



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**JUDICIAL REVIEW NO. 3 OF 2018**

**IN THE MATTER OF AN APPLICATION BY DR. BENJAMIN J. GIKENYI MAGARE**

**AND**

**IN THE MATTER OF RULES AND REGULATION GOVERNING**

**POST GRADUATE STUDIES OF MOI UNIVERSITY**

**AND**

**IN THE MATTER OF THE UNIVERSITIES ACT NO.42 OF 2012**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION**

**AND**

**REPUBLIC.....APPLICANT**

**VERSUS**

**VICE CHANCELLOR MOI UNIVERSITY.....1<sup>ST</sup> RESPONDENT**

**MOI UNIVERSITY.....2<sup>ND</sup> RESPONDENT**

**DEAN, SCHOOL OF MEDICINE MOI UNIVERSITY...3<sup>RD</sup> RESPONDENT**

**AND**

**DR. BENJAMIN J. GIKENYI MAGARE.....EX-PARTE APPLICANT**

**JUDGMENT**

1. The applicant through a Notice of Motion dated 8<sup>th</sup> February 2018 brought under certificate of urgency seeking orders that;

- i. The orders issued on 11<sup>th</sup> January 2018 be stayed pending the hearing and determination of this

application *inter-parties*.

ii. The orders issued on 11<sup>th</sup> January be varied, lifted and/or set aside pending the hearing and determination of the substantive notice of motion

2. The said application was supported by a supporting affidavit sworn by Lukoye Atwoli on the grounds that;

a) The orders issued on 11<sup>th</sup> January, 2018 were pre judicial to the Respondents/Applicant and continued subsistence of the aforementioned orders was causing the applicant untold suffering, embarrassment and likely to cause animosity among staff at Moi Teaching and Referral Hospital and in the medical family as a whole where the Respondent /ex-parte Applicant is meant to take his clinical work and or general surgery rotation.

b) The allegations/complains made against the ex-parte Applicant are serious and there is need to allow time for investigations to be undertaken to bring to light the truth behind the said allegations.

c) The suspension was to allow investigations to be undertaken with regard to the complaint raised.

d) The actions by the Respondents/Applicants to suspend the ex-parte Applicant from undertaking his clinical rotations was premised on the Post Graduate Rules and Regulations which rules are clear on what actions the respondent is supposed to take in a situation where malpractices by post graduate students are reported

e) The ex parte Applicant at least on one occasion did not provide coverage of the clinical areas at Moi Teaching and Referral Hospital which constitutes unprofessional and unethical conduct. It is alleged that at the same time the respondent is reported to be diverting patients from Moi Teaching and Referral Hospital to his private clinic for self-enrichment contrary to the rules and regulations in place.

f) That there is a list of patients who have been reported to have been diverted by ex-parte applicant to his private clinic

g) Lastly that the orders issued by the honorable court were oppressive and not in the best interest of the patients and institution.

3. The application is supported by a supporting affidavit sworn by Lukoye Atwoli who is the Dean, **SCHOOL OF MEDICINE AT MOI UNIVERSITY**. He states that the orders issued on 11<sup>th</sup> January 2018 are likely to cause untold suffering, embarrassment and animosity among staff.

4. He further states that the decision to suspend the ex-parte Applicant was arrived at after receipt of complaints from one **CONNIE KEUNG** raising serious issues about his professional competence.

5. That his suspension was intended to allow room for due process with regard to the complaint raised and that it was an interim measure intended to safe guard integrity of all the parties including the ex-parte Applicant as the disciplinary process progresses. The said decision was premised on the **Moi University Rules and Regulations** governing Post Graduate Studies.

6. That the said rules are very clear as to what action the Respondent/Applicants may take in a situation where there are reasonable grounds to suspect that there are malpractices by post graduate students.

7. And lastly that the orders issued by this honorable court were oppressive and are not in the best interest of the patients and institutions thereof as the acts complained thereof contravenes the patients constitutional right to the highest attainable standard of health care in a public institution.

8. The Respondents opposed the said application through a replying affidavit sworn by Dr. Benjamin J.

Gikenyi Magare on grounds that the application brought before the honorable court was bad faith and meant to mislead the court.

9. The Respondent further states that the application is mired in confusion and wrong instructions and lacks both factual and legal basis.

10. That the court is functus officio and staying the orders or vacating the same amounts to conducting an appeal from a decision of the court of concurrent jurisdiction.

