**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 460 OF 2014**

**IN THE MATTER OF KENYATTA UNIVERSITY**

**AND**

**IN THE MATTER OF BREACH OF RULES OF NATURAL JUSTICE**

**AND**

**IN THE MATTER OF SUSPENSION OF THE APPLICANT FROM THE RESPONDENT'S INSTITUTION**

**BETWEEN**

**REPUBLIC……....……APPLICANT**

**VERSUS**

**KENYATTA UNIVERSITY……..……..RESPONDENT**

***EX PARTE:*** **NJOROGE HUMPHREY MBUTHI**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 18th December, 2014, the applicant herein, **Njoroge Humphrey Mbuthi**, seeks the following orders:

> **1. That an order of Certiorari removing to this honourable court and quashing the Respondent's decision to suspend the Applicant from studies for a period of Two Academic Years together with payment of a fine of KShs. 30,000/= dated 12th May 2014**
>
> **2. That an order of mandamus directing the Respondent to re-admit the Applicant so as to continue with his studies.**
>
> **3. That costs of this application be provided for.**

***Ex Parte* Applicant's Case**

2. The Motion was supported by a Verifying Affidavit sworn by the applicant on 28th December, 2014.

3. According to the applicant, he was admitted by Respondent as a student on September 2011 to study a course leading to an award of a Bachelor of Science Degree in Computer Science. Sometimes in November, 2013 the Laboratory Assistant of the Respondent's Computer Laboratory whose name was unknown to the applicant, approached him while he was undertaking his studies at the Computer laboratory with the other classmates at the Respondent's University and summoned him to a small office within the laboratory where he met some of the Lab Assistants workmates waiting for them.

4. According to the applicant, the laboratory assistant inquired from him about his day and movements the previous Monday 4th November 2013, the nature of clothes he had worn, and the kind of bag he was carrying on the material day. He informed them that on the material day he left his place of habitation, went to Student's Centre for his class at the Computer Laboratory, and then went to an office in the building on 1st floor to have his Meal Voucher Card corrected. Thereafter he went to the Library and took a book on calculus and left the University compound at around 4.30pm.

5. The applicant added that while he was giving the explanation, he called the security department who were on the way to the place where they were and as they were meeting at the said office, three security officers (a lady and two men) arrived at the Laboratory Office and the said officer continued listening to the deliberations which they were having.

6. According to the applicant up to this point, he had no knowledge of the accusation against him as he was just answering questions the way they came. While there with the security officers, the Lab assistant walked out and called a fellow student into the small room and it was at this time that the Lab Assistant accused him before the fellow student that he had stolen his laptop computer an accusation which the applicant denied and in order to prove his point, called two of the classmates, who joined them in the small room, and corroborated his explanation relating to his movements on the day in question.

7. Thereafter, all of them accompanied the security officers in their car to their offices where the applicant's college mates gave written statements relating to the accusation regarding theft of the Lap top computer. The security officers however demanded that the applicant surrenders his school bag to them after removing all the contents and he was asked to sit on a chair at a corner with the officers who demanded that he pays for lap top in order to conclude the matter, or else they would take the case forward, a demand the applicant refused to oblige.

8. According to the applicant, after being detained for one hour, by the security officers he was just told to leave; and I left as advised.

9. On the 6th January 2014, the applicant averred he received a letter suspending him from the University for a period of two academic semesters, and demanding that he pays a fine of Kshs. 30,000/= for the laptop. The applicant averred that despite seeking the Minutes and Proceedings of the day the Respondent has declined to furnish him with the same. On 17th February 2014 he received a letter from the Registrar, Academic and Student Affairs, summoning me to attend a student Disciplinary Meeting on 21st February 2014 on the accusation that he had stolen a Lap Top Computer.

