REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 506 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW SEEKING FOR ORDER OF CERTIORARI BY THADAYO OBANDA

AND

IN THE MATTER OF THE UNIVERSITIES ACT THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF THE APPOINTMENT OF THE CHAIR AND MEMBERS OF THE COUNCIL OF THE UNIVERSITY OF NAIROBI

AND

I THE MATTER OF GAZETTE NOTICE NO. 7609 AND 7610 DATED 31ST JULY 2017 AND PUBLISHED ON 7TH AUGUST 2017

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI AND PROHIBITION BY WAY OF JUDICIAL REVIEW

BETWEEN

REPUBLIC...APPLICANT

AND

CABINET SECRETARY, MINISTRY OF EDUCATION........1STRESPONDENT

THE ATTORNEY GENERAL...2ND RESPONDENT

EXPARTE: THADAYO OBANDA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd August, 2017, the *ex parte* applicant herein, **Thadayo Obanda,**

seeks the following orders:

> **1. That this honourable court do issue an order of Certiorari by way of calling for into this court and quashing Kenya Gazette Notice No. 7609 and 7610 dated 31st July 2017 and published on 7th August 2017 by the 1st respondent appointing the chairperson and the members of the council of the University of Nairobi.**
>
> **2. That this honourable court do issue an order of Prohibition by way of Judicial review prohibiting the implementation of Kenya Gazette Notice No. 7609 and 7610 dated 31st July 2017 and published on 7th August 2017 by the 1st respondent appointing the chairperson and the members of the council of the University of Nairobi.**
>
> **3. That the costs of this application be provided for.**

Ex Parte Applicants' Case

2. According to the applicant, by Kenya Gazette Notice No. 2334 dated 10th March 2017 and published on 14th March 2017 the 1st Respondent purported to appoint **Timothy Mwangi Kiruhi** (chairman), **Keshack Kidenda**, **Victoria Otieno**, **Mahat Somane**, **Peter Maangi Mitiambo** and **Jane Wanjiru Michuki** as Members of the Council of the University of Nairobi pursuant to section 36(1) of the ***Universities Act, 2012***. It was however contended by the Applicant that the 1st respondent's purported appointments aforesaid are in blatant contempt of this court's orders issued in Milimani High Court Misc. JR. No. 56 of 2016 delivered on 3rd March 2017.

3. Based on legal advice, the applicant believed that the 1st respondent's purported recruitment and appointment of members of council of the University of Nairobi could not have been competitive as there has all along been stay orders in Milimani High Court Misc. JR No. 56 of 2016.

4. It was further disclosed that the 1st respondent's purported appointments vide Kenya Gazette Notice No. 2334 dated 10th March 2017 and published on 14th March 2017 has been successfully challenged in Milimani High Court Misc. JR No. 131 of 2017 where this Court stayed the said appointments and the effect of Kenya Gazette Notice No. 2334 dated 10th March 2017 and published on 14th March 2017. However in total disregard of this Court's orders therein, the 1st respondent again by dint of Kenya Gazette Notice No. 3236 dated 5th April 2017 and published on 7th April 2017 yet again purported to appoint **Timothy Mwangi Kiruhi** (chairman), **Keshack Kidenda**, **Victoria Otieno**, **Mahat Somane**, **Peter Maangi Mitiambo** and **Jane Wanjiru Michuki** as Members of the Council of the University of Nairobi pursuant to section 36(1) of the ***Universities Act, 2012***.

5. It was disclosed that the 1st respondent's purported appointments vide Kenya Gazette Notice No. 3236 dated 5th April 2017 and published on 7th April 2017 has also been successfully challenged in Milimani High Court Misc. JR 184 of 2017 where **Justice Aburili** stayed the said appointments and the effect of Kenya Gazette Notice No. 3236 dated 5thApril 2017 and published on 7th April 2017.

6. Yet again in contempt of court orders in Milimani High Court Misc. JR No. 131 of 2017 aforesaid and Milimani High Court No. 184 of 2017, the 1st respondent by dint of Kenya Gazette Notice No. 7609 and 7610 dated 31st July 2017 and published on 7th August 2017 has once again purported to appoint the said **Timothy Mwangi Kiruhi** (chairman), **Keshack Kidenda**, **Victoria Otieno**, **Mahat Somane**, **Peter Maangi Mitiambo** and **Jane Wanjiru Michuki** as Members of the Council of the University of Nairobi pursuant to section 36(1) of the ***Universities Act, 2012.***

7. Based on legal advice, the Applicant believed that the 1st respondent's purported appointments vide Gazette Notice No. 7609 and 7610 dated 31st July 2017 and published on 7th August 2017 is unlawful for the following reasons:-

i. There was no competitive recruitment of members of the said University of Nairobi Council;

ii. The appointed members of council do not meet the constitutional threshold of diversity;

iii. There are 3 court orders in place Milimani High Court Misc. JR No. 184 of 2017 given on 13th April 2017, Milimani High Court Misc. JR No. 131 of 2017 issued on 23rd March 2017 and in Milimani High Court Misc. JR No. 56 of 2017 delivered on 3rd March 2017, of which the 1st respondent is aware of but is blatantly ignoring this Court's and **Justice Aburili's** orders;

iv. The 1st respondent has purported to appoint new members of University of Nairobi Council for a term of 3 years and yet the law sets the term of council members at 4 years:

v. The 1st respondent's purported appointees, namely **Mahat Somane** and **Peter Maangi Mitiambo** are serving members of staff at the University of Nairobi and cannot, as public servants, hold another pubic office as members of the said university's council;

vi. The 1st respondent's purported appointees, namely **Mahat Somane** and **Peter Maangi Mitiambo** are serving members of staff at the University of Nairobi and cannot sit on the very University Council that employs them;

8. It was averred that the 1st respondent, in total disregard of the law and three different court orders, had gone ahead to gazette the names of chairperson and members of the council of the University of Nairobi without allowing public participation. The applicant was therefore aggrieved by the said appointments as minorities and persons with disability have been bypassed by the 1st respondent in his appointments due to lack of public participation.

9. The applicant's submissions were substantially the same as those of the interested party which submissions are summarised hereinbelow.

<u>Interested Party's Case</u>

10. The application was supported by the interested party herein, University of Nairobi (hereinafter referred to as "the University").

