REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS AT THE CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 466 OF 2017

IN THE MATTER OF AN APPLICATION BY WELLINGTON KIHATO WAMBURU FOR ORDERS OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF ARTICLES 47 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 4, 7, 8, AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT, SECTIONS 8 AND 9 OF THE LAW REFORM ACT AND ORDER 53 CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYATTA UNIVERSITY.....1ST RESPONDENT

THE VICE CHANCELLOR

KENYATTA UNIVERSITY.....2ND RESPONDENT

WELLINGTON KIHATO WAMBURU.....EXPARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 31st July, 2017, the ex parte applicant herein, **Wellington Kihato Wamburu**, seeks the following orders:

> **1. An Order of Certiorari do issue to remove to the High Court and quash the decision of the Respondents communicated through the Respondents' letter dated 7th February 2017 referenced "Disciplinary Action";**
>
> **2. An order of Mandamus directing the Respondents to release for examination both internal and external the Applicant's thesis for his Doctor of philosophy degree programme in management science which the applicant submitted to the Respondents on 20th March 2015 and also enlist the name of the Applicant Wellington Kihato Wamburu in the graduation list next following or in any subsequent graduation;**
>
> **3. A Declaration that the Respondents actions are in violation of the Applicants rights as guaranteed under Article 47 of the constitution of Kenya;**
>
> **4. An order for Costs.**

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

2. According to the Applicant, he is a lecturer at Dedan Kimathi University of Technology and also a student at the 1st Respondent institution for a Doctor of Philosophy Degree (PHD) in management science since the 22nd February 2010, admission number D86/CTY/13730/2009.

3. The applicant averred that sometime in February 2016 he received a letter from the Respondents dated 25th February 2016 referenced "Suspension for Examination Irregularities", which letter intimated that he had been suspended as a student of the 1st Respondent. He then moved this Court through Judicial Review Miscellaneous application number 101 of 2016 and after canvassing the same with the Respondents a judgement was delivered by this Court on the 19th September 2016 by which the Respondents' decision communicated through the letter dated 25th February 2016 was quashed and the Respondents were ordered to commence any disciplinary proceedings against the applicant, if necessary within 14 days of the judgement, failure of which the Respondents were to release for examination, the both internal and external, the applicant's thesis for doctor of philosophy degree in management science that he had submitted on the 20th March 2015.

4. To the applicant's dismay he received a letter from the 1st Respondent dated 7th February 2017 referenced, "Disciplinary Action" which letter intimated that a students' disciplinary committee (SDC) meeting held on the 28th November 2016 had decided to Discontinue his studies from the 1st Respondent and that he had been banned from accessing the 1st respondent's premises.

5. It was the ex parte applicant's case that the said decision was arrived at irregularly, illegally and more so against the judgement and orders of this Court issued on the 19th September 2016 in Judicial Review Miscellaneous application number 101 of 2016, signed on the 23rd September 2016 and served upon the Respondents on the same date. This belief was based on the following:

a) This Court having quashed the decision communicated to the applicant vide the letter dated 25th February 2016 suspending him from the 1st Respondent institution, the Respondents did not lift his suspension despite numerous request from the applicant and this remained the position until he received the letter dated 7th February 2017 discontinuing his studies;

b) This Court directed the Respondents to commence any disciplinary proceedings against the applicant within 14 days from the date of the ruling. However, the Respondents in total disregard of the order commenced proper disciplinary proceedings against him vide a letter dated 17th October 2016;

c) In relation to the foregoing, the respondents had initially sent the applicant a letter dated 30th September 2016 referenced "Students Disciplinary Case" that the applicant received on the 4th October 2016 after being informed of its existence through a short message (sms). This letter, it was averred was very vague and shallow as the Respondents only wrote the said letter which was meant to mischievously beat the 14 days deadline given by the Court for compliance and hence the Respondents intended to ridicule this Court. However, having realized that the said letter was insufficient they sent the applicant the letter date 17thOctober 2016.

d) The ex parte applicant averred that despite the fact that this Court directed the Respondents to conduct any disciplinary process in accordance with the law, the Respondents rebuffed the ex parte applicant's numerous requests for any documents, evidence or any other material that was to be used against him in the disciplinary proceedings so that he would adequately prepare myself.

e) It was further averred that the Respondents denied the applicant's counsel access to the boardroom where the disciplinary hearing was being held on the 28th November 2016 and the applicant was forced to go through the same unrepresented.

6. The applicant averred that in addition the disciplinary committee set up by the Respondents to hear his case was irregularly and illegally constituted, because it constituted individuals who already had predetermined minds and opinion about the applicant's case and thesis, and were not supposed to be part of the disciplinary committee as per the academic calendar 2014-2017. The applicant disclosed that these included **Prof Sichanya** and **Prof Okemo** who is the Dean Graduate school, both had previously sat in a committee in regards to the applicant's thesis and had also been tasked to prepare a report by the Deputy Vice Chancellor Academic way back in the year 2015, which report has however not been presented and nor was the applicant summoned for questioning in preparation thereof.

7. The applicant revealed that the above named individuals were very rude, harsh and even abusive to him, especially **Prof. Sichanya** for no apparent reason, except for the fact that they are professors and senior administrative officers of the university. In addition **Prof Wangari Mwai** who was allegedly one of the applicant's accusers and the acting deputy vice chancellor administration had already sworn an adverse replying affidavit against him in the said JR Misc Application number 101 of 2016 stating very biased and untrue allegations against the applicant, allegations which are subject of police investigation for perjury by DCI, Nairobi.

8. The ex parte applicant therefore questioned the impartiality of the said persons since the law cannot allow one to be an accuser, judge and executioner at the same time. In the ex parte applicant's view, this was a clear abuse of his constitutional rights guaranteed under Article 47 of the Constitution of Kenya and the various provisions of the ***Fair Administrative Action Act***.

9. The applicant further averred that he was not allowed to ask any questions during the hearing or even cross examine any of his accusers, who were also the committee members, as no other individual, witness or accuser of his alleged irregularity was called to give their testimony or give any evidence against him and no evidence was presented against him.

10. It was averred that after he received the letter dated 7th February 2017, he immediately wrote the Respondents requesting for the minutes/proceedings of the SDC meeting held on the 28th November 2016 to naught. According to him, this denial of the said crucial information by the Respondents is a further violation of his rights as guaranteed under Article 35 of the constitution of Kenya and has hampered his intentions to internally appeal the decision of the Respondents to the Senate as well as his preparation for filing these proceedings.

11. It was the ex parte applicant's case that the decision of the Respondents communicated to him vide the letter dated 7th February 2017 should not be allowed to stand, as it was arrived at irregularly, illegally and against the direct orders of this Court, which directive was crystal clear and unambiguous. In his view, the Respondents and its officials/employees have clearly shown that they are not acting in good faith in regards to this matter.

12. To the applicant, section 4(3) of the ***Fair Administrative Action Act*** requires an administrator to give a person affected by a decision among other things:

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

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

c) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

13. The applicant contended that the Respondents have breached his right to fair administrative action as well as all other rights that he is entitled to under Article 47 of the Constitution of Kenya and has further acted in total contravention of his rights and in total disregard of the law and this Court's orders and urged this Court to intervene.

14. In his rejoinder to the Respondent's response the applicant reiterated the foregoing and averred that he knew for a fact that the deponent **Prof Fatuma Chege** was only appointed acting Deputy Vice-Chancellor (Administration) in the month of November 2017 after **Prof Wangari Mwai** resigned from the said office in October 2017.

15. In his submissions the applicant relied on Articles 47 and 50 of the Constitution and reiterated that it is clear from the discourse herein above that the disciplinary committee set up by the Respondents to deliberate the Applicant's alleged disciplinary misgivings breached the Applicant's constitutional rights highlighted above. In support of his case the applicant relied on **Republic vs. Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Another [2017] eKLR** and submitted that this is in tandem with the current jurisprudence where the courts in judicial review have stretched the consideration further to not only consider the process as it were in arriving at the impugned decision, but also consider the merits of the said decision. Further reliance was placed on **Republic vs. Chesang (Ms) Resident Magistrate & 2 others Ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 Others [2017] eKLR** and **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others [2016] KLR.**

16. It was submitted that the process of arriving at the impugned decision was flawed and thus disposed to be scrutinised and quashed by this Court because the Respondents' disciplinary committee did not afford the Applicant any opportunity to know or have prior notice of his 'charges' or/and allegations against him and the evidence that it intended to use against him. In addition the disciplinary hearing itself was only a ceremonial sitting where the members of the committee insulted and embarrassed the Applicant to their amusement without giving him any opportunity to be heard or to make any representations. The applicant relied on **Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR.**

17. It was submitted based on the predisposition of the members of the said committee that its decision was not impartial and thus the said decision should not be allowed to stand at all and reliance was placed on **Porter and Weeks vs. Magill (House of Lords) [2001] UKHL 67** and **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134.** According to the applicant, it goes without saying that any reasonable person would think that the aforementioned disciplinary committee members who had a clear conflict of interest in the Applicant's matter would rule/decide unfairly against him.