10. At the said hearing, the applicant averred there was no complainant and the charges were not formally read to him nor was he cautioned to seek legal advice and/or legal representation. According to him, he just entered the room, and the Official Presiding over the Proceedings asked him to sit in front before the committee which comprised of about 14 to 15 members and he was told to state his case which he did, followed by a barrage of questions after which he was told to leave. According to him, he told them that if such lap top was stolen, a report ought to have been made to the police and same could be tracked, but they never heeded his advice.

11. On 12th May 2014 the applicant got a letter got a letter that he had been suspended from the University and he was required to pay a **Kimani Njuguna** Kshs. 30,000/= being the cost of the Laptop and he was further expelled from the Halls of Residence. The applicant reiterated that he has never been served with the minutes or the proceedings of the committee despite his letter requesting for the same.

Notwithstanding that on 19th May 2014, he proceeded to lodge an appeal to the University Senate Committee, citing the irregularities before the Students Disciplinary Committee. However, on 7th October 2014 he was advised that his appeal was unsuccessful and his expulsion for a period of two academic years was upheld and he was required to pay a Penalty of Kshs 30,000/=.

12. According to the applicant, he has have been positing good academic results and the suspension will ruin his carrier and livelihood as he cannot be admitted at any Public University in Kenya. In his view, his suspension and being fined Kshs. 30,000/= was un-procedural and illegal in that:

a. The due process of law was not adhered to.

b. He was not given adequate time to prepare his defence

c. The committee was nor properly constituted,

d. The Respondent breached the rules and regulations governing Disciplinary proceedings.

13. It was submitted that the applicant was neither furnished with the full particulars of the statute infringed by him nor was the specific clause of the University Rules and Regulations pursuant to which the disciplinary proceedings were carried out indicated. Further the statutes governing the students' conduct was not explained to him.

14. It was further contended that the applicant was never afforded an opportunity to interrogate the complainant regarding his accusation and the said complainant never attended the said disciplinary proceedings.

15. It was submitted that the period between the time when the alleged offence was committed and the time the disciplinary action was taken was too long hence there was an inordinate delay in determining the matter.

## Respondent's Case

16. The respondent opposed the application vide a replying affidavit sworn by **Prof Paul K. Wainaina**, its the Deputy Vice Chancellor (Administration) on 24th March, 2015.

17. According to him, this court lacks jurisdiction to hear and grant the order of Certiorari to quash the Respondent's decision dated 12th May 2014 since the Application for leave was made on 8th December 2014 by which time Six (6) months had already lapsed on 12th November 2014.

18. According to him, on 4th November 2013, a laptop belonging to **Kimani Njenga Stephen**, a *bona fide* student of the Respondent was stolen and on 20th November 2013 he received a report from the Director Security Services on the events surrounding the theft of the said laptop which report named the Applicant as the suspect following positive identification by **Nicks Macharia Mutua**, a staff at the Computer Center.

19. Pursuant to the findings of the Directorate of security services, the Respondent wrote a letter to the ex parte Applicant on 6th January 2014 suspending him with immediate effect from studies at the Respondent's institution pending his appearance at the Student's Disciplinary Committee. According to the deponent, the suspension was in accordance with the University Rules and Regulations Governing Student Conduct.

20. He added that on 17th February 2014, the Respondent wrote a letter to the Applicant inviting him to appear before the Student's Disciplinary Committee on 21st February 2014 and to him, the period between 6th January 2014 and 21st of February 2014 was sufficient to allow the Applicant time to prepare

his defence. On 21st February 2014, the Applicant appeared before the Committee which accorded him a fair hearing and after careful scrutiny of the Applicant's case and the evidence adduced, the committed found the Applicant guilty and recommended that the Applicant be suspended for two (2) academic years, with effect from the second semester 2013/2014 Academic Year, and therefore he be re-admitted during the Second Semester 2015/2016 Academic Year; that before his re-admission, he pays **Kimani Njenga Stephen** Reg. No. J79/4291/2012 Kshs. 30.000/= (Thirty Thousand Shillings Only) being the cost of the stolen laptop and that he be expelled from the Halls of Residence.

