IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 73 OF 2001

IN THE MATTER OF: AN APPLICATION BY IRUNGU KANG'ATA, DAVID OLE SANKOK, GEORGE OMONDI TAMBO, SYLVESTER NYANDERO, KENNEDY MBARA, CHRISTOPHER OWIRO, CALLEB DAVID OTIENO & STUDENT ORGANISATION OF NAIROBI UNIVERSITY (S.O.N.U.)

BETWEEN

REPUBLIC ..... APPLICANT

AND

UNIVERSITY OF NAIROBI ..... RESPONDENT

(An application for stay of execution of part of the orders of the High Court of Kenya at Nairobi (Mulwa J) dated 6th March, 2001

in

H.C.MISC.C.C. NO. 40 OF 2001)

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RULING OF THE COURT

Irungu Kang'ata, David Ole Sankok, George Omondi Tambo, Sylvester Nyandero, Kennedy Mbara, Christopher Owiro, Calleb David Otieno & the Student Organisation of Nairobi University (S.O.N.U.) who are the applicants in the motion before us, come to the Court under the provisions of ***Rule 5 (2) (b) of the Rules of the Court*** and they seek three basic orders, namely:

"(a)THAT there be a stay of execution of only such portion or part of the decision of 6th March, 2001, to the effect that the University of Nairobi shall convene Disciplinary Committees for the applicants to be tried afresh;

(b)THAT any further proceedings by the University of Nairobi Discipline (sic) Committees convened to try the Applicants be stayed until the applicants' intended appeal is lodged, heard and determined;

(c)THAT in the meantime the status quo be maintained to the effect that the University of Nairobi decision of 4th January, 2001 to suspend and expel the applicants remain quashed and the applicants are bona fide students of the University of Nairobi."

The applicants, save for the last one, are students of the University of Nairobi and on 4th January, 2001,

the University wrote a letter to each one of them conveying to them the decision of the University expelling or suspending each of them from the University. Each of them was aggrieved by the University decision to expel or suspend them. So by their Chamber Summons dated the 19th January, 2001, and drawn and filed by their counsel Mr E.K. Mutua, and purporting to be brought under ***Order 53 and Order 1 Rule 8 of the Civil Procedure Rules***, the applicants sought the leave of the superior court for orders:

"1.THAT the Applicants be granted leave of the court to sue on their own behalf and on behalf of all students of the University of Nairobi who have been expelled or suspended and or leave to bring this suit in an (sic) representative capacity.

2.THAT the applicants be granted leave to apply for ORDERS OF CERTIORARI and PROHIBITION against the Vice-Chancellor and/or the Senate Disciplinary Committee of the University of Nairobi, seeking to quash the decision made by the University of Nairobi on 4th January, 2001, to expel or suspend the applicant from the University.

3.THAT grant of leave do operate as a stay of the operations of this matter by the respondent and specifically the said leave do operate as a stay of the said decision by the University of Nairobi to expel and or suspend the applicants from the University."

The application for leave was granted by a Commissioner of Assize, Mr Visram, as he then was, on 19th January, 2001, and on either the 22nd or 23rd January, 2001, the applicants lodged their notice of motion under ***Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules*** and once again, the orders sought in the said motion were:

"1.THAT Judicial Review Orders of CERTIORARI and PROHIBITION do issue directed to the University of Nairobi, the Vice-Chancellor, University of Nairobi, the Senate and Council of the University of Nairobi, to remove to the High Court the proceedings and decision made on 4th January, 2001 and or thereabouts suspending or expelling the applicants (58 students) from the University of Nairobi so that the same may be considered and quashed."

That was the only prayer made in the motion and the grounds upon which it was brought were that:

"(a)The decision to expel the applicants is unlawful and discriminatory;

(b)The applicants were denied right to legal representation and therefore the decision goes against natural justice;

(c)The applicants were deprived (sic) their right of appeal having been tried by an appellate body/tribunal;

(d)The Senate Disciplinary Committee deliberated on matters pending in court for determination."

We pause here to remark that it is not clear to us what the applicants were seeking to prohibit the University from doing. As a matter of common sense, the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done - see for example, ***KENYA NATIONAL EXAMINATIONS COUNCIL V REP, Ex Parte GEOFFREY GATHENJI NJOROGE & OTHERS, CIVIL APPEAL NO. 266 OF 1996, (Unreported)***.

The complaint of the applicants before the superior court appears to have been that the University had either expelled or suspended them contrary to law and they, correctly in our view, sought an order of certiorari to bring into the superior court and quash the decision expelling or suspending them. The University could not be prohibited from expelling or suspending them because the University had already done that. We doubt whether the University could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law.

Be that as it may, Mulwa, J heard the applicants' notice of motion of the 22nd January, 2001 and by his decision dated 6th March, 2001, the learned Judge finally delivered himself as follows:

"For those reasons explained herein this application must succeed but the case is remitted back to the University with the Directions that the Vice-Chancellor shall without any delay convene the necessary Disciplinary Committees where those students concerned shall be tried, paying attention to the matters raised in this ruling."

Everybody concerned in the matter understood the decision of the learned Judge to mean that he quashed the decision of the University which either expelled or suspended the applicants. The learned Judge, we think, had jurisdiction to quash the University decision, whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for our consideration in the current motion.