18. The applicant therefore prayed that the application be allowed with costs.

Respondent's Case

19. On behalf of the Respondent, it was contended that Contrary to the *ex parte* Applicant's averments, the 1st Respondent complied with the order of this Honourable Court issued in J.R. 101 of 2016 concerning the commencement of the disciplinary proceedings.

20. According to the Respondent, the decision was dated 19th September 2016 and the *ex parte* Applicant was invited for the disciplinary hearing before the Students' Disciplinary Committee ("SDC") through a letter dated 30th September, 2016 which letter was issued within the stipulated time as directed in the said order and thus marked the commencement of the disciplinary proceedings.

21. It was averred that whereas the applicant was required to appear before the SDC on 13th October 2016, he did not honour the summons to appear and was issued with a second invitation to appear before the SDC on 28th October 2016, through a letter dated 17th October 2016. On the said date, the *ex parte* Applicant requested for more time to prepare his defence and finally, received another invitation to appear before the SDC on 28th November 2016.

22. According to the Respondent, since the subsequent disciplinary proceedings were substantively based on the same factual circumstances and issues that precipitated the proceedings in JR 101 of 2016, all the material and evidence was available to the *ex parte* Applicant in the form of the Replying Affidavit in Judicial Review No. 101 of 2016. This ought to have enabled him to mount his defence to the subsequent disciplinary proceedings.

23. It was averred that the *ex parte* Applicant attended the disciplinary proceedings on the scheduled date and was allowed an opportunity to defend himself, which opportunity he exploited.

24. It was explained that the SDC is regulated by section 37 of the ***Universities Act, 2012*** as read with Schedule 2.3 of Part Ten of the ***Kenyatta University Statutes, 2013*** (hereinafter the "**Statutes**") as set out in page 154 of the 1st Respondent's Calendar (2014-2017) to comprise of the following members:

(a) The Deputy Vice-Chancellor (Academic)

(b) The Principal of college of concerned student

(c) Two student's representatives (KUSA President and Academic Secretary)

(d) One member of the Senate

(e) Dean of school of concerned student

(f) Chairperson of relevant Department

(g) Director of Student Affairs

(h) Registrar (Academic) Secretary

25. To the Respondent, the Statutes further allow the 1st Respondent's Chief Legal Officer and the Senate Secretariat to attend if need be and also allow for the inclusion of any other officials as are necessary for purposes of the expediency of the hearing. It was the Respondent's position that from a perusal of the minutes of the disciplinary hearing, the SDC was properly constituted contrary to the *ex parte* Applicant's averments as the said minutes do not show that **Professors Okemo**, **Sichanya** and **Mwai** formed part of the membership of the SDC as the *ex parte* Applicant avers. Consequently denied the *ex parte* Applicant's allegations of bias in the composition of the SDC and conduct of the disciplinary proceedings and took great exception to the *ex parte* Applicant's averments.

26. It was disclosed that as the *ex parte* Applicant is fully aware, the 1st Respondent has sued him together with the Director of Criminal Investigations, the Inspector General of the National Police Service and the Attorney General in JR 61 of 2017, challenging those very averments a matter in which Judgment JR 61 of 2017 is pending delivery before **Aburili J**.

27. It was therefore the Respondent's case that in introducing those averments before this Honourable Court in these proceedings, the *ex parte* Applicant is demonstrably acting in bad faith, deliberately misleading and abusive of this Court's process.

