No. 16 of 2008**.

She denied ever stealing from the complainant or obtaining the alleged admission letter for the complainant.

36. Considering the proceedings before the two Disciplinary Committees, there is no doubt that the plaintiff was given an opportunity to state her case. The evidence is clearly recorded.

36(a) Before this court, her evidence was that the expulsion from the University was illegal and thus sought the prayers stated in the plaint.

In cross examination, the plaintiff stated that the correct procedure to expel her was not followed but could not state what she termed as the correct procedure.

She stated to have had no grudge with any of the University staff, among them who constituted the committees.

37. The plaintiff confirmed not having challenged the proceedings held on the 3<sup>rd</sup> April 2009 and 11<sup>th</sup> June 2009 Students Disciplinary Committees and the Senate Committee, and in her own words stated:

**“I have never challenged the proceedings of 3<sup>rd</sup> April 2009. I have not asked the court to find that the Disciplinary Proceedings were not proper. I did not ask that the proceedings be stopped --- I appeared before the Senate Committee on the 11<sup>th</sup> June 2009 --- The Senate upheld the minutes of 3<sup>rd</sup> April 2009 --- I never challenged them, other than in this court --- I appealed to the University Council from the Senate findings. My case was considered. Appeals Committee upheld the Senate decision. I did not challenge the findings of the Council ---Even in this case, I never challenged the decisions. I came to court after 4-5 years.”**

38. In further cross examination by Mr. Kisila, the plaintiff stated that she had no academic transcripts or any documents to show that she had sat and passed all the academic papers for the four year study period.

In Re-examination, it was the plaintiffs evidence that

***“It is the process that I was taken through that I am challenging in court.”***

39. I have considered the parties submissions.

A party is by law bound by their own pleadings, and any evidence that is at variance, or does not support the pleadings cannot be allowed to stand. The court too is not allowed to determine on an issue that is not pleaded. At no time will a court admit evidence that does not support the party's pleadings submissions by a party after evidence has been taken, and the case closed cannot replace the evidence or the pleadings. The submissions ought to support both pleadings and the evidence – **Independent Electoral Boundary Commission and Another –vs- Stephen Mutinda Mule & 3 Others (2014) eKLR**.

40. It is therefore evident from the plaintiff's evidence that she has no grievances at all about or over the proceedings of the various committees having stated verbatim in court that (See Paragraph 37 above) that she is not, and had not by her pleadings, asked the court to find that the proceedings before the various committees were not proper, nor challenged any of them and affirmed that her appeal was considered by the University Council and that even in court, she is not challenging the decisions.

41. Does therefore the above evidence support the plaintiff's pleadings as stated in the plaint?

The defendant on its part urge that the plaintiff was accorded an opportunity to defend herself before the various disciplinary committees.

**DW1 Prof. S.F. Owido the Deputy Registrar, Academic** testified that the investigations into the plaintiff's offences were conducted and were conclusive, and upon hearing both the complainant and the plaintiff, made a finding that the plaintiff had contravened the University's Regulations and Rules stated above.

It was further urged that the appeal chain was exhausted and eventually the plaintiff was expelled from the University by a letter dated 11<sup>th</sup> October 2010.

42. It is trite that courts would be very hesitant to interfere with internal mechanisms of public bodies vested with statutory powers to make rules and regulations, unless it is shown that the body took into consideration matters which it ought not to have taken into consideration, or neglected to take into account matters which they ought to have taken into consideration, or come into a conclusion so unreasonable that no reasonable authority could ever come to – **Republic –vs- Kenya School of Law and Another Exparte Ibrahim Maalim Abdullahi (2014) e KLR**.

43. The right to a fair hearing applies to all persons, and bodies exercising administrative duties.

In **JR Case No. 113/2017 Republic -vs- Chuka University Exparte Kennedy Omondi Waringa and 16 Others**, the Court rendered that

“...failure to accord the applicants an opportunity to be heard during the Senate hearing deprived them of their constitutional right to be heard and to be accorded a fair hearing to fair administrative actions since the decisions that were taken here no doubt are going to adversely affect the applicant’s right to education.”

44. The defendant’s Grievances Committee had its own procedure, by inviting or not, depending on the matter. Though minutes for the proceedings for the day shows that the plaintiff was not invited, in her own testimony, the plaintiff testified to have had no problem with the procedure, and that she did not ask the court to find that the proceedings were not proper, and therefore, no finding can be made that the plaintiff’s right to a fair hearing were violated, as no evidence was adduced to that effect. The plaintiff was satisfied with the disciplinary procedure of the University.

