REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW APLICATION NO. 24 OF 2018

IN THE MATTER OF AN APLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS BY DORCAS NYAOKO

AND

IN THE MATTER OF DECISION OF THE MACHAKOS UNIVERSITY COLEGE STUDENT'S DISCIPLINARY COMMITTEE CONTAINED IN THE LETTER DATED 15TH JANUARY, 2015

AND

IN THE MATER OF ARTICLE 25 (C) OF THE CONSTITUTION

AND

IN THE MATER OF UNIVERSITIES ACT 2012

BETWEEN

REPUBLIC ..... APPLICANT

AND

MACHAKOS UNIVERSITY ..... RESPONDENT

AND

DORCAS NYAOKO ..... EX PARTE APPLICANT

RULING

1. By a notice of motion dated 13th February, 2018, the ex parte applicant sought orders that:

> ***a) This court do issue an order of certiorari directed to the respondent to bring to this court and quash the resolution of the Machakos University College Student's Disciplinary Committee dated 15th January, 2015.***
>
> ***b) This court to issue an order of prohibition to prohibit the respondent from implementing the decision of the Machakos University College Disciplinary Committee dated 15th January, 2015.***
>
> **c) *That this court to issue an order of mandamus compelling the respondent to admit the ex-parte applicant to the university* to complete her education.**

2. The grounds upon which the application is made are in her statement, further affidavit and supplementary affidavit filed on 19th March, 2018 and 10th April, 2018 respectively. The respondent opposed the motion vide a replying affidavit and supplementary affidavit sworn by Professor Douglas Shitanda who is the Deputy Vice Chancellor (Administration Planning and Finance of the Respondent. The said affidavits were filed on 14th March, 2018 and 4th April, 2018 respectively.

3. It is the ex parte applicant's case that she received an expulsion letter on or about 24th July, 2017 through the office of the Registrar

Academic Research and Linkages which letter was backdated to 15th January, 2015. That she was expelled with immediate effect from the Respondent's university on allegation of involvement in an examination irregularity. That the letter indicated that she was given an opportunity to defend herself before the University Disciplinary Committee on 13th January, 2014 and that she was involved in an examination irregularity on 17th December, 2014 thereby the decision to expel her was made before the alleged irregularity. That she had been during and after the period of the alleged commission of the offence been paying fees, attending college and sitting examinations without a hitch. She denied ever having been involved in the alleged examination irregularity and that she was served with a hearing notice and accorded an opportunity to be heard before the University Disciplinary Committee.

4. Professor Shitanda contended that the notice of motion herein cannot stand the test of the law. That this was due to the reason that orders of certiorari can only be brought within 6 months of the making of the impugned decision. He stated that the chronology of events leading to the ex parte applicant's discontinuance was as follows; the ex parte applicant was admitted to the University to pursue Bachelors of Education (Science) on 9th September, 2014 under admission number E 37 - 2047 – 2014; she on 11th March, 2016 signed acceptance of offer letter; during the examinations held on 17th December, 2014, whilst sitting her first year first semester examination in introduction to psychology, the ex parte applicant was found in possession of unauthorized written material relevant to the examination; she was asked to sign the examination incident form but she declined; she was on 18th December, 2014 suspended from the University for the alleged irregularity by a letter dated 18th December, 2014; she was invited to appear before the University Disciplinary Committee on 13th January, 2015 by a letter dated 5th January, 2015; she appeared before the Committee on 13th January, 2015 wherein a hearing was conducted and a verdict reached; the Committee acting under the Statutes II (3) deliberated and found her guilty and an expulsion was recommended as per Statute XXX1 after giving her an opportunity to defend herself; a letter communicating the decision of the Committee was issued on 26th January, 2015; that the ex parte applicant sneaked back in class and has been in class since January 2015 to 27th July, 2017; that despite being expelled, she continued attending class and sitting examinations until she was discovered on 24th July,2017 and that she manipulated the University examination system and registered herself for examinations which is a criminal offence.

5. In her further affidavit, the ex parte applicant contended that the application is timeous since the decision to expel her was made known to her on 24th July, 2017 by a letter back dated to 15th January, 2015. That annexure 'DS4', the letter of acceptance to abide by the University Rules and Regulations is ambiguous and does not describe unauthorized material. She contended that she was never invited to appear before the University Disciplinary Committee and that she could not have registered herself for examinations. She questioned why the minutes and proceedings of the Committee were not documented.

6. In response thereto, Professor Shitanda in the supplementary affidavit annexed copies of the agenda and proceedings. In rebuttal, the ex parte applicant contended that the respondent introduced new evidence contrary to its application on 4th April, 2018; that the evidence has been brought after the ex parte applicant has filed submissions; that annexures 'DS1' to 'DS5' (admission letter dated 16th March, 2016, letter of acceptance by the candidate, alleged unauthorized material, letter of acceptance to abide by the University Rules and Regulations and examination incident form) are manufactures. That the meeting is said to have been held on 13th January, 2015 while the alleged invitation instructed her to appear before the Committee on 13th January, 2014. That Professor Shitanda was not present in the meeting or University College Academic Board Meeting. That she could not have sneaked into the college while still a bona fide student as evidenced by the acceptance letter signed on 11th March, 2016.