11. According to the University, by Gazette Notice Nos. 7609 and 7610 dated 31st July 2017, the 1st Respondent purported to appoint the undernoted persons as Chairman and Council Members of the Interested Party;

i. Dr. Timothy Mwangi Kiruhi (Chairman)

ii. Eng. Meshack Kidenda

iii. Ms. Victoria Otieno

iv. Mahat Somane

v. Peter Maangi Mitiambo

vi. Jane Wanjiru Michuki

12. According to the University, prior to the publication of Gazette Notice Nos. 7609 and 7610 dated 31st July 2017, the 1st Respondent had purported to appoint the individuals listed above as Chairman and Members of the Council of the University on several occasions vide the Gazette Notices Nos. 2334 dated 10th March 2017 and 3236 dated 5th April 2017.

13. According to the University, section 36(1) of the ***Universities Act*** provides that the Council of a Public University shall consist of *inter alia* five members appointed by the Cabinet Secretary for Education through an open process. In this case however, the 1st Respondent acted in an opaque manner in the appointment of the afore-listed individuals as Chairman and members of the Council of the University as he did not adhere to section 36(1) of the ***Universities Act*** in that the positions were not advertised; there was no open process of recruitment through shortlist-ting of candidates and no interviews were conducted, further the names of the appointees were not announced to the members of the public prior to the official appointment by way of a Gazette Notice. It was therefore the University's case that there was no competitive recruitment prior to the appointment of the aforesaid individuals as Chairman and members of the Council of the Interested Party.

14. With respect to the Respondent's contention that there was advertisement, short-listing and interviewing of shortlisted candidates for the position of the Chairperson and members of the Council of the University of Nairobi through an alleged *ad hoc* Committee which makes recommendations to the Cabinet Secretary for appointment of Chairpersons and members to the Councils of Public Universities, the University noted that whereas there is a reference to the details of the Committee in exhibit JK-7, there is however no such exhibit.

15. The University reiterated that there was no short-listing or interviewing of persons for the positions of Chairperson and members of the Council of the Interested Party. It averred that had short-listing of the candidates been done, the University would have submitted material before the interviewing panel demonstrating why some of the persons who are allegedly said to have applied for the position of Council member of the Interested Party ought not to be considered for the aforesaid positions. The reasons as to why the persons ought not to be considered are as follows;

> **i. Mr. Peter M. Mitiambo-**He was an employee of the University of Nairobi and resigned in the year 1996 without following the stipulated procedure. **Mr. Mitiambo** did not give the three (3) months notice as required prior to his resignation, consequently he has never been cleared by the University of Nairobi.
>
> **ii. Mr. Mursal Mahat Somane-** As at 14th March 2017, when the 1st Gazette Notice No. 2334 dated 10th March 2017 was published **Mr. Mursal Mahat Somane** was working as a Lecturer in the Department of Commercial Law, College of Humanities and Social Sciences. However, employees of the University ought not to be appointed to serve as Council members in the same University.
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> **Mr. Mahat Somane** delivered his resignation letter to the University on 19th April 2017 and impressed upon the Secretary to back date the receipt of the letter to 1st April 2017.

16. It was further averred that instead of the 1st Respondent undertaking the recruitment of persons to fill the position of Chairperson and members of the Council of University of Nairobi in accordance with the law as was directed by the Court, the 1st Respondent has sought to undertake the aforesaid recruitment in disregard of the law as well as in disobedience of various court orders issued by this Court. Further, despite the existence of the court orders staying the Gazette Notices whereat the individuals listed above were appointed as Chairman and members of the Council of the University of Nairobi, the Chairman purportedly appointed, one **Dr. Timothy Mwangi Kiruhi** telephoned the Vice Chancellor of the University and informed the Vice Chancellor that he (**Dr. Kiruhi**) has called for a Special Council meeting of the University of Nairobi which was scheduled to be held on 18th August 2017. **Dr. Kiruhi** further sent email correspondences as regards the aforesaid special meeting. In the University's view, the 1st Respondent's conduct as well as the conduct of **Dr. Timothy Mwangi Kiruhi** of disobeying the court orders issued herein is a contempt of this Honourable Court. Such conduct interferes with the administration of justice.

17. The University insisted that the 1st Respondent ought to act in accordance with the law in the appointment of the Chairperson and members of the Council of University of Nairobi.

18. In support of its submissions the University relied on section 36(1) of the ***Universities Act, 2012***.

19. It was submitted on behalf of the University that under section 7 (2)(a)(i) and (ii) of the ***Fair Administrative Action Act***, a court or tribunal may review an administrative action or decision if the person who made the decision was not authorised to do so by the empowering provision and acted in excess of jurisdiction or power conferred under any written law. In this case it was submitted that the decision by the 1st Respondent to appoint the Chairperson and members of the Council of the Interested Party notwithstanding the fact that there was no competitive recruitment prior to the appointment of the aforesaid individuals is illegal and *ultra vires*. Since the decision by the 1st Respondent appointing the Chairperson and members of the Council of the Interested Party offends the provisions of section 36 of the ***Universities Act, 2012***, the aforesaid decision is *ultra vires* and hence null and void.

20. It was submitted that the ***Universities Act, 2012*** does not allow the 1st Respondent to appoint the Chairperson and members of the Council of the Interested Party without there being an open process of recruitment, hence the 1st Respondent acted in excess of his jurisdiction.

21. The University submitted that constitutional principles dictate the manner in which the 1st Respondent exercises his powers of appointment and the University has in the Supporting Affidavit filed herein demonstrated that had short-listing of the candidates been done, it would have submitted material before the interviewing panel demonstrating why some of the persons who are allegedly said to have applied for the position of Council member of the Interested Party ought not to be considered for the aforesaid positions. In support of this submission the University relied on **Benson Riitho Mureithi vs. J. W Wakhungu & 2 Others [2014] eKLR, Elgeyo Marakwet Civil Society Organization Network –vs- Ministry of Education, Science & Technology & 2 others [2016] eKLR** and **Republic –vs- The Cabinet Secretary Hassan Wario Arero & Another Ex-Parte Kipchoge Keino & 2 others [2017] eKLR.**

22. It was the University's contention that in arriving at the impugned decision, the 1st Respondent acted in an unreasonable and irrational manner in that he did not take into account the fact that the individuals whom he purported to appoint as Chairperson and members of the Council of the Interested Party had not been interviewed for the aforesaid positions which was a relevant consideration. In this respect the University relied on the holdings in **Associated Provincial Picture Houses –vs- Wednesbury Corporation [1948] 1KB 223** and **Kevin K. Mwiti & Others –vs- Council of Legal Education & Others, Judicial Review Miscellaneous Application No. 377 of 2015** consolidated with Petition 395 of 2015 and Judicial Review Miscellaneous Application No. 295 of 2015.