45. I have stated earlier that submissions cannot take the place of evidence – See **IEBC case –vs- Stephen Mutinda (Supra)**.

I am not persuaded that the reasons for the decisions of the various disciplinary committees of the University were not given to the plaintiff. Once again, the plaintiff having not testified to that effect, submissions will not suffice as they support neither the pleadings nor the evidence.

The minutes produced by the Defendant’s witness (DW1) are clear and contain the complaints, the decisions taken by the committees and the reasons thereto.

46. The plaintiff has no quarrel with the decisions reached at all the stages.

In the case **Ridge –vs- Baldwin (1964) AC 40**, the court stated and clarified that the rules of natural Justice, in particular, right to fair hearing applied to all bodies exercising administrative duties and identified three features of natural justice as

1. the right to be heard by an unbiased tribunal
2. the right to have notified the charges of misconduct and
3. the right to be heard in answer to those charges.

47. There is no complaint in this suit that the above features were not accorded to the plaintiff. The defendant complied with its laid down procedures as stated in its statutory regulations, rules and procedures.

The plaintiff was at all stages of the disciplinary process found guilty of serious offences. The court cannot ignore the conduct of the plaintiff as evidenced in the minutes and proceedings.

To that end, I come to a finding that the plaintiff breached the University’s statutes and Regulations governing students discipline in reaching the verdict it did, that the university was guided and acted within, and in accordance with its laid down procedures and regulations in expelling the plaintiff.

48. In her prayers, the plaintiff sought a declaration that her expulsion was null, void and illegal, and an order to compel the University to issue to her with a degree certificate having successfully completed her BSC course.

In her testimony before this court, the plaintiff other than stating that she had completed her four years of study at the University, she could not produce any transcripts of the courses she undertook during the four years.

49. Though it was her evidence that her name appeared in the provisional graduation list for December 2010, she did not produce it to the court, nor had she requested the University to produce one. She admitted that a clearance certificate that she showed did not show that she was to graduate. She too admitted that she could not prove to the court that she had completed and passed her examinable papers to warrant an order directed to the University to give her a degree certificate.

50. The Deputy Registrar (Academic Affairs) – DW1- testified that the plaintiff had not graduated but was in her 4<sup>th</sup> year and as such no degree certificate can be issued to her.

A degree certificate in my opinion is not a piece of paper, it has to be earned and genuinely so.

51. The court in the case **Kimani Ruth Waithera & 4 Others –vs- Egerton University and 2 Others Nakuru HCCC No. 219 of 2009** in very similar circumstances, the court R.P.V. Wendo K rendered that

“...Examinations regulations are meant to maintain integrity in examinations and ensure fairness amongst all those taking examinations and not to allow some to have undue advantage over others...”

52. For this court to issue such an order that the plaintiff be issued with a degree certificate, it ought to be persuaded and convinced, on a balance of probability, and upon cogent and credible evidence, that indeed the student - plaintiff - had been cleared by the University Senate and Council, upon its laid down regulations on examinations and proof produced to that effect. None of the above was done.

I decline to issue such an order.

53. A prayer for general damages for psychological torture and trauma in the sum of Kshs.10,000,000/= was put forth on grounds for suffering for 10 years without a degree, jobless and destitute.

As much as I sympathise with the plaintiff's plight, I am bound by the law, that it is not enough to state or plead, but evidence must be adduced to support the claim for damages.

The plaintiff was found guilty of serious disciplinary offences.

As stated in the **Monicah Karimi Njiru –vs- Egerton University (2011) e KLR**, to grant the orders sought, and in particular the general damages as pleaded “*would be sending the wrong message to would-be offenders and it would be against public policy.*”

54. To conclude, I wish to associate myself with the holding on subject, with Odunga J in **Republic –vs- University of Nairobi Ex-parte Lazarus Wakoli Kunani (Supra)**, citing **Republic –vs- Kenyatta University and 2 Others Ex-parte Jared Juma, HC Misc. Civ. App No. 90 of 2009** that

“Most bodies established under statute also establish disciplinary committees .... The University has jurisdiction to conduct its own disciplinary proceedings.

This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable --- the exercise of such a disciplinary committee has always been recognised by the courts. The courts also recognise that their relationship with such committee is limited to supervision.”

55. Accordingly and in consequence, it is my finding that the plaintiff has failed to prove her case to the required standard on a balance of probabilities.

The upshot is that the plaintiff's case is dismissed with costs.

**Delivered, Signed and Dated at Nakuru this 3<sup>rd</sup> Day of October 2019.**

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**J.N. MULWA**

**JUDGE**