



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 111 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLES 47 AND 50(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT

AND

IN THE MATTER OF THE UNIVERSITIES ACT

BETWEEN

MARTHA WAIHUINI NDUNGU.....APPLICANT

VERSUS

THE KENYATTA UNIVERSITY.....RESPONDENT

RULING

The Application

1. The Applicant, Martha Waihuini Ndungu, is a student at the Kenyatta University, the Respondent herein. The said Applicant filed a Chamber Summons application dated 9th March 2018, and seeks the following orders therein:

1. That this court be pleased to certify this matter as urgent and service thereof be dispensed with at the first instance.
2. That the Applicant be granted leave to file judicial review proceedings without exhausting the internal mechanisms of appeal put in place by the Respondent
3. That the Applicant be granted leave to apply for an order of Certiorari to remove into the High Court for purposes of quashing the proceedings and decision of the Respondent's Student Disciplinary Committee of 22nd December 2017 discontinuing the Applicant from studying at the Respondent with immediate effect.
4. That the Applicant be granted leave to apply for an order of Mandamus compelling the Respondent to reinstate the Applicant back to her studies and further compel the Respondent to administer all the exams that the Applicant has missed out during the period of her suspension and discontinuation from her studies.
5. That the leave so granted does operate as stay of the Respondent's decision to discontinue the Applicant from undertaking her studies at the university.
6. That the cost of this application be provided for.

2. The application was supported by the grounds on its face and by the Applicant's verifying affidavit and statement of facts both dated 9th

March 2018, and the annexures thereto. This Court (Odunga J.) directed that the said Chamber Summons be canvassed *inter partes* at a hearing held on 12th March 2018. Parties were thereupon directed by the Court to file and exchange written submissions on the application.

3. The Applicant's case in summary is that she was admitted to the Respondent university to undertake a Bachelor's Degree in Education in the year 2015; and while sitting for examinations on the 28th November 2016 she was alleged to have been involved in an examination irregularity. She was then informed by way of a letter dated 15th December 2016 that she had been suspended for the examination irregularity and would be informed in due course when to appear before the Students Disciplinary Committee.

4. The Applicant stated that on 13th June 2017 she received a call from the Respondent inviting her to a Student's Disciplinary Committee hearing on the 15th June 2017, and informing her that she should pick an official letter which she did moments before appearing at the Students Disciplinary Committee hearing. Therefore, that due to the short notice she did not have adequate time to prepare for her defence, and did not cross examine her accuser at the hearing as he did not appear.

5. Furthermore, that the decision to suspend her was unreasonably delayed, having been made more than six months since the hearing was conducted, which is a contravention of section 63 (3) of the Universities Act which requires that all matters before the university counsel be disposed off within a period of six months. In addition, that she sought to be supplied by the Respondent with copies of the proceedings together with evidence adduced for purposes of filling an appeal with the Chairman of the Senate, and was yet to be supplied with documents contrary to Sec 6(3) of the Fair Administrative Act .

6. Lastly, that the Respondent in making its decision failed to act in accordance with Article 47(1) of Constitution and section 4 of the Fair Administrative Action Act, therefore arriving at a decision that is not expeditious and or procedurally fair.

7. These grounds were reiterated by the Applicant's advocates, Mawira & Ndung'u LLP, in written submissions dated 26th April 2018. The counsel pointed to section 6 (1) of the Fair Administrative Action Act which requires that every person materially affected by any administrative action has a right to be supplied with such information as may be necessary, to facilitate his or her application for an appeal or review.

8. It was further submitted that the granting of leave to institute judicial review proceedings without exhausting the internal appeal mechanisms is a discretionary power of the court, and that the Applicant indicated to the court at the earliest opportunity that she had not exhausted the appeal mechanisms provided by the Respondent, and outlined the reason, which was that she was denied the requisite material to launch her appeal.

9. Further, that the period of filling the appeal was to lapse on 19th January 2018 and since the Respondent did not respond to the Applicant by that date, the Applicant could not file an appeal and her only recourse was to institute the instant proceedings. It was also submitted that the Respondent does not deserve the exercise of the courts discretion in its favour, since the reasons given for the failure to supply the documents are not valid and genuine; in that although the Respondent claimed that it could only supply the document if a court order was given, it proceeded to supply the documents without the court order.

