REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 562 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE RULES AND REGULATIONS OF THE UNIVERSITY OF NAIROBI

AND

IN THE MATTER OF ARTICLES 22(1), 23(1) (3), 27(1), 159(2)(d) and 165 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

UNIVERSITY OF NAIROBI.....1ST RESPONDENT

SENATE EXAMINATION DISCIPLINARY COMMITTEE...2ND RESPONDENT

THE SENATE.....3RD RESPONDENT

THE HONOURABLE ARTTORNEY GENERAL.....4TH RESPONDENT

EXPARTE:

PATRICK BEST OYESO

JUDGMENT

The Application

1. The Application before the Court for determination is a Notice of Motion by Patrick Best Oyeso, the *ex parte* Applicant herein, (hereinafter "the Applicant"), in which he is seeking the following orders:

> **i. An order of Certiorari directed at the 1st ,2nd & 3rd Respondents removing to this Court its decision made on the 18th of May 2016 and upheld on 30th May 2017 expelling the Applicant in Disciplinary Cause of 2016 for purposes of having it quashed.**

ii. An order of Prohibition prohibiting the 1st 2nd and 3rd Respondents from executing its expulsion orders and or interfering with the Applicant completed course work and the final results.

iii. An order of Mandamus compelling the 1st 2nd & 3rd Respondents to take into account completed course work and final results thereby allowing him to graduate.

iv. That such leave granted do operate as stay of the proceedings in Disciplinary Cause of 2016 and particularly of any further process of execution therein .

2. The application was supported by a statutory statement dated 29th November 2017, and a verifying affidavit and further affidavit sworn by the Applicant on 29th November 2017 and 13th March 2018 respectively.

3. The Applicant's case, as summarized from the pleadings he filed, is as follows. The Applicant had since 2012, been a student at the University of Nairobi (the 1st Respondent herein and hereinafter "the University), having been admitted therein to study for a Bachelor of Economics degree in the School of Economics. He averred that he did complete his course work and obtained his results, and that academic transcripts were issued to him. He attached copies of the academic transcript.

4. That on 22nd January 2016, the Respondent wrote to the Applicant suspending him from the University, claiming that he had impersonated one Elegwa Keith to sit a university examination, and he was subsequently requested to appear before the College Disciplinary Committee on 8th March 2016 through a letter dated 1st March 2016. The Applicant annexed copies of the said letters.

5. The Applicant further contended that the 1st Respondent through a letter dated the 18th May 2016 expelled him from the University with effect from 8th March 2016; that he appealed the decision to the Senate Examination Committee which upheld the decision in a letter dated 10th August 2016; and being dissatisfied, he appealed to the Senate Disciplinary Committee who dismissed his appeal and reaffirmed the expulsion in a letter dated 30th May 2017. Further, that he was advised to pick the said letter of the Senate Disciplinary Committee through an sms on the 20th July 2017. The Applicant annexed copies of the said letters.

6. According to the Applicant, the alleged offence was impersonation of one Elegwa Keith during an examination that took place on the 16th October 2016, and the purported cheating was not in relation to his examinations, neither was he found cheating in his examinations. Further, that on the 16th October 2016 he had already completed his examinations. Therefore, that the alleged case of impersonation ought not to have affected his results as it did not relate to them.

7. The Applicant also alleged bias on the part of the Respondents, citing the case of a fellow student who cheated in the examinations and was re-admitted. He also alleged that some of the members of the College Disciplinary Committee meeting held on 8th March 2016 also dealt with the appeal at the Senate Examinations Committee.

8. It is the Applicant's case that the Respondents' actions were in the circumstances excessive, unreasonable, illegal and not based in law; that they had no legal authority or capacity to adjudicate on an offence which was purely criminal in nature; and that they acted unconstitutionally and have not acted reasonably as is expected of a public body, as the same parties sat in the proceedings up to appeal status.