11. That the applicants adopted the most peculiar and barbaric procedures not found even within their own rules. That even though even though under Regulation 16 of the Moi University Rules and regulations governing the conduct and discipline is vested on the Vice Chancellor, the 1<sup>st</sup> Respondent herein has never exercised the same to date.

12. Further that at no single date did the ex-parte Applicant receive any communication detailing the malpractices neither has he been given a fair hearing.

13. Being aggrieved in the manner in which the Respondents behaved, the ex-parte Applicant filed judicial review proceedings in this court which after establishing a prima facie case, the court considered the application on its merit and granted leave which was to operate as a stay.

14. Jurisdiction to vary and or set aside the orders of this Honorable Court is one which is sparingly exercised and the reasons for invoking that jurisdiction must be specified and must be on solid basis. In *Judicial Review Handbook*, 3<sup>rd</sup> Edition by Michael Fordham at pages 360 and 361 it is stated that:

*“At the request of a defendant or an interested party, the Court can set aside permission previously granted. However, this is a very restricted power. It was never popular with judges, who required there to be a very clear-cut case before discharging the permission...The jurisdiction to set aside is one which is sparingly exercised and the reason for invoking that jurisdiction in a particular case must be specified....”*

15. Based on *Aga Khan Education Service Kenya v Republic Ex-parte Ali Seif & 3 Others (2004) eKLR* the position that this is a jurisdiction that should be very sparingly exercised; that the whole purpose of the [permission] stage would be vitiated if the grant of [permission] were to be regularly followed by an application to set it aside; that whereas it may very well be that [the claimants] will face great, perhaps insuperable, difficulties when the case is finally heard, this was never a case for an application to set aside [permission]” as such an application is not to be brought merely on the footing that a [defendant] has a very powerful, even overwhelming case.

16. The most recognized grounds for varying and or setting aside judicial review permission/order include instances of material non-disclosure, concealment of material particulars/documents, misrepresentation and where the application for leave/permission/order granted is an abuse of the process of Court. **In the Matter of an Application by Justus Nyangaya & Others**, High Court of Kenya at Nairobi, Misc. Civil Case No. 1133 of 2002 where it was observed at page 9 thus:

*“However the Courts have set aside ex-parte orders obtained in judicial review proceedings following non-disclosure of material facts, concealment of material documents and on misrepresentation.”*

17. These are the principles under which the Courts do exercise their discretion in granting an order for stay. However, it is not in doubt that such an order, if granted *ex parte*, may be set aside at a later stage if the Court finds that the stay ought not to have been issued in the first place or that the change in circumstances no longer warrant the continued existence of the orders of stay. Parties and their counsel are, however, cautioned that the grant of an order of stay ought not to be followed by an application seeking to vacate the same. It is only in cases where the Court is convinced that the conduct of the applicant at the *ex parte* stage when the stay was granted does not justify the grant either by non-

disclosure of material facts or misrepresentation of the same or due to subsequent events that the Court will set aside the stay granted. This is due to the fact that Courts do not grant orders of stay as a matter of course and where the Court is in doubt, the Court is now at liberty to direct that the prayer seeking the stay be heard *inter partes* even in cases where the leave has been granted.

18. Whether the court has powers to vary, set aside or discharge an order of stay is to be found under Order 53 rule (1)4 which states:-

***“the grant of leave .....shall, if the judge so directs, operate as a stay of the proceedings in question until the judge orders otherwise.”***

19. The wording of this sub-rule clearly indicates that the court has jurisdiction to review, vary, set aside or discharge stay and that the powers of court are discretionary. Referring to the review, varying or setting aside ex-parte orders by the court the matter was discussed in ***Civil Appeal No.77/2003 in Court of Appeal Judicial Commission of Inquiry to the Goldenberg Affair & Others vs. Job Kilach***. The Court of Appeal referring to the case of Ex-parte **Harbage** and the words of **MAY L. J.** quoted a passage on page 14 thus:-

**“The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court.....nevertheless in his judgment in that case **Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said:****

**“I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision.”**

20. This passage highlights the approach a judge should make in considering the review variation or discharge of ex parte order.

***Our Court of Appeal remarked “the ex parte order before that judge was an Anton Piller Order. Such orders can be made ex parte not because the rules provide that they be made ex parte but because of urgency of the matter they emphasized. We cannot think of a situation where a party would be allowed to come to this court (Appeal Court) before going to the judge who made the ex - parte order with a view to persuading him to set aside the order.”***

21. The court proceeded to declare that application for leave to apply for Judicial Review under4 Order 53 provides that the application shall be made ex parte to a judge in Chambers.