The Response

10. The application was opposed through a replying affidavit sworn on 4th April 2018 by Aaron Tanui, the Respondent's legal officer. It is his case that on 6th December 2016 the Chairman of the Respondent's Philosophy And Religious Department informed the Registrar of Academics through an internal memo that the Applicant was involved in an examination irregularity during the administration of an examination on 28th November 2016. Further, that this led to the suspension of the Applicant pending appearance before the Students Disciplinary Committee, through a letter written to the Applicant dated the 15th December 2016.

11. The deponent averred that the Applicant was subsequently informed through a letter dated 8th June 2017 that appearance before the Students Disciplinary Committee would be on the 15th June 2017. He refuted the Applicant's assertion that she was only aware of the nature of the examination irregularity after reading the letter 8th June 2018, and contended that the Applicant was aware from the time of the incident that the charge involved usage of her mobile device during the examination.

12. According to the Respondent, the Applicant contravened the university examination regulations as stipulated in the 2014-2017 University Calendar, and in the University Statute XLVI. Further, that the Student's Disciplinary Committee considered the Applicant's case on 15th June 2017, and the Registrar (Academic) through a memo dated 5th December 2017 forwarded to the Vice- Chancellor the Students Disciplinary Committee recommendations that the Applicant be discontinued from studying at the Respondent university for committing an examination irregularity.

13. In addition, that the Applicant was informed that she was being discontinued from studying at the Respondent university vide a letter dated 22nd December 2017, which letter further stated that she had 14 days on receipt of the letter to appeal to the Chairman of the Senate. That the Applicant's Advocates then wrote to the Respondent university on 16th January 2018 and 19th January 2018 seeking documents in which to prepare an appeal.

14. The Respondent stated that in response, its advocate, through a letter dated 7th February 2018, informed the Applicant that the incident report and all the documentary evidence relied upon by the Students Disciplinary Committee are confidential documents that cannot be shared without a court order. However, that the Applicant has since been provided with the necessary documentation for the purposes her intended appeal. The Respondent averred that the proceedings herein are premature as the Applicant has yet to exhaust the internal processes of the applicant.

15. Kinoti & Kibe Company Advocates for the Respondent filed written submissions dated 30th April 2018. They argued therein that the Respondent has not declined to supply the Applicant with the examination incident forms. They relied on the case of **Sylvana Mpabwanayo Ntaryamira vs Allen Waiyaki Gichuhi, (2018) e KLR** that the Applicant is under an obligation to show that she has a *prima facie* arguable case for the grant of leave. According to the Respondent, the Applicant had not shown a *prima facie* case as the proceedings before the Students Disciplinary Committee show that she admitted the charge against her.

16. Reliance was also placed on section 9(2), (3), and (4) of the Fair Administration Act, and the decision in **Republic vs Retirement Benefits Authority Exparte Abraham Mackie Mutisya Kilonzo and 39 Others, [2017] eKLR**, for the position that the law is clear that where there is an alternative procedure or remedy established by law for resolution of a dispute, one will not be allowed to invoke the judicial review jurisdiction of this court except in exceptional circumstances, and on application.

17. Further, that the onus is on the Applicant to satisfy the court that she ought to be exempted from resorting to such other alternative remedies for redress. The Respondent submitted that the Applicant has not shown exceptional circumstances that mandate her exemption from the available internal mechanism of an appeal to the Chairman of the Senate, and that judicial review proceedings at this time would be premature and an inefficient use of valuable court time and resources.

18. Lastly, while relying on the decision in **Republic vs Egerton university exparte Robert Kipkemoi Koskey, [2006] eKLR**, the Respondent submitted that although it failed to make a decision within 6 months, this does not render its decision flawed as it involved examination malpractice that take time to complete, and a period of one year does not constitute inordinate delay.

