



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 29 OF 2015**

**OBARE CEDRICK**

**RAY MASHA SHEGU**

**CHEPKURUI OBADIAH**

**BRIAN KIPLIMO BETT**

**SAMUEL NG'ANG'A MAINA**

**BARRACK AUKA ODERA**

**NIKODEMUS NAMACHANJA.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**KENYATTA UNIVERSITY**

**THE REGISTRAR KENYATTA UNIVERSITY (ACADEMICS)...DEFENDANTS/RESPONDENT**

**RULING**

1. Sometimes between 13<sup>th</sup> October, 2014 and 15<sup>th</sup> October, 2014 from a group of students supporting a candidate by the name Sammy Owino who had been disqualified from vying for the seat of president of Kenyatta University Students Association ('KUSA') for alleged misconduct went on a rampage. In the rampage, the demonstrating students are alleged to have maliciously destroyed property belonging to the institution including the looting of tuck shops in Nyayo zone and Kilimanyaro hostels, destruction of window panes and walk through machine. Following the incident, the Respondent suspended the Applicants of having been involved in the illegal demonstration.
2. The Applicants subsequently filed this suit which was accompanied with a Chamber Summons application dated 27<sup>th</sup> January, 2015 through which they seek the following orders:-
  - i. *That the Respondent be ordered to lift the suspension imposed on the Applicants and allow them to register for the 2015 semester pending the hearing and determination of a criminal case number 4903 of 2014, complainant being the 1<sup>st</sup> Respondent against the Applicants herein set out for hearing on 4<sup>th</sup> August, 2015 at Makadara Law Court which charges are alleged malicious damages to school property involving 11 students that led to the Applicants' suspension.*

- ii. *That pending the hearing and determination of this suit, the Respondent, their servants and/or agents or otherwise howsoever be restrained from issuing any further suspension faced by the Applicants, stop any interference with the Applicants studies and re-admit them before end of semester registration which is 2<sup>nd</sup> February, 2015.*
3. It is the Applicants gravamen that the Respondent's committee investigating the disturbance that occurred in the university conducted the proceedings contrary to the rules of natural justice. That the proceedings were unfair, malicious, threatening and intimidating and that the committee did not want to hear anything positive from the Applicants but insisted that they were on the material night involved in illegal demonstration as indicated by a security officer who was not at the scene but appeared later when the police had arrested them although they were innocent. It was lamented that with intimidating tactics, the committee ranging from 9 to 11 members summoned the Applicants one by one and tried to force them to accept that they participated in the illegal demonstration only relying on the arrest made by the police and not investigations report or sources from the ground or any identification parade.
  4. In his affidavit in support of the application sworn on 27<sup>th</sup> January, 2015, the 1<sup>st</sup> Applicant stated that on the material day the Applicants were in various hostels taking cover while rowdy students engaged the police in running battles. That the police threw teargas to hostels informing the Applicants and others to come out of the hostels which order they abided by but instead they were rounded up and ordered to lay on the ground and later bundled to a waiting van at the gate. That female students with whom they were bundled, were spared the arrest. He stated that he was on the material date sitting for his continuous assessment test and was unaware of any planned riot. He denied that the Applicants participated in the riot. He averred that the he, the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Applicants were at their hostel in Nyayo 6 at the material time.
  5. The Respondent filed a notice of preliminary objection dated 2<sup>nd</sup> February, 2014 to the effect that; the Applicants' suit is not justiciable under the civil jurisdiction of the High Court; that this court has no jurisdiction under the Civil Procedure Act Cap 21 and Rules thereunder to adjudicate over the Applicants' purported cause of action; the Applicants' suit is an abuse of court process as its real objective is to circumvent and defeat the 1<sup>st</sup> Respondent's statutory power to enforce disciplinary rules and good order among the students; the Applicants' suit is premature unless and until the 1<sup>st</sup> Respondent has adjudicated over the complaints made against the Applicants and other students and the Applicants suit offends statutory provisions to wit, the University Act, 2012, the Rules and Regulations of Kenyatta University. The court ordered that the objection be argued as part of grounds of opposition to the application.
  6. The application was canvassed by way of oral submissions. Mr. Sitati learned counsel for the Applicants submitted that students of the 1<sup>st</sup> Respondent demonstrated on 15<sup>th</sup> October, 2014 on some grievances. The Applicants were arrested and charged with the offence of malicious damage to property at Makadara which case is still pending and is due for hearing in August, 2015. That the Applicants have subsequently been served with suspension letters pending their appearance before the students' disciplinary committee (*'the committee'*). He stated that it is unknown when the students are to appear before the committee. That the university is due to close its registration on the week of 4<sup>th</sup> February, 2015. That some of the Applicants were meant to proceed for attachment which is relevant to their academic year and that if they do not register, they shall not be liable to attend attachment and registration whereby they will suffer irreparable loss. He further submitted that the Respondent will suffer no prejudice if the Applicants were admitted to their academic semester.
  7. In response to the preliminary objection, Counsel submitted that this court has inherent powers which it can exercise and hear the Applicants; that under the Universities Act, 2012, Section 63 (1) the 1<sup>st</sup> Respondent's council is enjoined to uphold the right of every person and shall inform that person of the nature of the allegation made against him; that the Applicants had not been informed of their wrongs in the suspension letters. Counsel concluded that the Applicants have