But did the learned Judge have jurisdiction to, in effect, order the University to retry the applicants? The applicants, through their counsel Mr Mutua, told us that the learned Judge did not have jurisdiction to order a retrial. All the learned Judge was entitled to do, says Mr Mutua, was either to quash the decision of the University as he did, or refuse to quash and dismiss the applicants' motion. Neither the applicants, nor the University itself had asked the learned Judge for an order of mandamus, it was not feasible to ask for an order of mandamus because nobody had alleged before the learned Judge that the University was wrongfully refusing to perform a public duty imposed on it by law. In those circumstances, contends Mr Mutua, the Judge was not entitled to decree as he did that:

"... the Vice-Chancellor shall without any delay convene the necessary Disciplinary Committees where the students concerned shall, be tried, paying attention to the matters raised in this ruling."

Mr Mutula Kilonzo for the University told us that the Judge had jurisdiction to make the order and Mr Kilonzo referred us first to the provisions of ***sections 8 and 9 of the Law Reform Act, Cap 26,*** which give the High Court power to issue orders of certiorari, prohibition and mandamus. We agree with Mr Kilonzo that under ***section 8(2) of the Law Reform Act***, the High Court has power to issue those orders in circumstances in which the High Court of Justice in England would have power to issue them. But we do not think that is the point to be canvassed in the intended appeal. The point to be canvassed in the intended appeal is whether, in the exercise of his admitted jurisdiction, the learned Judge was in fact entitled to, in effect, issue an order of mandamus against the University when neither the applicants nor the University had asked for such an order. We think this point is clearly arguable. Mr Kilonzo told us that even if the Judge had not issued the order for retrial, the University would nevertheless have convened its disciplinary committees to deal with the case of the students afresh and Mr Kilonzo contended the University would have been entitled to do so. That may well be so but that does not appear to be what has actually happened. Professor Gichaga, the University Vice Chancellor in his replying affidavit dated 23rd March, 2001, swears as follows, where relevant:

"11.THAT in a Ruling delivered on 6th March, 2001 by Hon. Justice Kasanga Mulwa of the superior court, the Court allowed the Application dated 19th January, 2001 and further ordered the case be remitted back to the University with Directions that the Vice-Chancellor shall without delay convene the necessary Disciplinary Committees where those students concerned shall be tried, paying attention to the matters raised in this Ruling."

"12.THAT I confirm that in obedience to the superior Courts' order the University:

12.1Issued a circular dated 7th March, 2001 attached herewith and marked G1 to all the concerned students who appeared before the Senate Disciplinary Committee, informing that they remained suspended until they appeared before the proper Committees.

13.THAT I confirm that in pursuance of the Circular and in further conformity with the Honourable Court's Ruling, the University issued a Notice through the press, attached herewith and marked G2 inviting the students for a Disciplinary hearing in their respective colleges from 15th March, 2001."

Professor Gichaga's replying affidavit contained a total of twenty seven paragraphs. In none of those paragraphs does he swear that even in the absence of Mulwa J's order, he would still have convened the disciplinary committees to deal with the cases of the applicants. On the contrary, in paragraphs 12 and 13 the contents of which we have set out, he specifically swears that he convened the disciplinary committees in obedience to and in conformity with the order of the superior court. As Mr Kilonzo properly conceded before us, if the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable. The further affidavit of Professor Gichaga dated 3rd April, 2001 does not carry the matter any further for the only point he makes in that affidavit is that the disciplinary proceedings ordered by Mulwa J had begun and were being conducted fairly.

We are satisfied that the applicants have shown to us that their intended appeal is arguable and is not a frivolous one.

Will their appeal, if successful, be rendered nugatory, if we do not grant an order of stay to them? We think that their appeal will in fact be rendered nugatory, unless we grant to them an order for stay. They risk the probability of either an expulsion or suspension at the hands of the University and such drastic steps ought to be taken only when the point of law in issue has been determined. We believe the point ought to be determined as quickly as possible because, otherwise, the applicants might be forced to return to the courts many times over seeing that the courts are not the final arbiters on the issue of whether or not the applicants are to be disciplined by the University. All that the courts are entitled to do is to ensure that the process of conducting the disciplinary proceedings is in accord with the law, in this case the University of Nairobi Act, and that the rules of natural justice are complied with.

We have said enough, we think, to show that the applicants are entitled to an order of stay and the order which commends itself to us and which we now make shall be that that portion of Mulwa J's order to the effect that:

"... the Vice-Chancellor shall without any delay convene necessary Disciplinary Committees where those students concerned shall be tried, paying attention to the matters raised in this ruling.";

be and is hereby stayed until the hearing and determination of the intended appeal. The effect of that must be that all disciplinary proceedings still to be held pursuant to that order are stayed and the recommendations and/or decisions made in proceedings already held pursuant to the said order shall not be acted upon or carried out pending the hearing and determination of the intended appeal. We will go no further than that in this motion. We do not think it would be right for us to make orders such as that prayed for in *paragraph (c)* of the notice of motion. It is not for the courts to tell the Universities to suspend or not to suspend students whom they (that is the University) intend to discipline. As we have said, the role of the courts in such matters is to ensure that any disciplinary action taken by the University is in conformity with the law. The prayer in *paragraph (c)* of the applicant's notice of motion is perilously close to the order of Mulwa J against which the applicants are complaining. We accordingly reject it. The costs of this motion shall be in the intended appeal. Those shall be the orders of the Court on the motion dated 14th March, 2001.

Dated and delivered at Nairobi this 27th day of April, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR