Case Number:	Miscellaneous Civil Application 35 of 2020 (JR)
Date Delivered:	26 Nov 2021
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Judgment
Judge:	William Musya Musyoka
Citation:	Republic v Jomo Kenyatta University of Agriculture and Technology (JKUAT) Kakamega CBD Campus & another; Ex parte omo Kenyatta University Students Association (JKUSA) [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Judicial Review
History Magistrates:	-
County:	Kakamega
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 2020 (JR)

REPUBLIC.....APPLICANT

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY (JKUAT)

KAKAMEGA CBD CAMPUS.....1ST RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....2ND RESPONDENT

EX PARTE: JOMO KENYATTA UNIVERSITY STUDENTS ASSOCIATION (JKUSA)

JUDGMENT

1. The *ex-parte* applicant moved this court by way of a Motion, dated 3rd September 2020, and filed on 8th September 2020, seeking, for an order of prohibition, to stop the respondents from implementing a decision taken to close a campus of the 1st respondent situated within Kakamega Township. There is a prayer for a declaration that the decision to close the campus was a violation of the Constitution. The alternative order is for the campus to be converted into an examination centre.

2. There are two responses to the application. The first is by the 1st respondent. It is averred that the subject campus had been inspected by the 2nd respondent, for the purposes of determining whether to grant provisional accreditation for it to mount academic programmes at Kakamega. That was in November 2016. A provisional accreditation was given, subject to remedial action on some deficiencies that had been identified. A fresh inspection was done in August 2019, to confirm whether the deficiencies noted had been remedied, in order to make a final determination on full accreditation. After the re-inspection, it was noted that the deficiencies identified earlier were still subsisting, and the 2nd respondent took a decision not to grant accreditation, and to have the campus closed instead. It was to be closed within ninety days. The time was extended, to end of August 2020. Students were notified of the impending closure on 20th June 2020. It is averred that the 2nd respondent had the mandate in law to do what it had done, and its decision was not *ultra vires*, or biased, or in breach of rights. It is averred further that the students had opportunity to transfer to other colleges and campuses of the 1st respondent of their own choice.

3. The second response is by the 2nd respondent. It is averred that the 2nd respondent is established by statute, with mandate to provide guidelines for the development establishment and accreditation of universities in Kenya. It is stated that the 2nd respondent carried out an inspection of the Kakamega campus of the 1st respondent and decided to give notice of closure of the campus to the 1st respondent, and issued the requisite notices, after it was established that it did not have adequate facilities and resources, and that if it offered course, it was likely to compromise the quality of education offered at the campus. It is averred that when that notice was given, the 1st respondent opted to close the campus instead. The 1st respondent wrote, on 4th March 202o, saying it had no objection to the closure, and asking for time to wind down and translocate its operations. It is averred that the 1st respondent did not indicate that it was aggrieved by the decision, and it had a responsibility to comply. It is asserted that what the *ex-parte* applicant is asking the court to do is operate from an uncredited campus. It is concluded that the said decision was made in the best interests of the *ex-parte* applicant.

4. The present application has been canvassed by way of written submissions. Both sides have filed and served extensive written submissions. I have read through them, and noted the arguments made. I have also read through the cited judicial pronouncements and noted the principles stated in them.

5. Let me start by looking at the province of judicial review. It was said in *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR (Nyamu J), that:

"The grounds for judicial review have experienced unprecedented increase and the challenge for the court is to weigh each and every case presented before it on its own merits. However, there are conservative grounds that have remained outstanding in judicial review challenge such as: -

(i) Abuse of discretion.

(ii) Irrationality.

(iii) Excess of jurisdiction.

(iv) Improper motives.

(v) Failure to exercise discretion

(vi) Abuse of the rules of natural justice

(vii) Fettering of discretion.

(viii) Error of law."

6. It was explained, in *Republic vs. Political Parties Dispute Tribunal & 3 others Ex-Parte Saadia Ahmed Mumin* [2018] eKLR (Odunga J), that:

"… the purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question."

7. In Republic vs. Judicial Service Commission Ex-Parte Pareno [2004] eKLR (Nyamu J), it was stated:

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question."

8. Let me start by saying that the Motion dated 3rd September 2020 is mounted on Order 53 Rule 3 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act, Cap 26, Laws of Kenya. Under these provisions, the Judicial Review orders available for making by the High Court are: *Certiorari*, *Mandamus* and Prohibition. The order sought in the Motion, of a declaration, is not available in a Judicial Review application premised on Order 53 Rule 3 of the Civil Procedure Rules and sections 8 and 9. A declaration as to violation of the Constitution is not a remedy under Order 53 Judicial Review, but under Constitutional Judicial Review, which should be sought though a constitutional petition. Secondly, prayer 2 of the Motion is also not available for making by a court exercising a Judicial Review jurisdiction. The *ex-parte* applicant should have filed an ordinary suit, if they desired to obtain such orders. Ultimately, the only legitimate Judicial Review order sought herein is the *Certiorari*.

9. Judicial Review monitors exercise of statutory powers by administrative and quasi-judicial bodies. The respondents are such bodies. They are established and regulated by statute, that is to say the Universities Act, No. 42 of 2012. Their mandates are set out there, and the powers they exercise, with respect to discharge of that mandate, are also delineated in that statute. Inspection of university facilities, accreditation and closure of such facilities are part of that mandate. The issues in controversy revolve around

those mandates.

10. The *ex-parte* applicant challenges the decision of the respondents to close the Kakamega campus where its members are students. It should be reiterated that the function of the court is not to look at the merits of the decision of the entity in question, but the process through which the decision is made or arrived at, to determine whether it was made within the law, in terms of whether there was jurisdiction to make it, whether the decision was within the powers or parameters set by the law, whether it was reasonable, or arbitrary, whether the process of making was lawful, and so on. To determine that the court will have to look at the decision in question against the provisions of the statute under which the entity allegedly made the decision in question. In this case, the relevant statute is the Universities Act. It is the frame against which to assess whether or not the decision challenged was made outside of the law or without jurisdiction.

11. It is trite that a court determines a matter only on the basis of the pleadings filed. The cause herein was initiated by the *ex-parte* applicant. It is the *ex-parte* applicant who says the respondents acted outside their powers when they closed the campus. The burden to establish that is on the *ex-parte* applicant, the respondents are only obliged to demonstrate that they acted properly within the applicable law. The *ex-parte* applicant had to demonstrate that the respondents acted outside of the powers and mandate given to them under the Universities Act, or that they abused those powers in some way. I have very closely perused through the Motion, dated 3rd September 2020, the affidavit sworn on even date in support of the Motion, and the statutory statement under Order 53 rule 1(2), I have noted that none of them make any reference whatsoever to the provisions of the Universities Act, under which the impugned closure of the campus was premised. *Certiorari*, in this case, would be available against the respondents if it is demonstrated that they acted contrary to the provisions of the Universities Act. The *ex-parte* applicant has made no attempt to connect the closure of the campus with the Universities Act, and has not sought to demonstrate that the respondents acted in anyway in violation of any of the provisions of that statute. There is, clearly, no basis upon which I can grant the Judicial Review order prayed for.

12. The *ex-parte* applicant has made a lot of play about violation constitutional provisions and the principles in the Fair Administrative Action Act, No. 4 of 2015. Let me make it clear, that the application before me is founded on Order 53, not the Constitution. If the *ex-parte* applicant desired to obtain orders relating to violations of the Constitution, then it ought to have moved the court by way of a constitutional petition. Secondly, the application is not premised on the Fair Administrative Action Act, and the principles set out in that statute are of no application here. Even if the Constitution and the Fair Administrative Action Act were to apply to these proceedings, which I reiterate is not the case, it should be understood that they would not be the primary law. The principal law, for the purpose of the instant matter is the Universities Act, and the provisions of the Constitution and the Fair Administrative Action Act can only be cited to assess exercise of mandate and jurisdiction by the respondents under the Universities Act. The Constitution and the Fair Administrative Action Act cannot apply to these proceedings exclusive of the Universities Act, given that the impugned decision was made under the Universities Act. The principles in the Constitution and the Fair Administrative Action Act can only apply in the context of the mandate given to the respondents under the Universities Act.

13. I do not think I need to say more, the *ex-parte* applicant has utterly and woefully failed to demonstrate that it has a case for grant of the Judicial Review order sought. The Motion, dated 3rd September 2020, is for dismissal, and I hereby dismiss the same. Costs should follow the event, but since the *ex-parte* applicant is a body of students, I shall order that each party bears its own costs. The stay order made herein on 19th August 2020 is hereby discharged. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2021

W MUSYOKA

JUDGE