23. It was submitted that in the numerous litigations facing the 1st Respondent herein, the Court directed that the recruitment of persons to the positions of Chairpersons and members of the Councils of public universities ought to be carried out in accordance with the law and cited **Petition No. 33 of 2013 - Joseph Mutuura Mberia & Another –vs- Cabinet Secretary for Education, Science & Technology & 2 Others** and **Elgeyo Marakwet Civil Society Organization Network –vs- Ministry of Education, Science and Technology & 2 Others [2016] eKLR.**

24. It was the University's case that it had demonstrated that the 1st Respondent acted unlawfully by appointing the Chairperson and members of the council of the Interested Party without following the provisions of section 36 of the ***Universities Act*** whereat it is required that there be an open process prior to the appointment of persons to the positions of Chairperson and members of Council of public universities. Therefore the 1st Respondent ought to be compelled to act in accordance with the law in the appointment of the Chairperson and members of the Council of University of Nairobi. The Court was therefore urged to allow the notice of motion filed herein as prayed and as the 1st Respondent has demonstrated no respect for law, the Court was implored to grant costs of the suit to the Applicant and the Interested Party.

Respondents' Case

25. On behalf of the Respondents, it was averred that the Cabinet Secretary responsible for university education was compelled through an order of *mandamus*, in the **Joseph Mberia Mutuura & Another vs. Cabinet secretary Ministry of Education, Science and Technology & 2 others (2104) KLR**, to commence the reconstitution of the council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) in line with the provisions of section 36(1)(d). Accordingly, the then Cabinet Secretary, **Prof. Jacob Kaimenyi** vide a letter dated 23rd October 2015 appointed an Ad Hoc Committee to shortlist the chairperson and members of councils for the Technical University of Kenya and Jomo Kenyatta University of Agriculture and Technology.

26. The 1st Respondent averred that he was advised by his advocate that the order in Petition No. 33 of 2013 - **Joseph Mberia Mutuura & Another vs. Cabinet Secretary for Education and Another** applied to all public universities as was clarified by **Justice Nduma Nderi** in Petition No 23 of 2016.

27. It was averred that the now expired Council of the University of Nairobi was appointed on 31st July 2013 vide Gazette Notice no 11529 published in Vol. CXV No. 115 dated August, 8th 2013, for a period of four (4) years. Its term was to end on 31st July 2017 because of the resistance to the court orders issued **Nduma Nderi, J**. It was averred that whereas the decision in Petition No. 23 of 2016 was rendered on March 2nd, 2017 that in JR. 56 of 2016 rendered a day after on March 3rd 2017.

28. It was averred that upon taking over as the Cabinet Secretary for Education in mid-December 2015, **Dr. Fred Matiang'i**, faced with numerous litigations against the University Councils as a result of the determination in the ***Joseph Mberia Mutuura Case*** and informed by the decision in the in February, 2017 declaring vacancies in the University of Nairobi Council among others. Accordingly, the Cabinet Secretary constituted an Ad Hoc Committee to shortlist and interview interested person for the positions of the chairpersons and members of Council of election public universities in the first instance including those of Universities of Nairobi.

29. It was however disclosed that of all public universities whose councils were reconstituted through the open and competitive process as directed by the Court, University of Nairobi's Council is the only one which is a subject of litigation. However, on 10th March 2017 the 1st respondent appointed six (6) persons to serve as members of the University of Nairobi Council in full compliance with the decision in Petition No.23 of 2016 which had declared the University of Nairobi Council as having been irregularly appointed. In making his appointment the 1st respondent, the Cabinet Secretary, however forgot to revoke the terms of the three members (**Dr. Sanjay Advani**, **Pascalia Koske** and **Lucy Kiyiapi**) whose term had "not" expired and were to expire on 31st July 2017, hence the council ended up with 12 members instead of nine members. In view of the aforesaid, the applicant filed a judicial review application NRBHCCA No. 131 of 2017 wherein the court granted an order suspending the implementation of the said gazette notice pending the hearing and determination of the substantive motion.

30. It was averred that in view of the foregoing, on 5th April 2017, the Cabinet Secretary issued another Gazette Notice No. 3236 published on 7th April 2017, reappointing the six members (In GN 3236) and revoked the appointment of the three (**Dr. Sanjay Advani**, **Pascalia Koske** and **Lucy Kiyiapi**), and therefore, the gazette notice No. 2334 which forms the basis of JR. No. 131/2017 stands withdrawn.

31.It was however disclosed that unknown to Cabinet Secretary, while he was implementing the Court's directive issued in Petition 23 of 2016, there was another court order in JR. No.56 of 2016 issued on March 3rd, 2017 affecting his ability to act in accordance with the provisions of section 36(1). It was the Respondents' case that the Cabinet Secretary continues to run the risk, including contempt proceedings, of conflicting decisions from courts of similar ranking (but of different divisions) that handled these matters regarding the University of Nairobi Council. However, the Ministry proceeded on the basis of **Justice Nduma's** determination which came earlier to their attention other than the judgement in JR No. 56 of 2016 which came in later.

32. The Respondents further averred that the Cabinet Secretary's action was strengthened by the decision

of 23rd June 2016 in Petition No. 68 of 2016 – **Elgeyo Marakwet Civil Society Organization Network vs the Ministry of Education and 2 Others.**

33. It was therefore the Respondents' position that the 1st respondent acted within the law in making the appointments of the six council members to the University of Nairobi Council for reasons that:

i. There was an open competitive recruitment process. A call for applications was made, interested individuals applied, they were shortlisted and interview by an ad hoc selection panel appointed by the Cabinet Secretary, who made recommendations to him, of those suitable for appointment

ii. That by exercise of his powers as provided for in section 36(1) of the ***Universities Act*** is amended in 2016, the Cabinet Secretary had regard to the development of university education, balanced competence gender equity and the inclusion of stakeholders, the marginalized and minority groups and that the council as currently constituted, passes the matter.The chairman (**Dr. Timothy Kiruhi**) has impeccable credentials in organizational leadership. **Ms Victoria Otieno**, is a private sector expert/banker, **Peter Maangi** is a public finance expert with a long track record in the public sector including the university sector. **Mr. Mohat Somane** provides both a generational change and minority group. While **Jayne Michuki** is a Legal Practitioner with wide experience in corporate governance and lastly, **Meshack Kidenda** is an engineer by profession with a wealth of experience in the public and private sector.

iii. That the onus of proof is on the applicant as to reasons for the said individuals failing to meet the constitutional threshold. The ministry is happy with their skills and public experience. As it is, the council has a gender balance within the two thirds rule, and has minority represented through **Mohat Somane** (who is a Somali).

iv. That the court order in JR No 184 of 2017, JR 131 of 2017 and JR No. 56 of 2016 ought to be read together with the court orders in Petition no. 33 of 2013, Petition No. 23 of 2016 and Petition No 68 of 2016.

v. That the practice is to make a three-year appointment for council members as per the ***Universities Act*** as amended which provides for balloting for those who should do the 4th year to provide for continuity on the councils.

vi. That **Mohat Somane** and **Peter Maangi Mitiambi** are not serving members of staff of the University of Nairobi as alleged by the applicant. There is no evidence attached to prove the wild allegation. Further, even if they were members of staff, the easier thing to do is to require them to resign before taking up their roles on the council.