The Determination

19. The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. On whether leave once granted should operate as a stay, Order 53 Rule 1(4) of the Civil Procedure Rules further provides as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

20. The Law Reform Act also provides as follows in section 3:

“ In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

21. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

22. In the present application, it is evident that the Applicant is directly affected by the decisions of the Respondent, as she is a party in the disciplinary proceedings before the said Respondent, and will be affected by decisions made therein as regards her continued education at the Respondent university. She therefore has *locus* to bring the present proceedings. The substantive issues that require to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence judicial review proceedings, and if so whether the leave should operate as a stay.

23. As regards whether the Applicant has an arguable case, the Applicant has raised provided facts as regards her inability to adequately prepare and to receive information so as to be able to defend herself in the proceedings before the Respondent. She also seeks for leave to institute judicial review proceedings without first exhausting the internal mechanisms provided for by the university.

24. These facts and application for leave are opposed by the Respondent who argues that the Applicant is yet to exhaust the internal review mechanisms, in particular that the applicant still has the right to appeal the decision of the Student Disciplinary Committee to the Chairman of the Senate Committee. The Respondent relied on section 9(2) (3) and (4) of the Fair Administrative Action Act which provide as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under

this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

25. It is trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but just give a cursory glance at the evidence before court and make the decision. The Applicant herein presented the following key facts. Firstly that on 13th June 2017 she was invited to attend the student disciplinary committee hearing held on 15th June 2017. The Respondent on the other hand stated that the invitation was in a letter dated 8th June 2017.

26. Secondly, the parties do not contest that the Applicant’s assertion that the decision to discontinue the Applicant’s studies was in a letter dated 22nd December 2017 and she had a 14 day period within which to appeal to the Chairman of the Senate. Thirdly, the Respondent also does not dispute that the Applicant requested for documentation to prepare for her appeal. What is disputed is if, and when the said documentation was availed to the Applicant, and if the said documentation was provided before the Applicant’s period of appeal had lapsed.

27. It is the position that under section 9(2) (3) and (4) of the Fair Administrative Action Act and under Article 159(2)(c) of the Constitution, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. However, the Court is also granted discretion to exempt an applicant from such mechanisms in exceptional circumstances.

28. I find in this regard that the facts as presented so far demonstrate an arguable case, and also entitle the Applicant to be exempted from the requirements of the Fair Administration Act as to exhaustion of internal remedies. This is for the reasons that it is not evident from the facts presented by the parties what timeframes were applied to the Applicant, and whether the applicable internal mechanisms are still available to the Applicant.

29. The court shall now turn to the issue whether the leave granted shall operate as stay. The decision whether or not to grant a stay pursuant to leave is an exercise of judicial discretion, and that discretion must be exercised judiciously. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of the proceedings have been laid down in various decisions. Firstly, in **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.

30. Secondly, it was held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself as follows:

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

31. In the present application, the Respondent’s decision of 22nd December 2017 will now be subject to review by this Court, and there is thus a possibility of the consequent judicial review proceedings being rendered nugatory if a stay of the decision is not granted. This Courts discretion will thus be exercised in favour of the Applicant for this reason.

32. In the premises, I find that the Applicant’s Chamber Summons dated 9th March 2018 is merited, and I accordingly order as follows:

1. That the Applicant be and is hereby granted leave to file judicial review proceedings without exhausting the internal mechanisms of appeal put in place by the Respondent.

2. That the Applicant be and is hereby granted leave to apply for an order of Certiorari to remove into the High Court for purposes of quashing the proceedings and decision of the Respondent’s Students Disciplinary Committee of 22nd December 2017, discontinuing the Applicant from studying at the Respondent with immediate effect.

3. That the Applicant be and is hereby granted leave to apply for an order of Mandamus compelling the Respondent to reinstate the Applicant back to her studies and to further compel the Respondent to administer all the examinations that the Applicant has missed out during the period of her suspension and discontinuation from her studies.

4. That the leave so granted does operate as stay of the decision of the Respondent's Students Disciplinary Committee of 22nd December 2017 discontinuing the Applicant from studying at the Respondent University.

5. The costs of the Chamber Summons dated 9th March 2018 shall be in the cause.

33. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY 2018

P. NYAMWEYA

JUDGE