21. It was averred that the Respondent communicated the decision of the Committee to the Applicant on 12th May 2014 and on 19th May 2014, the Applicant filed an appeal against the decision of the Committee listing fifteen (15) grounds of appeal. On the 7th August 2014, the Respondent wrote a letter to the Applicant inviting him to appear before the Student's Appeals Disciplinary Committee on 13th August 2014 which Student's Appeal Disciplinary Committee met on 13th August 2014 and after considering the Applicant's appeal upheld the verdict of the Student's Disciplinary Committee.

22. According to the deponent, due process was followed in the disciplinary process the Applicant was subjected to and based legal advice, he deposed that judicial review is concerned with the process of decision-making and not the merits of the decision. Consequently, the Applicant having appealed against the decision of the Student's Disciplinary Committee of 12th May 2014, he cannot impeach the merits of that same decision in these proceedings.

23. It was submitted that since the applicant seeks to quash a decision contained in the letter dated 12th May, 2014 the date when the 6 months limitation period provided under section 9(3) of the ***Limitation of Actions Act***, Cap 26 lapsed was on 11th November, 2014. However this application was filed on 8th December, 2014 which was over one month out of time. In support of this application the applicant relied on **Gilbert Hezekiah Miya vs. Advocates Disciplinary Committee [2015] eKLR** in which it was held that where a particular cause of action is declared to be barred by limitation, the Court would lack jurisdiction to entertain the same unless time for doing so is extended.

24. It was further submitted that the application is incompetent since contrary to Order 53 rule 1(2) of the ***Civil Procedure Rules***, the statutory statement accompanying the application does not specify the grounds upon which the application is based.

25. It was further submitted that since the applicant was accorded an opportunity to defend himself, the same is unmerited. Further having appealed against the decision intended to be quashed, it was submitted that the applicant cannot now challenged the same decision through these proceedings. Therefore if an order of certiorari cannot issue, it was similarly submitted that mandamus cannot issue unless the decision is quashed.

## Determinations

26. I have considered the application.

27. The first issue for determination is that the instant application is time barred. However in **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** the High Court, dealing with the same issue expressed itself as follows:

> **"A reading of section 16 of the KNHCR Act, 2002 shows that the Commission has both investigative and adjudicative functions and we find that it is one of the subordinate courts envisaged under section 65 (1) and 84 (3) of the Constitution and would therefore be subject to the supervisory powers of the High Court… What is sought to be quashed is the regulations which are said to have been gazetted on 16/9/05 vide Gazette Supplement 67 of 2005 and yet this application was filed on 16/11/06, over a year after the gazettement. We do agree with the submission by Mr Ojiambo and which submission we subscribe to, that order 53 rule 2 only relates to the challenge of formal orders set out under that rule that is**

**judgments, decrees, orders etc. It does not apply to other decisions like this situation. The 6 month's limitation only applies to formal orders mentioned in rule 2 and nothing else and that it does not apply to decisions which are null ab initio. Where a body lacks jurisdiction it cannot be said that there was a valid decision in the first place, for time to start running against certiorari. We hold that the 6 months limitation does not apply to the impugned Regulations."**

28. I also wish to refer to **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004[2004] eKLR** and **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 Of 1998.** In these cases it was similarly held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else. A decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.

29. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318,** the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

30. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which certiorari may be applied for.

31. The decision made by the Respondent which is the subject of these proceedings was an administrative action. Though it was a quasi-judicial one, in my view the same does not qualify as one falling within the genre of the matters contemplated under Order 53 rules 2 and 7 aforesaid. Accordingly, I find that the application is not time barred.

32. The applicant contends that during the disciplinary proceedings against him, the complainant was not present and therefore he was never afforded an opportunity to cross-examine him.