34. It was noted that the University of Nairobi has no operational council since March 2017 and that the continued absence of an operational council will lead to the affairs of the institution grinding to a halt. Unlike in the case of Companies Law, the ***State Corporations Act*** and the ***Universities Act*** do not provide for an alternative mechanism where a governing council is not in place in a public university.

35. It was revealed that the last three members of the University of Nairobi Council whose terms had been protected by the various and contradicting Court orders, expired on 31st July, 2017 and that they have since acknowledged that with an 11 page contemptuous letter to the Cabinet Secretary, dated 26th July 2017. According to the Respondents, the effects of the non-implementation of gazette notice number 7609 and 7610 dated 31st July 2017 and published on 7th August, 2017 exposes the University of Nairobi to greater risks than the harm the applicant could suffer if the new council is in place.

36. It was contended that the council of a public university is an important institution of governance oversight and legal clothing. The University of Nairobi is a leading public university with complex academic and administrative programs and staff workforce that require continuous presence of an effective governance structure. The effect of staying the implementation of gazette notice no. 7609 and

7610 exposes the university to audit, and accountability queries. As it is even the recent graduation conducted without a functioning council at the University of Nairobi, which is required to seal the list of graduating students, is an action that could attract litigation. In the absence of a functioning council, the academic programs of the university, financial obligations and statutory reports cannot be produced and approved as per the requirements of the ***State Corporations Act***, and the ***Universities Act***.

37. In the circumstances and based on the foregoing reasons, it was the Respondents' case that the Applicant's Notice of Motion, verifying affidavit and Statement dated 27th of July 2017, are baseless, misconceived and devoid of any merit and that the orders sought should not be granted.

Determination

38. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed as well as the legal authorities relied upon.

39. The relevant provisions dealing with the appointment of the Chairperson and members of the Council of the University of Nairobi is section 38 of the ***Universities Act, 2012*** which provides as follows:

> ***The council of a public university or constituent college of such a university shall consist of nine persons appointed by the Cabinet Secretary as follows:-***
>
> > ***a) Chairperson***
> >
> > ***b) The Principal Secretary in the Ministry for the time being responsible for the university education***
> >
> > ***c) The Principal Secretary in the Ministry for the time being responsible for Finance***
> >
> > ***d) Five members appointed by the Cabinet Secretary through an open process in such a manner as may be prescribed in guidelines issued by the Cabinet Secretary; and***
> >
> > ***e) The Vice-Chancellor or, in the case of a constituent college, the Principal of such college who shall be an ex officio member of the Council."***

40. It is therefore clear that the 5 members must be appointed through an open process in such a manner as may be prescribed in guidelines issued by the Cabinet Secretary. By expressly providing that their appointments is through an open process, it is my view that the Act is emphasizing on the provisions of Article 10 of the Constitution which provides that national values and principles of governance therein bind all State organs, State officers, public officers and all persons whenever any of them, *inter alia*, applies any law or implements public policy decisions. Public appointments are clearly undertaken pursuant to the law and in accordance with public policy. Accordingly, Article 10 is relevant in such actions. The said Article proceeds to particularize some of these values as including participation of the people, good governance, integrity, transparency and accountability. It is therefore my view that what is contemplated by the requirement that the appointments of the members of the University Council be through an open process is that such a process must meet the constitutional criteria of transparency and accountability and in a process in which the public are afforded an opportunity to participate. That was the position adopted by this Court in **Elgeyo Marakwet Civil Society Organization Network –vs- Ministry of Education, Science & Technology & 2 others [2016] eKLR,** where the Court held as follows:

> **"It is clear that apart from the persons who sit in the said councils of a public universities or constituent college of such a universities by virtue of their offices, the five members to be appointed by the Cabinet Secretary are to be appointed through an open process. It follows that in effecting the appointments of the said five persons, the Cabinet Secretary is bound to adhere to the Constitutional provisions such as the national values and principles of governance under Article 10 as read with Article 129 of the Constitution…In other words the**

discretion given to the CS to make the appointment of the said five persons cannot be arbitrarily exercised by must be exercised in accordance with the Constitution and the law. In my view the power given to administrative or executive authorities ought to be properly exercised and must not to be misused or abused."

41. That constitutional principles must be adhered to in such undertakings was appreciated in **Benson Riitho Mureithi vs. J. W Wakhungu & 2 Others [2014] eKLR,** where the Court stated as follows:

> "**It would appear from the material before the Court that the question of the Interested Party's suitability for public office was not addressed in accordance with the requirements of the Constitution…The Cabinet Secretary, the 1st respondent, had power of appointment under section 51 of the *Water Act*. At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the *Public Officers Ethics Act*. The 1st respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party's suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution. What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10. It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made…It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands…It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution. In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1st respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under Chapter 6 of the Constitution… In the present case, the Court has found that no inquiry was made with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with section 7 of the 6th Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it- the 1st Respondent."** [Emphasis added].

42. In this case it was contended that the positions were not advertised; there was no open process of recruitment through shortlisting of candidates and no interviews were conducted, further the names of the appointees were not announced to the members of the public prior to the official appointment by way of a

Gazette Notice. In answer to this damning allegation the Respondents relied on an internal memo dated 22nd June, 2017 from the Deputy Director, DUE to the Principal Secretary, Ministry of Education transmitting a list of candidates allegedly shortlisted by an *ad hoc* committee appointed by the Cabinet Secretary to be forwarded to the Cabinet Secretary supposedly for appointment. That document is however not an advert inviting interested persons to apply for the said positions. Nor is it an invitation to the members of the public to make representations regarding the said applicants.