**And a right of appeal to the Court of Appeal is donated under Law Reform Act, Cap.26, Section 8(5):- “any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal concluded that the applicants in that case had a right of appeal and an option to returning to the judge who made the order ex parte for his review.”**

22. The application was canvassed by way of written submissions where the applicant’s counsel in the present application argued that the decision to suspend the Exparte applicant was well within the powers of the Moi University in accordance with the Rules and Regulations Governing Post Graduate studies, and the situation necessitated drastic action which cannot be said to be an infringement on the right to be heard. This court was referred to the case of **LEWIS vs HEFFER & OTHERS [1978] 3AllER 354**

where **Lord Denning** held that

*“Very often irregularities are disclosed in a government department...a man may be suspended...pending inquiries. Suspicion may rest on him and so he is suspended until he is cleared of it. No-one ... has ever questioned a suspension on the ground that ... it could not be done unless he is given notice of the charge and an opportunity to defend himself...the suspension is merely done by way of good administration...The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to work, the man is suspended, at that stage the rules of natural justice do not apply”*

*This court is urged to find that the same situation applies in the present case.*

23. It is also argued that at the time the applicant brought this application to court, the suspension had already taken effect and the **Graduate Studies Committee** was to deliberate within a month from 19<sup>th</sup> December 2017, and the *exparte* applicant was aware of the invitation made to him to prepare his submissions in anticipation of the disciplinary process which would ensue from the suspension, yet he did not disclose this to the court

24. The *exparte* applicant is also accused of abusing the court process by choosing to ignore a parallel remedy available to him through administrative action. In this regard the court is referred to **section 9 (2) and (3) of the Fair Administrative Action Act No 4 of 2015** which bars the courts from reviewing administrative action or decisions unless the mechanisms including internal mechanisms and all remedies available have been exhausted.

Citing the case of **George Phillip M Wekulo vs The Law Society of Kenya and Anor [Kakamega] HCMiscA No 29 of 2005** which held that where the decision sought to be quashed has been fully implemented, leave ought not to operate as a stay, it is further argued that similarly in the present case the suspension had already taken effect and staying it is likely to cause untold suffering and animosity among staff at the **Moi Teaching and Referral Hospital** where the *exparte* applicant is meant to take his clinical work and/or general surgery rotation as part of his studies at the said university’s School of Medicine.

25. Respondent’s counsel describes application as defective and untenable in law as there is no nexus between the grounds contained in the application and the orders sought. The same is described as an appeal before the same court which granted the orders, and that in any event it is not clear whether what is contested is the grant of leave or the stay orders.

26. It is further submitted that the applicant has not demonstrated that the orders issued were obtained by fraud, non-disclosure or an abuse of the court process as the respondent. It is the respondent’s contention that he received the initial letter alleging various concerns about his conduct before receiving the letter of suspension, and there was no concealment of any material facts from the court which issued the orders. The argument raised is that it was enough that the court was satisfied that a *prima facie* case had been made to warrant granting of stay.

27. Certainly judicial review is about fair treatment, and whether leave granted to commence such proceedings should operate as stay is a judicial discretionary function. I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if:-

- a) There is non-disclosure of material facts
- b) Concealment of material documents
- c) Misrepresentation

*In this regard see **PIUS WANJALA vs CLEOPHAS MAILU AND ANOR [2016] eKLR, also Republic***

**vs REGISTRAR OF SOCIETIES *ex parte* JUSTUS NYANGAYA AND 3 OTHER [2005] eKLR.**

The *ex parte* applicant does not deny that following his suspension, the Committee had invited him to prepare his submissions for the next step. Was this fact disclosed to the court before the contested orders were made? In my view such disclosure was critical in helping the court to appreciate the true existing status quo before issuing such orders.

To request the court to re-look the background leading to the issuance of stay, is in my view not asking the court to sit on appeal on orders of a court of equal status, It is simply telling the court to reconsider the orders issue in light of the fact that the beneficiary of those orders concealed or did not disclose all the material facts prevailing. All the other issues raised will better be addressed at the hearing of the main motion.

I hold and find that the application is merited and the stay orders issued be and are hereby vacated forthwith

**DATED, SIGNED and DELIVERED at ELDORET this 5<sup>th</sup> day of June 2018.**

**H. A. OMONDI**

**JUDGE**

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