33. According to the respondent the complainant was one **Kimani Njenga Stephen**, one of the respondent's students. However the person who allegedly positively identified the applicant was one **Nicks Macharia Mutua**, a staff at the Computer Centre.

34. Article 47 of the Constitution of Kenya provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Similarly section 4(1) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4(3) of the said Act on the other hand provides:

***Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***

***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d) a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable; (0 notice of the right to cross-examine or where applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

35. Section 4(4)(c) thereof on its part provides that the administrator shall accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him. However, section 4(6) of the Act provides that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

36. It is therefore clear that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. I agree with **Michael Fordham** in ***Judicial Review Handbook*** 4th Edn. at page 1007 that:

**"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

37. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

**"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."**

38. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

**"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."**

39. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of the Constitution. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR .**

40. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

**"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."**

41. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

**"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."**

42. However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses. In this case two crucial people whose statements were relied upon in the disciplinary proceedings against the applicant never appeared at the hearing. These were the person who claimed ownership of the laptop and the person who allegedly saw the applicant pick up the laptop. In the absence of these witnesses and as the law required that they be availed for cross-examination, there is no way the manner in which the respondent conducted its proceedings can be said to have met the threshold under Article 47 of the Constitution pursuant to which the ***Fair Administrative Action Act*** was enacted. It is not contended by the respondent that its disciplinary rules or procedure provided for a different mode of conducting proceedings from that provided under the Act. Even if there existed such a procedure it had to comply with the letter and spirit of Article 47 of the Constitution.

43. It is contended that since the applicant had exercised its right of appeal, he ought not to have commenced these proceedings. In my view the right to a fair hearing under Article 47 is a fundamental right that cannot be taken away by a right of appeal. It ought to be remembered that the right of appeal usually deals with the merits of the decision made rather than the process of arriving at the decision.

44. I have looked at the decision of the appellate committee and although the applicant raised the issue of the absence of the witnesses whose evidence was relied upon to "nail" him, the appellate tribunal did not even allude to this important ground. It instead relied on extraneous matters such as the applicant's "arrogance in his oral submission". In my view, where a process does not meet the constitutional threshold, it cannot be sanitised by a process of appeal which is itself flawed as happened in this case.

45. It was contended that the application was incompetent for failure to particularised the grounds on which it is based in the statutory statement. Although it is true that there was no heading dealing with the grounds on which the application is based, a perusal of the "facts relied on" clearly disclose the grounds such as that the applicant's suspension was unlawful, un-procedural and against the rules of natural justice. Although expressed in broad terms, it is my view that these grounds sufficiently put the respondent on notice as to the applicant's grievances.

46. Having considered the issues raised in this application, it is my view and I hereby hold that the disciplinary proceedings undertaken by the respondent which culminated in its decision of 12th May, 2014 were clearly improper and failed to meet both the constitutional and the relevant statutory threshold. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** where the Court expressed itself as follows:

**"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."**

47. As was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** procedural impropriety is one of the grounds for granting judicial review application.

48. In the premises I find merit in the Notice of Motion dated 18th December, 2014. This decision however, has nothing to do with the merits or otherwise of the respondent's decision. Whereas the respondent's decision may well have been merited the process through which it arrived at its decision was clearly flawed and it cannot be allowed to stand.

## Order

49. In the result I grant the following orders:

**1) That an order of Certiorari removing to this court for the purposes of being quashed and quashing the Respondent's decision dated 12th May, 2014 suspending the Applicant from studies for a period of Two Academic Years together with payment of a fine of Kshs. 30,000/=.**

**2) That an order of mandamus directing the Respondent to re-admit the Applicant so as to continue with his studies unless otherwise lawfully disciplined.**

**3) The costs of this application are awarded to the applicant.**

**Dated at Nairobi this 4th day of November, 2015**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

***Mr Matundura for Mr Maosa for the Applicant***

***Mr Khaseke for the Respondent***

***Cc Patricia***