43. I appreciate that under section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya, "*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence....The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson at Para 95.**

44. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30**was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

45. In this case, there was a statutory obligation imposed on the 1st Respondent to ensure that the process of appointment of the members of the University Council is undertaken through an open process. In **Petition No. 33 of 2013 - Joseph Mutuura Mberia & Another –vs- Cabinet Secretary for Education, Science & Technology & 2 Others** the Court agreed with the position adopted by the Attorney General that:

> **"…the Minister should have applied the provisions of Articles 10 and 232 of the Constitution as well as Section 36(1)(d) of the Act and subjected the appointment of the Interested Party's Council members subject of this Petition to an inclusive, competitive, accountable and transparent process that involves public participation and best practices in management, equal and affordable opportunities for all, promotes public trust, is non-discriminatory, promotes equity, equality and social justice. This would be through advertising for the position, shortlisting for interviews and conducting the interviews in accordance with the stated provisions. Even where the immediate incumbent is seeking re-appointment and the employer has assessed his performance to be good and wants to retain him, we are of the view that the vacant position must be subjected to the appointment process. His performance will be a factor to be considered in determining whether to retain him or not as against the other candidates who have been afforded an opportunity to compete for the same position."** [Emphasis added].

46 The Court then expressed itself as hereunder:

"I fully concur with the above submissions by the learned Hon. Attorney General. I hold that the Interested Party (Cabinet Secretary) is bound by the legal advice of The Hon. Attorney General which in the Court's considered view is sound and in line with the obligations of the office of The Hon. Attorney General in terms of the provisions of Article 156 of the Constitution of Kenya 2010. In this case, the relevant provision is Section 36(1)(d) of the *Universities Act, 2012* which mandates the Cabinet Secretary to appoint five (5) members of the Council through an 'open process.'"

47. On its part this Court in **Elgeyo Marakwet Civil Society Organization Network –vs- Ministry of Education, Science and Technology & 2 Others [2016] eKLR,** expressed itself as follows:

"According to the Respondents, since the CS's action was based on a court order, the said action ought not to be questioned. However, what the Judge directed in Joseph Mberia & Another –vs- The Cabinet Secretary, Ministry of Education, Science & Technology was that the Cabinet Secretary for Education, Science & Technology do commence the recruitment process of members of JKUAT Council in accordance with the law. The Cabinet Secretary was therefore not given a blank cheque in carrying out the recruitment process. It follows that if the process is not being carried out in accordance with the law, the CS cannot fall back on the said decision and claim that his actions cannot be questioned."

48. Whether or not there were invitations for persons to apply for the said positions, whether or not there were in fact such applications, whether or not invitations were extended to the public to comment on such applicants' suitability was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and his said panel. Therefore it behoved them to place before the Court credible material supporting the fact that they had fulfilled the legal obligation placed on them. Without such evidence, it would be unreasonable to expect the applicant to prove the negative that the Cabinet Secretary and the panel did not so comply apart from making an allegation to that effect.

49. In the absence of such evidence, there is no material on the basis of which this Court can find that the constitutional and statutory requirements were complied with.

50. The Respondents however took the position that the effects of the non-implementation of gazette notice number 7609 and 7610 dated 31st July 2017 and published on 7th August, 2017 exposes the University of Nairobi to greater risks than the harm the applicant could suffer if the new council is in place. To the Respondents the council of a public university is an important institution of governance oversight and legal clothing. Being a leading public university with complex academic and administrative programs and staff workforce that require continuous presence of an effective governance structure, it was contended that the effect of staying the implementation of gazette notice no. 7609 and 7610 exposes the university to audit, and accountability queries and in the absence of a functioning council, the academic programs of the university, financial obligations and statutory reports cannot be produced and approved as per the requirements of the ***State Corporations Act***, and the ***Universities Act***. In other words the Respondents contend that public interests and expediency militate against the grant of the orders sought herein. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** thus:-

"I have no hesitation in finding that the respondent's decisions of the 29th May 2013 and the 8th October 2013 were made in breach of the rules of natural justice for the hearing of the affected persons and in contravention of their legitimate expectation created by the provisions of the Physical Planning Act and borne of the development approvals given by the national Roads Authority and the respondent's predecessor upon payment of the requisite licence fees. There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have

been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

51. I agree with the decision in **Resley vs. The City Council of Nairobi [2006] 2 EA 311** where the Court held that:-

> **"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed (sic)…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed."**

52. I wish to restate this Court's position in **International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013**, that:

> **"Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."**

53. As the High Priests of the Temple of justice, the judiciary which, unlike the other arms of the Government, which are mostly concerned with short term considerations and are strangely indifferent to the paradox of enacting law or passing policies and then preventing courts from enforcing them, with their eyes on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power. **See Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708.

54. Accordingly the Courts will never tire in its quest of upholding the Constitution and the rule of law and where the same are violated, the Courts will continue to bring back those who defile the Constitution and the law on track by pointing out to them their iniquities and transgressions and to quash and or set aside such actions until such a time that the decision makers get their acts right. I do not subscribe to the school of thought that a mistake repeated several times acquires validity by that mere fact.

55. It this case the 1st Respondent was required by the law to appoint the Chairperson and the members of the University Council through an open process. As stated in **Joseph Mutuura Mberia & Another –vs- Cabinet Secretary for Education, Science & Technology & 2 Others** (supra) such a process ought to have entailed advertising for the positions, shortlisting for interviews, inviting the public to make their representations and conducting the interviews in accordance with the stated provisions. By not adhering to this process, the 1st Respondent clearly got hold of the wrong end of the stick. He failed to consider the letter and the spirit of the enactments guiding his exercise of power and discretion. As was held in **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:**

"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute."

56. It has been said time and again that a decision which is arbitrarily taken cannot stand the test of fairness. In the words of **Chaskalson, Woolman and Bishop** in ***Constitutional Law of South Africa,*** *Juta, 2nd ed. 2014, page 49*:

"Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."

57. In my view constitutional dictates cannot be wished away on the grounds of public interest since the will of the public is presumed to have found an expression in the Constitution. Therefore public appointments cannot be justified simply on the grounds that they are vacant and that such vacancy is detrimental to the proper running of the institution without bothering about the process of such appointments and the people being appointed in such positions. Public appointments, it is my view, are not Christmas gifts to be dished out as a token of appreciation to those who have or are willing to run errands for the appointing authorities. The appointments, to be valid, must be in accordance with the laws of the land.