7. It was the ex parte applicant's submission that the respondent's decision to expel her without according her a chance to be heard and canvass her case is arbitrary and in violation of Article 47 and her right to fair hearing. That the application is brought within time as the decision to expel her was made known to her on 24th July, 2017 when a letter dated 15th January, 2015 was handed over to her by a Secretary. It was submitted that the respondent's failure to disclose how service of the letter was made exposes the respondent to punishment of its decision being quashed. In this regard **Republic v. Mount Kenya University & another [2017] eKLR** relied on. It was submitted that the allegation that the ex parte applicant manipulated the university system and registered herself for examination are unsubstantiated claims which are unmerited to this case. That annexure 'DS4' in particular Clause 4 (a) (ii) is ambiguous and does not define and explain what constitutes an 'unauthorized material'. That the letter presented by the respondent in its replying affidavit marked 'DS8' inviting the ex parte applicant to appear before the Disciplinary Committee is dated 5th January, 2015 while the ex parte applicant is invited to appear on 13th January, 2014 at 8.30 am. That it is apparent that the invitation was done a year after the Disciplinary Committee had been conducted. That according to the respondent, the ex parte applicant was invited by a letter dated 1th January, 2015 however, the respondent has failed to demonstrate how the invitation letter was sent and or received by the ex parte applicant since she had been suspended on the 18th December, 2014 and was out of the University. The case of **Dennis Nyambane v. Egerton University [2016] eKLR** was cited in reliance. That the suspension and invitation letter were never served on the ex parte applicant.

8. The respondent was of the opinion that the issues that are for determination are whether the ex parte applicant was found in possession of unauthorized material during examination and whether the ex parte applicant was accorded her right to a fair hearing as is required by the Machakos University College Statute. On the first issue, the respondent submitted that the Machakos University Statutes are very clear and it is the practice of the Institution to read to all their students the examination irregularities and its consequences before sitting for every paper as is also indicated on the student's examination answer booklet. That the ex parte applicant does not deny being found in possession of unauthorized material during the examination. That the material in her possession was short notes pertaining to the unit - Introduction to Psychology while examination was ongoing. That she admitted that the short notes were hers as the same was her handwriting although she did not know how they got to her booklet. On the second issue, it was submitted that the applicant was duly notified of the Disciplinary Proceedings which she fully participated in and was accorded a chance to defend herself where she admitted that indeed the unauthorized material was found in her booklet however she was not aware how it had gotten there. That the Committee deliberated upon her defence and arrived at a verdict of expelling her. That she did not appeal against the decision of the Disciplinary Committee yet she had 14 days right of appeal. It was submitted that the ex parte applicant has come to this court with unclean hands. That she defied the University Statutes when she manipulated the school systems and sneaked back into the University. That the respondent did not act beyond its powers in undertaking disciplinary proceedings against its bonafide student. That the respondent had a duty to ensure the integrity of the institution is guaranteed and the standard of quality credentials acquired by students is maintained and one way of ensuring that is through ensuring students do not engage in examination irregularities. That quashing the decision by the respondent to expel the ex parte applicant and compelling it to re admit the ex parte applicant would be compromising on the standard and quality of academic credentials acquired from the respondent hence

defeating the good administration of the public institution. The respondent cited **Council for Civil Service Unions v. Minister for Civil Service [1985] AC 374 at 401 D** and **Municipal Council OF Mombasa v. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** to illustrate the scope of Judicial Review. It was submitted that an order of prohibition is pre-emptive in nature and cannot be granted here since the action of expelling the ex parte applicant has already been taken and that certiorari cannot stand the test of time for the reason that the applicant brought the application almost 12 months after the decision was made offending the provisions of Order 53 rule 2 of the Civil Procedure Rules. To support the said argument, the respondent relied on **R v. Mwangi Nguyai & 3 others Ex Parte Haru Nguyai [2013] eKLR**, **Rosaline Tubei & others v. Patrick K. Cheruiyot & 3 others [2014] eKLR** and **Republic v. Senate Examination Disciplinary Committee & another Ex Parte Shadrack Muchemi Mbau [2006] eKLR**.

I have given due consideration to the dispositions and the submissions tendered by the rival parties. As correctly submitted by the respondent, the parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** which held that:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

In so doing, the court must be satisfied that internal mechanisms/remedies have been exhausted before coming to it. In the circumstances, the issue to be first determined is whether or not the ex parte applicant exhausted internal mechanism before filing this application. See: **Speaker of National Assembly v. Karume {1992} KLR 21** where the Court of Appeal held:

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

9. In **Geoffrey Muthinja Kabiru & 2 Others v. Samuel Munga Henry & 1756 Others, {2015} eKLR** the Court of Appeal held:

> ***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."***

10. Section 9 (2) of the Fair Administrative action Act provides that 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. Sub-section (3) provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1). It is to be noted that section 9 (2) & (3) are couched in mandatory terms. Exception to the said provision is in section 9 (4) which provides thus:

> ***"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."***

It follows therefore that an applicant must demonstrate exceptional circumstances and on application by the applicant, the Court may exempt the person from the obligation.

11. It is an undisputed fact that the impugned decision arose from an administrative action under section 2 of the Fair Administrative Action Act and an internal remedy must be exhausted prior to Judicial Review, unless the ex parte applicant demonstrate exceptional circumstances to exempt her from the said requirement.

The said factors were as stated by Mativo J. in **Republic v. Kenyatta University Ex Parte Ochieng Orwa Domnick & 7 others [2018] e KLR** which position I concur with, thus:

> ***"Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate."***

Applying the test, the ex parte applicant did not exhaust the internal mechanisms i.e. appeal the said decision as provided for in the Regulation Governing the Conduct and Discipline of the Student of the University Clause 4 (a) (i) and has not demonstrated and or established the existence of exceptional circumstances. The Exparte Applicant should first comply with the issues raised by the Respondent in the letter that had been served upon her. In the circumstances, this application is premature and is hereby dismissed. Each party to bear their own costs

Orders accordingly.

Dated and delivered at **Machakos** this **11th** day of **October,** 2018.

D.K.KEMEI

JUDGE