been wrongly victimised and referred this court to ground (c) and stated that the Applicants do not reside within the university.

8. On the other hand, Mr. Kibe learned counsel for the Respondent submitted that the decision to suspend the Applicants was lawful and within the Respondent powers under the Universities Act, 2012; that Section 63 of the Act provided how the Council of the university has to uphold the rights of the person which must be within six (6) months. He submitted that since the Applicants had been suspended on 30<sup>th</sup> December, 2014 they are entitled to a decision from the disciplinary committee by 30<sup>th</sup> June, 2015 which would be well before 4<sup>th</sup> August, 2015 when the criminal case is coming up for hearing. He contended that the Applicants had not alleged that the 1<sup>st</sup> Respondent has no powers to discipline or that the exercise of the powers was being done in an unlawful manner. He stated that the Kenyatta University Charter Article 17 Clause 8 (e), Regulations for discipline of students, page 124 Statute XXIX set out the powers of the senate and in particular sub-clause 4 (r).
9. On his preliminary objection Counsel submitted that the Applicant's cause is not justiciable under the High Court Civil Jurisdiction. That the Applicants had not denied that the 1<sup>st</sup> Respondent exercises statutory powers under the University Act, Statutes and Charter. That in exercise of those, powers the university is under the supervisory powers of the High Court under the Law Reform Act Section 8. That the three remedies available are certiorari, mandamus and prohibition which cannot be exercised by this court under its civil jurisdiction. On the issue of jurisdiction he submitted it is not a technicality since the procedure of exercise of the court's powers is a matter of substantive law and not a technicality. Counsel further submitted that the right to a hearing is before the adjudication body and not the investigative body. Counsel submitted that there is no civil dispute before this court to warrant this court to exercise its civil jurisdiction. Counsel relied on the case of **West Kenya Sugar Co. Ltd v. Kenya Sugar Board and Butali Sugar Ltd** Court of Appeal No. 89 of 2011 (UR) and stated that the statutory body must first be allowed to exercise its powers before the exercise of supervisory powers by the High Court. Citing **Commissioner of Lands Vs Kenste Hotel Limited Nakuru High Court, Civil Appeal No. 234 of 1995 (UR) and Suba Vs Egerton University (1995 – 1995) EA 303 – 309** Counsel submitted that Judicial Review is concerned with the process and not merits. In the premises, counsel concluded that this suit is premature as no decision has been made yet.
10. In reply, Mr. Sitati submitted that this court has jurisdiction to entertain the application since it has been averred that the 1<sup>st</sup> Respondent's actions are unlawful and that there has to be an avenue for fair hearing. He stated that the Respondent will suffer no prejudice since there will be another registration in May, 2015.
11. This is an injunction application. The Applicants must satisfy the principles enunciated in **Geilla Vs Cassman Brown Case (1973) EA 259** that they have a prima facie case with a probability of success, that unless the injunction sought is granted they stand to suffer loss which damages will not be adequate to compensate and that if the court is in doubt it will decide the matter on a balance of convenience.
12. Prima facie has been defined by the Court of Appeal in **Mrao Vs First American Bank of Kenya Ltd and 2 others (2003) KLR 125** as a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal by the latter.
13. Is any right of the Applicants who has been infringed by the Respondent which required a rebuttal by the Respondent? I have carefully looked at both the Complaint and the Affidavit in support of the Summons. Paragraphs 4 and 5 of the complaint are only narrative as to what transpired at the 1<sup>st</sup> Respondent's institution between 13<sup>th</sup> and 15<sup>th</sup> October, 2014 which led to the arrest of the Plaintiff's. The Plaintiff's cause of action can be found at paragraphs 6 and 7 of the complaint. This they plead that the Respondent had suspended them without having given them a hearing.

14. In both the Complaint and the Supporting Affidavit, it was never alleged that the Respondent had breached any legal rights of the Applicants or that the Respondent did not have the power to act as they had. Counsel for the Applicants was unable to pinpoint any particular section of the statute or regulations which had been breached which this court could safeguard by issuing an injunction against the Respondent. To the contrary, it turned out that what had been commenced by the Respondent was a disciplinary process which is allowed under the statutes and Regulations governing the 1<sup>st</sup> Respondent.
15. This court has looked at the Charter of Kenyatta University issued pursuant to Section 19 of the Universities Act, 2012. Part III thereof provides for the governance of the 1<sup>st</sup> Respondent. Section 17 of the Part establishes the 1<sup>st</sup> Respondent's Council under subsection 8(e), that council is mandated to make regulations governing the conduct and discipline of students of the 1<sup>st</sup> Respondent statute XLIII empowers the council as well as the senate to delegate any of its functions to any person they shall deem fit. Mr. Kibe submitted that the 2<sup>nd</sup> Respondent wrote the letters of suspension under this authority.
16. The court has seen Schedule 2 of the 1<sup>st</sup> Respondent's statutes. The same provides for the Senate Committees. One of the Committees created is the Student Disciplinary Committee. Its first term of reference is: -

***“1) to consider all matters of a disciplinary nature involving students, the report to the senate the action taken, provided that the student may appeal to the Vice-chancellor.”***

17. According to the letters dated 30<sup>th</sup> December, 2014 the Applicants were being suspended by the 2<sup>nd</sup> Respondent pending their appearance before the student Disciplinary Committee (the SDC). At the hearing of the application, the court required whether the Respondent had the powers to suspend the Applicants pending the disciplinary proceeding, whilst Mr. Mungai for the Respondent answered in the affirmative, Mr. Sitati for the Applicant had no answer.
18. As already noted, the Plaintiffs did not allege that the Respondent did not have power to suspend them pending their appearance before the SDC. Since courts of law do not act on suppositions or speculation but hard facts, this court cannot enquire as to whether the Respondent were entitled to suspend the Applicants. That would be an inquiry which could have been properly carried out by this court exercising its supervisory powers under Section 8 of the Law Reform Act and Order 53 of the Civil Procedure Rules. I agree with Mr. Kibe that when exercising its supervisory powers under Article 165 of the Constitution, this court has to be exercising a special jurisdiction that is not civil in nature.
19. In this regard, this court is not convinced that any prima facie case has been established by the Applicants. In the issue of damages, the Applicants have a chance to date themselves once the proceedings commence.
20. Be that as it may, I should point out here that if I were exercising the special jurisdiction of Judicial Review, I would have ordered a stay on the basis of the material on record. I say so because, the complaint that the investigations were concluded without the Applicant's being given a hearing is a serious issue. The conclusion of the said investigations has adversely affected the Applicants in that it has led to their suspension.
21. However, since the Applicants did not invoke that special jurisdiction but the civil jurisdiction of this court whereby the court looks at the merit and not the decision making process, I cannot grant any orders to the Applicants.
22. The upshot is that the application has no merit and the same is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 6<sup>th</sup> day of March, 2015.

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**A MABEYA**

**JUDGE**