58. I must point out that this is not the first time this Court is directing the 1st Respondent on how to undertake its statutory duties in matters of similar nature. In fact in Miscellaneous Civil Application No. 56 of 2016 – **Republic vs. The Minister for Education ex parte Thadayo Obanda,** a matter in which both the cause of action and the parties were substantially similar, this Court noted that noted that despite the Attorney General having given his legal opinion to the 1st Respondent advising him not to interfere with the running of Universities, the advice was purportedly rescinded much later. The Court expressed itself as hereunder:

"In this case the Court was informed vide submissions that upon the Attorney General giving his opinion in the matter, the CS beat a hasty retreat and rescinded the letter dated 16th December, 2015. If this indeed happened it would be a move in the right direction as this was the position taken by Nyamu, J (as he then was) in Midland Finance & Securities Globetel Inc vs. Attorney General and Another [2008] KLR 650 in which the Learned Judge cited with approval the decision Bank of Uganda vs. Banco Arabe Espanol [2007] EA 333 that:

'The opinion of the Attorney General as authenticated by his own hand and signature regarding the laws…and their effect or binding nature or any agreement contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents…It is improper and untenable for the Government…or any other public institution or body in which the Government…has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interest of 3rd parties. As a country we must have and maintain an acceptable measure or standard of public morality and the Attorney General should be held to his bargain, both on the ground of public morality and on the principle of good faith (*pacta sunt servanda*).'

It is therefore highly advisable for public servants and government and institutions to seek the legal opinion of the Attorney General in areas where they are not sure of their action or propose action and abide by the same in order to avoid rushing in decision which may well turn out to be reckless and unlawful hence subject the tax payer to unnecessary costs. In this

case however there was no affidavit and therefore the communication purportedly rescinding the impugned decision was not properly placed before the Court."

59. It seems as if the Court's advice fell on deaf ears because had the 1st Respondent heeded this Court's advice, he would have sought legal opinion before embarking on a similar voyage. In my view such action, to paraphrase **Tsekooko, JSC** in **Goustar Enterprises Limited vs. Oumo [2006] 1 EA 77 (CCK),** is like sailing on the high seas without a radar and compass.

60. In this case, despite the legal infrastructure at the disposal of the 1st Respondent, he keeps on catching the wrong end of the stick. That kind of conduct can only be explained on the basis of impunity. It is my view that the Lords of Impunity, however high and mighty must be made to carry their own crosses. I have no doubt in my mind that there are certain plain but well-defined cases, in which public officers employed to execute statutes are personally liable and this is expected of every other system in which the principles of jurisprudence are rightly understood, in damage and reparation to parties injured by the non-execution of the Acts. Such liability unquestionably attaches to statutory officers personally, who corruptly, or wilfully, and tortiously refuse to execute statutes properly, when any error or illegality in their previous proceedings has been pointed out, or found and declared by a court of law. When public officers thus wilfully refuse to execute duty imposed on them, they ought to held personally to account.

61.In this respect I gather support from the decision of the Constitutional Court of South Africa, a country whose Constitution mirrors ours in many respects, in ***Economic Freedom Fighters vs. Speaker of the National Assembly and Others; Democratic Alliance vs. Speaker of the National Assembly and Others [2016] ZACC 11*** where it expressed itself as hereunder:

> ***"One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:***
>
> ***"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."***

62. In our case though the elements of our Constitution are not informed by apartheid regime, the current Constitution of Kenya, 2010, is a product of a long struggle for democracy spanning decades by the people of Kenya. It is therefore partly a response to many years of misrule by a single party dictatorship. One must therefore start from the presumption that the provisions dealing the national values and principles of governance were meant, *inter alia,* to correct the historical deficiencies that placed the people at the mercy of the executive by usurping the people's sovereignty and giving the executive unchecked power over all other institutions of governance. This was appreciated by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012,** where it held that we ought to take into account the agonized history attending Kenya's constitutional reform. Accordingly, in interpreting the national values and principles of governance in the Constitution it important that we do so while keeping in mind what Kenyans intended to achieve by retiring the former Constitution and substituting it with the current Constitution.

63. I have stated before that it is time those who deliberately violate the Constitution despite being directed by the Courts took responsibility for their actions. This Court has had occasion to deal with the

same issue in Judicial Review Case No. 2 of 2014 - **<u>Kenya Country Bus Owners' Association & Others vs. Cabinet Secretary for Transport & Infrastructure & Others</u>**, a matter which similarly involved a member of the Cabinet, the then Cabinet Secretary for Transport & Infrastructure, **Eng. Michael S M Kamau,** in which the Court expressed itself as hereunder:

> **"It is trite that in order to safeguard and preserve the dignity and authority of the Court, the Court has powers to make any necessary orders which in my view include an order that a particular public or state officer whose conduct the Court finds reprehensible pays the Costs of litigation. Such decision, however, is an exception to the general rule and the jurisdiction to do so is not to be invoked lightly. It is only to be made where the Court is convinced that the action taken by that officer was taken with impunity in disregard of the consequences… Where the action was taken as a result of a *bona fide* mistake or error of judgement on the part of the officer, it is my view that he ought not to be held personally liable. However where from the circumstances it is clear to the Court that the officer took the particular action not caring whether it was wrong or not or for malicious or other extraneous purposes or where the officer deliberately decides not to disclose to the Court facts material to the issue before the Court either with a view to discrediting the legal process or in a manner amounting to playing lottery with the judicial process, the public ought not to be burdened by the consequences of such misadventures. This is reflected in Article 201(d) of the Constitution which provides that one of the principles guiding all aspects of public finance in the Republic is that public money shall be used in a prudent and responsible way… In my view the people of the Republic of Kenya by adopting and enacting to themselves and their future generations the Constitution and in particular the values and principles of governance in Article 10 wanted to change the way in which all State organs, State officers, public officers and all persons are to conduct themselves while applying and interpreting the Constitution, enacting, applying and interpreting any law and making and implementing any public policy decisions. By specifically enacting that in doing so the principle of accountability must be taken into account, in my view the people of Kenya intended to do away with the culture of impunity. Accordingly with the Constitution came the advent of transparency and accountability so that persons entrusted with decision-making powers must be transparent in, accountable and answerable for their actions personally without subjecting the people to the vagaries of their irresponsible actions which cause loss to the people of Kenya. It is not for nothing that it is therefore provided in Article 73(2) of the Constitution that the guiding principles of leadership and integrity include selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties and accountability to the public for decisions and actions. As was pronounced by the Supreme Court in <u>Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR:</u>**
>
> **'No State agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of ideosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays…The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens. The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.'**

To penalise the public for such action would be to cultivate and abet the culture of impunity on the part of the public officers. Similarly where a public officer takes an action which is clearly meant to demean or bring judicial process into disrepute he ought to personally shoulder the consequences since such action cannot be said to have been taken on behalf of the public from whom the judiciary derives its mandate."

64. The tax-payers of this country ought not to be unduly burdened by being compelled to shoulder the consequences of people whose actions contravene the Constitution, the social contract between the governors and the governed, and expect the people, the principals of the governors on whose behalf the governors exercise sovereign power, to pay for the governors' sins. That there are cases where public officers may be held personally liable was appreciated by **Kasango, J** in **Daneva Company Limited vs. Kenya National Highways Authority [2014] eKLR.**

65. I am guided in my finding by the decision in **President of the Republic of South Africa vs. Office of the Public Protector and Others (Economic Freedom Fighters and Others Intervening) (79808/16) [2017] ZAGPPHC 748; [2018] 1 All SA 576 (GP)** (13 December 2017) where the North Gauteng High Court, Pretoria while penalizing the South African Head of State, **Jacob Zuma** expressed itself as hereunder:

[47] My view is that in this case a simple punitive costs order is not appropriate. I say this because that would make the tax payer liable for the costs. This is a case where this Court would be justified in finding that this is an unwarranted instance for the tax payer to carry that burden. The conduct of the President, and the context of the litigation he initiated, requires a sterner rebuke. There is not the slightest doubt that, properly considered, the background of the matter and the circumstances of the litigation show that the President had no acceptable basis in law and in fact to have persisted with this litigation. In fact, the President's conduct amounts to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector.

[48] In ***Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government*** **2013 (5) SA 24 (SCA) para 64 the SCA specifically discussed the personal liability of public officials for legal costs. It said:**

'In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However that does not excuse their behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs it is time for courts to seriously consider holding officials who behave in the high-minded manner described above, personally liable for costs incurred.' (Emphasis added).

[49] The finding made regarding the issues considered and discussed on this aspect can only result in one conclusion, that the President persisted with litigation and forced the intervening parties to incur costs in circumstances when this should and could have been avoided as well as delaying the release of the report. In so doing he clearly acted in flagrant disregard for the constitutional duties of the Public Protector. What is also aggravating is the fact that the President's application was based on self-created urgency. Simply put, the President had become aware some six (6) months before his abortive application that the Public Protector was in possession of complaints implicating him ***in*** **serious misconduct and he did nothing when he was invited for comment… [54]. if that conduct falls outside the confines of the Constitution, more particularly Chapter 5 thereof, we fail to see how such conduct can be regarded as conduct of the Head of State acting in his official capacity.**

[55] In the final analysis the President's overall conduct leaves me one option but to find that he must be held personally liable for all the costs that were occasioned from 14 October 2016, when Fourie stated that the previous Public Protector had finalised the investigation and signed the report. The President compounded matters when he persisted with the litigation, based on a supposed typing error, after initially conceding that the report be released if indeed the Public Protector had finalised the investigation and signed the report.

66. This is not the only matter in which the same President was penalised in costs. A similar order was made by the South African Supreme Court of Appeal in **Jacob Gedleyihleksia Zuma vs. Democratic Alliance and Others [2017] ZASCA 146[2017] 4 All SA 726**.

67. This Court is well aware of the provisions of section 21(4) of the ***Government Proceedings Act***, Cap 40 Laws of Kenya, which provides that:

> ***(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any***

Government department, or any officer of the Government as such, of any money or costs.

68. However the preamble to the ***Government Proceedings Act*** provides that it is:

> ***An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.*** [Emphasis added].

69. It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as judicial review proceedings and matters relating to the interpretation of the Constitution which fall under their own class. In other words they are proceedings *sui generis*. This was the position adopted by **Ringera J** (as he then was) in **Wellamondi vs. The Chairman, Electoral Commission of Kenya [2002] 1KLR 286**,where he explained the legal position to be as follows:

> **"I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis."**

See also **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

70. That the was position applies with equal force to matters seeking interpretation or application of the Constitution was appreciated by a three judge bench of this Court in **The Council of Governors and Others vs. The Senate and Others Petition No. 381 of 2014** (as consolidated with Petition no 430 of 2014) where the Court expressed itself as hereunder:

> **"It must be observed, first, that the present matter is not a civil matter relating to *"the affairs or property of government"* in the manner contemplated under the provisions of the Government Proceedings Act. The petition before us seeks the interpretation of the question whether an Act of Parliament is unconstitutional for violating the Constitution. It is brought under the provisions of Article 165 and 258 of the Constitution which grant the Court the jurisdiction to interpret whether an Act of Parliament is inconsistent with or otherwise in**

contravention of the Constitution. It cannot therefore be deemed to be *"civil proceedings"* as contemplated in the Government Proceedings Act. In our view, the provisions of section 12 of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution."

71. The rationale for this position to be found in **Masefield Trading (K) Limited vs. Rushmore Company Limited and Another [2007] 2 EA 288**, where it was held that:

"The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of government, which contains rules about the Government of the country…The Constitution is the supreme law of the land and the Constitution and the rules made thereunder do not provide for serving the notices that are required to be issued to the Attorney General prior to filing suits or applications in which there are allegations of breach of constitutional provisions. Once a party alleges violation of their fundamental rights, the court will hear them and the requirement of notices to the Attorney General like in civil cases does not arise."

72. Similarly, in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** it was held:

"The respondents have contended that this matter is time barred under the Limitation of Actions Act cap 22. However the Act does not apply to judicial review which is *sui generis*. "Suit" as defined in s 2 of the Civil Procedure Act means "all civil proceedings commenced in any manner, prescribed" "Action" under the Interpretation and General Provisions Act cap 2 means "all civil proceedings in a Court and includes any suit as defined in s 2 of the Civil Procedure Act." Since the actions set out in Part II of the Limitation of Actions Act cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters."

See also **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2KLR 6.**

73. It is therefore clear that there is nothing barring the Court in appropriate cases from holding an officer of the Government individually liable where the conduct of that officer give rise to circumstances under which it would be unjust and oppressive to subject the public to either pay the money decreed or the costs arising therefrom or both. In other words there is no immunity from impunity. This is what I would call the lifting of the veil of the executive inscrutability and inoculation. For as **Theodore Roosevelt**, the 26th President of the United States of America once said:

"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour''.

74. **Lord Denning's** similarly made it clear in **Gouriet vs. Union of Post Office Workers and Others (1977) CA** that:

"Be you ever so high, the law is above you."

75. That this is so is supported by Article 226(5) of the Constitution which provides that:

If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not

76. Article 259(1) of the Constitution obliges this Court to interpret the Constitution in a manner that *inter alia* promotes its purposes, values and principles. One of those values and principles prescribed in Article 10 of the Constitution is good governance. The purposive interpretation of the Constitution leads me to the inescapable conclusion that Article 201(d) as read with Article 232(1)(b) of the Constitution

which provide that one of the values and principles of public service is efficient, effective and economic use of resources, clearly requires that before a public or state officer makes a decision or takes action, such a decision must be well thought of and the necessary legal advice sought before the same is taken. It follows that a reckless decision cannot be an efficient economic use of resources where such action unreasonably leads to loss of public funds and where it is clear from the previous course taken that a particular state or public officer has a penchant to ignoring glaring legal provisions and advice, he cannot ensconce himself in executive immunities when their it turns out that the action was ill-thought of or misconceived.

77. It was therefore held in **President of the Republic of South Africa vs. Office of the Public Protector and Others (Economic Freedom Fighters and Others Intervening)** (supra) at paragraphs 45 and 46 that:

> **"[45] This demonstrates that the other unavoidable finding one must make is that the President was grossly remiss in ignoring all indications from 14 October 2015 that the previous Public Protector had finalised her investigation and signed the report. Whatever one may say about Fourie's statements in his affidavit of 14 October, the indications were clear from that day that the door had been firmly shut by the previous Public Protector. The recordal in the order of that day only emphasised the finality of that part of the previous Public Protector's investigation. A reasonable litigant would have realised this and aborted the application then and there.**
>
> **[46] The President's persistence with the litigation; in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounts to objectionable conduct by a litigant and amounts to clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to mulct the culpable litigant with a punitive costs order."**

78. As I have stated elsewhere in this judgement, this is not the first time the 1st Respondent is before this Court on the same cause of action. As the Court has stated, the first time this matter came to Court, the Attorney General gave his opinion on how the matter ought to be handled but it seems that that opinion was not taken seriously. When the matter came to Court this Court found fault with the manner in which the 1st Respondent had acted. Subsequently, an application for contempt was filed when the 1st Respondent purported to make fresh appointments. In fact in one instance, the 1st Respondent admitted that he forgot to revoke the terms of the three members of the Council whose term had "not" expired hence the Council ended up with 12 members instead of nine members. This forced him to issue another Gazette Notice reappointing the same members but revoking the appointment of the three others. He was therefore of the view that the earlier gazette notice stood withdrawn.

79. In in Miscellaneous Civil Application No. 56 of 2016 – **Republic vs. The Minister for Education ex parte Thadayo Obanda**, while this Court did not find that the allegations levelled against the 1st Respondent that his decision was personal and was intended to settle scores informed by the termination of his employment by the University of Nairobi hence amounted to misuse of power on his part, the Court however advised opined:

> **"It is therefore highly advisable for public servants and government and institutions to seek the legal opinion of the Attorney General in areas where they are not sure of their action or proposed action and abide by the same in order to avoid rushing into a decision which may well turn out to be reckless and unlawful hence subject the tax payer to unnecessary costs."**

80. This opinion ought to have put the 1st Respondent on notice that next time he embarked on the same process he ought to seek legal advice from the Chief Government Legal Adviser, the Attorney General. He seemed not to have done this. The failure to do so can only be explained on deliberate move to ignore

the law or recklessness in not caring whether the said actions would be lawful or not. While *bona fide* mistakes made in the course of decision making may be excused, deliberate actions or actions taken recklessly cannot and ought not to be condoned or go unpunished. In my view, a public or state officer who repeatedly breaks the law with impunity cannot purport to be acting for the well being of the public yet under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.As was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR**:

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution."**

81. To subject the innocent tax payer to shoulder the consequences of the continuous violation of the law by the 1st Respondent herein would in my view amount to abetting such transgressions on the part of the 1st Respondent. The applicant herein, though successful, would thereby be compelled to meet the costs of the litigation in which he has been awarded the very costs since he is a Kenyan taxpayer, in respect of an act that could have been avoided had due diligence been taken by the 1st Respondent.

82. Therefore in this case I do not see the reason why the Kenyan taxpayer who is already labouring under the weight of heavy taxation ought to bear the burden of shouldering the costs incurred by the unlawful but deliberate and/or reckless actions of a member of the executive the executive whether well intended to be so or not. As was held in **In Re Alluvial Creek Ltd** 1929 CPD 532 at 535:

> **"…sometimes such an order is given because something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that. But I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious."**

83. However as this Court cautioned in **Kenya Country Bus Owners' Association & Others vs. Cabinet Secretary for Transport & Infrastructure & Others** (supra):

> **"This action is not intended to send shivers down the spines of State and public officers but to ensure that the national values and principles of governance as engraved in the Constitution are upheld and adhered to at all times."**

84. This Court has held time and again that the executive must remember that since the year 2010 there is a new sheriff in town known as the Constitution of Kenya, 2010 which does not countenance yester-years impunity. To paraphrase **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** the new Constitution has enshrined the Bill of Rights of all citizens and the national values and principles of governance and to fail to grasp those principles is to perpetuate a fundamental breach of the Constitution and to legalise impunity at very young age of our Constitution. That kind of behaviour, act or omission is likely to have far and serious ramifications on the citizens of this country and its leaders. It also raises basic question of why the members of the executive who have sworn and agreed to be guided by the provisions of the Constitution are breaching the supreme law of the land with remarkable arrogance or ignorance. This application is a clear indication that some members of the executive arm of this country have not tried to understand and appreciate the provision of this new Constitution. It also shows yester years impunity are still thriving in our executive arm of the government.

85. In my view, the views expressed in ***Economic Freedom Fighters vs. Speaker of the National Assembly and Others; Democratic Alliance vs. Speaker of the National Assembly and Others*** (supra) with reference to the President of South Africa also apply, *mutatis standi*, to other members of the executive. In that case the Court expressed itself at paragraph 27 as hereunder:

"An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national Executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do. It is, no doubt, for this reason that section 83(b) of the Constitution singles him out to uphold, defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant."

86. Having considered the issues raised herein it is my view and I do find merit in the Notice of Motion dated 22nd August, 2017.

Order

87. In the premises I issue the following orders:

1) An order of Certiorari removing into this Court for the purposes of being quashed the Kenya Gazette Notice No. 7609 and 7610 dated 31st July 2017 and published on 7th August 2017 by the 1st respondent appointing the chairperson and the members of the council of the University of Nairobi which Notice is hereby quashed.

2) An order of Prohibition prohibiting the implementation of Kenya Gazette Notice No. 7609 and 7610 dated 31st July 2017 and published on 7th August 2017 by the 1st respondent appointing the chairperson and the members of the council of the University of Nairobi.

3) An order that the costs of and incidental to these proceedings are awarded to the applicant to be borne by the person who at the material time was in charge of the 1st Respondent, Fred Matiang'i, personally/individually.

88. It is so ordered.

Dated at Nairobi this 12th day of February, 2018

G V ODUNGA

JUDGE

In the presence of:

Miss Nyagah for MR Ngatia for the interested party

Miss Ngelichei for Miss Chimau for the Respondent

CA Ooko