28. On behalf of the Respondent, it set out to distinguish the rights guaranteed under both Article 47 and Article 50 of the Constitution of Kenya, 2010 In this respect the Respondent relied on the Court of Appeal decision in **Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** and **Dry Associates Ltd. vs. Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd [2012] eKLR.**

29. The Respondents denied that they are in contempt of the orders of 19th September, 2016 issued in **Judicial Review Miscellaneous Application 101 of 2016** and averred that they had given evidence of their compliance with the order for the commencement of disciplinary proceedings as the letter inviting the *ex parte* Applicant to appear before the SDC was issued on 30th September 2016 which is well within the 14 (fourteen) day period that was allowed by the Court.

30. In the Respondents' view, if the *ex parte* Applicant wanted relief, he ought to have approached the Court by way of contempt proceedings in **Judicial Review Miscellaneous Application 101 of 2016** and not though the institution of a separate and fresh cause of action being these judicial review proceedings and they relied on **Eliud Nyauma Omwoyo vs. Kenyatta University & Ors [2016] eKLR** and submitted that the present judicial review proceedings are the improper forum for this Court to address the *ex parte* Applicant's claims.

31. As to whether the ex parte Applicant's right to fair administrative action was violated, the Respondents submitted based on Article 47 of the Constitution and section 4(3)(g) of the ***Fair Administrative Action Act***, 2015 that the Respondent satisfied all the elements of procedural fairness in the administrative law context as provided by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817**, and contended that in the present case , the Respondents fully upheld the *ex parte* Applicant's right to fair administrative action as:

i) He was given adequate and prior notice of the proposed administrative action as set out in paragraphs 17(i) and (ii) of these submissions.

ii) The *ex* parte Applicant was given sufficient notice to allow him to prepare for the disciplinary hearing in time. He was aware that he would appear before the SDC upon the issue of the first invitation in the letter dated 30th September, 2016. Further, the second invite allowed him an extra 11 (eleven) days to prepare before he finally appeared. The ex parte Applicant cannot now purport that he did not have enough notice and time to prepare. He was twice invited to appear before the SDC before finally doing so on 28th October, 2016.

iii) The subsequent disciplinary proceedings were substantively based on the same factual circumstances and issues that precipitated the proceedings in JR 101 of 2016. Therefore, the ex parte Applicant was already supplied with all the information, materials and evidence to be relied on appearing as exhibits KU 1, KU 2, KU 3, KU 4 and KU 5 annexed to the Replying Affidavit filed on 11th

May 2016 in **Judicial Review Miscellaneous Application 101 of 2016.**

iv) He was given the opportunity to make representations before the SDC.

v) The SDC was properly constituted for purposes of the hearing and in accordance with the applicable law being the 1st Respondent's Statutes.

vi) In any event, the allegations of insults and embarrassment caused to the *ex parte* Applicant by the SDC set out in page 4 of his Submissions are not in within the scope of fair administrative action and further are unsubstantiated as the minutes of the hearing neither reflect nor support the same.

32. As regards the allegation of bias, it was submitted that the persons alleged to be the cause of the bias were not members of the SDC and did not appear before the *ex parte* Applicant on the day of the hearing. In any event, for a claim of bias to succeed it must satisfy the test by the Supreme Court of Canada in **R. v. S. (R.D.) [1977] 3 SCR 484** cited with approval by the Court of Appeal of Kenya in **Kaplana H. Rawal vs. Judicial Service Commission & 2 others [2016] eKLR.**

33. It was the Respondents' submission that the *ex parte* Applicant's aversions of bias amount to mere suspicion. No documents or facts in support of his allegations at all have been furnished before this Honourable Court to prove the impugned bias hence he has failed to meet the required threshold to be allowed to succeed in his claim of bias.

34. In view of the above, the Respondents urged the Court to dismiss the Application with costs**.**

Determinations

35. I have considered the application herein, the affidavits both in support of and in opposition thereto and the submissions filed.

36. It is not in doubt that this Court in **Judicial Review Miscellaneous Application 101 of 2016** issued the following orders on 19th September, 2016:

> **1) An order of certiorari removing into this Court for the purposes of being quashed the decision made by the Respondent vide its letter dated 25th February 2016 referenced "Suspension for Examination Irregularities" which decision is hereby quashed.**
>
> **2) Unless the Respondent commences the disciplinary proceedings in accordance with the law within 14 days from the date of this decision, an order of mandamus compelling the Respondent to release for examination both internal and external the applicant's thesis for his doctor of Philosophy Degree in Management Science submitted on 20th March 2015.**
>
> **3) The costs of this application are awarded to the applicant to be borne by the Respondent.**

37. It is contended that the Respondents did not in purporting to comply with the said order strictly adhere to the letter of the order. If that is the position, I do not see the reason why the applicant would be barred from coming back to court to quash the new decision. This must be so because contempt of court would not quash the new decision which constitutes a fresh course of action.

38. This must be so because the mere fact that a person in purporting to implement a Court order makes mistakes thereby does not necessarily amount to contempt of Court. Consequently, the aggrieved party is not barred from challenging the said decision on the grounds that the decision was either not in conformity with the decision of the Court or the law where the Court directed that the action be taken in accordance with the relevant law. That was this Court's view in **Republic versus Public Procurement Administrative Review Board & 3 Others ex parte Fursys Kenya Limited [2014] eKLR** when it held that:

> **"..where a Court or Tribunal has nullified the first process and ordered that either a fresh process be undertaken or that the process be undertaken in accordance with specified directions, the body or authority to which the directions are directed is not entitled to ignore the law or directions in its fresh undertaking. If it does so a party aggrieved would still be properly entitled to move the body which made the directions or gave the orders for the nullification of a process not undertaken in compliance with the directions or orders and would not by that mere fact fall foul of the doctrine of *res judicata.* Therefore, if in the first decision made by the Review Board, the decision of the 1st interested party was nullified and directions given on how to carry out the Tender and the 1st interested party in purporting to comply therewith fell foul of the said directions, the 2nd interested party would not be barred from moving the Respondent once again to have the second decision by the 1st interested party nullified since the second challenge arose out of the changed circumstances given rise to by the decision of the Board which circumstances arose after the first decision of the 1st interested party. To contend therefore that the 2nd interested party ought to have appealed against the second decision of the 1st interested party is to miss the point…It is therefore my view that taking into account the contentions made by the 2nd interested party the Respondent was properly entitled to and had jurisdiction to entertain the second challenge."**

39. From the above decision, it is clear that the Respondents were required to commence the disciplinary proceedings in accordance with the law, if they still wanted to do so, by latest 4th October, 2016. According to the Applicant, in total disregard of the order, the Respondent commenced proper disciplinary proceedings against him vide a letter dated 17th October 2016. He however admitted that the respondents had initially sent the applicant a letter dated 30th September 2016 referenced "Students Disciplinary Case" that the applicant received on the 4th

October 2016 after being informed of its existence through a short message (sms) which letter, according to the applicant was very vague and shallow as the Respondents only wrote the said letter to mischievously beat the 14 days deadline given by the Court for compliance and hence intended to ridicule this Court. However, having realized that the said letter was insufficient they sent the applicant the letter date 17thOctober 2016.

40. From the foregoing it is clear that the Respondent did commence the disciplinary proceedings within the time prescribed by this Court. The fact that the information contained in the original letter could have been insufficient does not mean that the said proceedings had not been commenced since the insufficiency of the information is curable by a request for further and better particulars. Accordingly, I do not agree with the applicant that the proceedings were commenced out of time

41. The applicant however contended that the proceedings were not conducted in accordance with the law as was directed by the Court. I have no hesitation in finding that the letter dated 30th September, 2016 did not meet the legal threshold of a letter of information containing complaints which a person is expected to answer. In **Winrose Gathigia –vs- Kenyatta University, Nairobi High Court Misc. Application No. 1029 of 2007** the court held that a similar letter inviting students for disciplinary proceedings offended the principles of natural justice and proceeded to quash disciplinary proceedings carried out pursuant to such invitation by holding at page 19-20 of the judgment, that:

> **"A reading of the above letter does not disclose the nature of the charges that the petitioner was going to meet at the committee on 3rd August, 2006. It was very general. All that the petitioner would have known is that she violated unit ECT 300, Education Technology but not how she violated it."**

42. Similarly in **Eliud Omwoyo & Others vs. Kenyatta University Petition No. 365 of 2012**, the court, whilst commenting on the letter inviting the student to disciplinary hearing, stated at paragraph 48, line 18 onwards as follows:

> **"..The questions that I would ask then are, was the letter supposed to reveal the manner of influencing tampering with on-line grades? Was it supposed to reveal any evidence? Was it supposed to reveal the nature of the tampering and the parties involved? Was it supposed to reveal the sources of the evidence that the petitioners were to be charged with? My answer to these questions would be in the affirmative. I say so because the letters were basically inviting them for proceedings whereby they would be required to give their defence and side of the story. It was also at these proceedings that the respondent was going to lay down the evidence that he had against the petitioners but obviously this did not happen. In fact even at these proceedings, the Respondent merely stated that "investigations revealed that the petitioners were complicit in the tampering of online grades". As to what evidence had led the Respondent to such a conclusion, none as placed before me at all, and like the petitioners, I take the view that the respondents treated the matter rather casually..."**

43. However the letter dated 17th October, 2016 was more detailed and in my view the deficiencies in the letter dated 30th September, 2016 were cured by the contents of the letter dated 17th October, 2016.

44. The *ex parte* applicant averred that despite the fact that this Court directed the Respondents to conduct any disciplinary process in accordance with the law, the Respondents rebuffed the *ex parte* applicant's numerous requests for any documents, evidence or any other material that was to be used against him in the disciplinary proceedings so that he would adequately prepare myself. In **Eliud Omwoyo & Others vs. Kenyatta University** (supra), the Court was clear in its mind that the letter of complaint ought to have revealed the evidence sought to be relied upon. This is now a statutory requirement since section 4(3(g) of the ***Fair Administrative Action Act*** provides that 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 information, materials and evidence to be relied upon in making the decision or taking the administrative action. However, it is my view that if this evidence is supplied to the applicant and subject to the applicant's right to seek time to study, the same the omission to furnish the same is not necessarily fatal to the disciplinary proceedings.

45. In this case the applicant averred and exhibited documents through which he sought to be supplied with the documents. According to him his request elicited no positive response. The Respondents have not denied that the said requests were made. They have however not shown that they complied with the Applicant's lawful requests. In the premises it cannot be said that the Respondents complied with the mandatory provisions of section 4(3(g) of the ***Fair Administrative Action Act.***

46. It was further averred that the Respondents denied the applicant's counsel access to the boardroom where the disciplinary hearing was being held on the 28th November 2016 and the applicant was forced to go through the same unrepresented. Section 4(3)(e) of the ***Fair Administrative Action Act, 2015,*** provides that 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 notice of the right to legal representation, where applicable.

47. In this respect the respondent relied on **Oluoch Dan Owino –vs- Kenyatta University, High Court Petition No. 54 of 2014** where the court held that:

> **"The petitioners have also argued that their right to choose, and be represented by, an advocate, and to be informed of this right promptly was violated. The right of a party to be represented by Counsel in quasi-judicial proceedings such as the petitioners were subjected to is well recognized, but is subject to the rules of procedure of the tribunal to which a party is appearing before, and must be requested for before a violation of the right to legal representation can be alleged…the issue of legal representation was not raised before the Disciplinary Committee, and it cannot therefore properly be raised now as a ground for challenging the decision of the Committee."**

48. In support of their case, they relied on ***R*epublic vs. Pwani University College Ex-parte Maina Mbugua James & 2 Others Misc. App. No. 28 of 2009 where the court observed that*:***

> ***"The situation in Kenya was captured in the case of Geoffrey Mwangi Kariuki vs. University of Nairobi. – but where the distinction can immediately be drawn in that the college Disciplinary Committee refused to allow Geoffrey to be represented by advocates in the proceedings, and the High Court ruled that he was entitled to such representation.*** **My own view is that if an individual requests for legal representation, then he should be entitled to such representation but in the present scenario there was no such request and no such denial, so the breach alleged does not arise at all."**

49. Therefore unless the rules of the disciplinary procedure expressly exclude the right to legal representation, that right is presumed to be applicable to such proceedings and the applicant is entitled to be informed of such a right. I have perused the alleged minutes of the said disciplinary proceedings which state that the applicant's request for legal representation was declined because the same is not provided for in the disciplinary procedures. With due respect the Resondents seemed to have caught the wrong end of the stick. The requirement is that such a procedure be expressly excluded and not simply by implication. If not expressly excluded it is deemed to be applicable since it is a statutory requirement.

50. In this Court's decision in **Judicial Review Miscellaneous Application 101 of 2016,** this Court expressed itself as hereunder:

> **"These decisions must however now be read in light of the provisions of section 4(6) of the Act which 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.***
>
> **In other words an administrator may be empowered by a written law to follow a procedure other than the one prescribed under the *Fair Administrative Action Act* and such a procedure will not [be] faulted as long as it does not derogate from the provisions of Article 47 of the Constitution."**

51. It is therefore clear that the Respondent did not comply with section 4(3)(e) of the ***Fair Administrative Action Act***.

52. The applicant averred that, in addition, the disciplinary committee set up by the Respondents to hear his case was irregularly and illegally constituted, because it comprised of individuals who already had predetermined minds and opinion about the applicant's case and thesis, and were not supposed to be part of the disciplinary committee as per the academic calendar 2014-2017. The applicant disclosed that these included **Prof Sichanya** and **Prof Okemo** who is the Dean Graduate School, both who had previously sat in a committee in regards to the applicant's thesis and had also been tasked to prepare a report by the Deputy Vice Chancellor Academic way back in the year 2015, which report has however not been presented and nor was the applicant summoned for questioning in preparation thereof. However in the absence of any other minutes apart from those exhibited by the Respondents, which do not show that **Prof Sichanya** and **Prof Okemo** were part of the Disciplinary Committee meeting, I am unable to find for the *ex parte* applicant on this issue. Similarly, based on the material before me, I cannot find that the committee was very rude, harsh and even abusive to him.

53. The applicant further averred that he was not allowed to ask any questions during the hearing or even cross examine any of his accusers, who were also the committee members, as no other individual, witness or accuser of his alleged irregularity was called to give their testimony or give any evidence against him and no evidence was presented against him. One of the accusations facing the applicant was that some sections of his thesis were plagiarised. No witness was called to adduce evidence on this issue yet the Disciplinary Committee found that the applicant was gulty of committing examination irregularities as charged. It defeats reason how such a charge could be proved without evidence of a prior work which the applicant was alleged to have plagiarised. It is therefore clear that the Respondents' decision was tainted with irrationality.

54. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

55. That the Respondents have the powers and jurisdiction to discipline students is not in dispute. It is not contended that it has no power to suspend or even expel a student who is found to have committed an irregularity. As to whether there was such an irregularity is however not for this Court exercising its judicial review jurisdiction to determine. The question to be determined is whether in arriving at its decision the due process of the law was adhered to.

56. From the foregoing discourse it is clear that the Respondent's decision expelling the applicant was not only unfair but was also irrational and cannot stand.

57. Since the earlier decision had been found wanting and was quashed, the Respondent cannot in conducting fresh proceedings contend that the applicant must have been, based on the said quashed proceedings, be deemed to have been aware of the charges that he was to face.

58. In the earlier decision this Court found that the applicant's right to education would be meaningless unless the results of his examination are released and that the Respondent is under a constitutional obligation to let the applicant know the results of his examination. The Court however found with respect to the prayer for an order of *mandamus* directing the Respondent to enlist his name in the graduation list next following or in any subsequent graduation, that since the Applicant's results were yet to be released, it would be premature to issue such an order at that stage.

59. The position seems to be the same.

60. These proceedings clearly show that the Respondents do not appreciate the ingredients of fair administrative action. In fact this Court has in the past decried the number of cases being brought against the 1st Respondent simply as a result of its failure to adhere to the basic principles of fair administrative action. Such attitude ought not to be countenanced in an institution of higher learning. It is high time the 1st Respondent's administration got its act right in the manner in which it is dealing with disciplinary proceedings affecting its student in order to avoid unnecessary legal proceedings.

Order

61. Consequently the orders which commend themselves to me and which I hereby grant are as follows:

> **1. An order of certiorari removing into this Court for the purposes of being quashed the Respondents' decision communicated through the Respondents' letter dated 7th February 2017 referenced "Disciplinary Action" which decision is hereby quashed.**
>
> **2. Unless the Respondents commence the disciplinary proceedings in accordance with the law within 10 days from the date of this decision, an order of *mandamus* shall issue compelling the Respondents to release for examination both internal and external the Applicant's thesis for his Doctor of philosophy degree programme in management science which the applicant submitted to the Respondents on 20th March 2015.**
>
> **3. The costs of this application are awarded to the applicant to be borne by the Respondents.**

62. Orders accordingly.

Dated at Nairobi this 20th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ruiru for the ex parte applicant

Mr Mwangi for the Respondents

CA Ooko