9. The Applicant is apprehensive that he will not be allowed to graduate unless the said erroneous orders of expulsion are quashed by this Court. It was his case that his constitutional right to education has been denied which he has worked so hard to attain.

The Response

10. The application was opposed through a replying affidavit sworn on 15th February 2018 by Prof. Henry W. Mutoro, the Deputy Vice Chancellor in charge of Academic Affairs at the 1st Respondent University, on behalf of the 1st 2nd and 3rd Respondents. He confirmed that the Applicant was admitted as a module II undergraduate student in the School of Economics in the 2012/2013 academic year to pursue a Bachelor of Economics degree programme.

11. Prof. Mutoro denied the contents of the Applicant's case, and stated that on 16th October 2015, he was informed by a Dr. Daniel Mwai who was invigilating a university supplementary examination, namely, XEA 202- Macroeconomic Theory, that the Applicant had sat for the examination and had impersonated another student, Elegwa Keith Musungu, of registration number X75/48471/2012.

12. He deponed that through a letter dated 22th January 2016, the 1st Respondent wrote to the Applicant to inform him of his suspension from the University based on his conduct, which was in contravention of the rules governing the conduct and discipline of students of the 1st Respondent. Further, that a College Disciplinary Committee meeting was held on 8th March 2016 to consider the Applicant's case, and that the Applicant pleaded guilty of the charges against him. The College Disciplinary Committee thereupon recommended to the Senate that the Applicant be expelled from the University with effect from 8th March 2016, and that decision was communicated to the Applicant through a letter dated 18th May 2016.

13. According to the Respondents, the Applicant subsequently appealed the decision, and the 1st Respondent through a letter dated 15th February 2017 informed him to appear before the Senate Examination Appeals Disciplinary Committee for the determination of his appeal case. Further, that the Senate Examination Committee held a meeting on 22nd February 2017 and considered the Applicant's appeal, but found no merit in it and recommended that the earlier senate decision to expel the Applicant be upheld.

14. In conclusion, Prof. Mutoro averred that the Applicant was accorded due process in accordance with applicable law; and that the application does not establish any legal and factual basis for the reliefs of certiorari, prohibition and mandamus that are sought. He attached copies of the letters he relied upon, and of the proceedings of the College Disciplinary Committee and Senate Examination Appeals Disciplinary Committee meetings that considered the Applicant's case and appeal.

The Determination

15. Four issues have been raised in this application that require determination. These are firstly, whether the Respondents' actions were *ultra vires*; secondly, whether the decision to expel the Applicant from the 1st Respondent University was unreasonable and disproportionate; thirdly, whether the Respondents breached the rules of natural justice during the Applicant's disciplinary processes; and lastly, whether the Applicant is entitled to the reliefs he seeks.

16. The applicable principles as regards these issues were explained in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** as follows:

> **"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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision 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…..**
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> **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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
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> **Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

17. The parties were directed to canvass the application by way of written submissions. The counsel for the Applicant, Ochanda Onguru& Company Advocates, on the first issue on the illegality of the Respondent's actions, reiterated that it is clear from the proceedings and the letter expelling the Applicant that the offence was impersonation and or cheating. That the above offences fall under the Penal Code and are therefore matters outside the jurisdiction of the 1st, 2nd and 3rd Respondents.

18. According to the Applicant, the Respondents were under duty to report the Applicant to a police station for criminal action to be initiated. However, that this was not done and neither was the Applicant charged in a court of law and a determination made. They submitted that the Respondents do not have jurisdiction to entertain a criminal matter, nor hear and determine an issue which was purely criminal and that falls under the Penal Code and ought to have been dealt with by the Courts.

19. Reliance was placed on the decisions in **The Institute of Certified Public Accountants of Kenya vs Joy Vipchandra Bhatt t/a J.V.Bhat & Co, Nrb HC Misc App. No 285 of 2006, Lillian Njeri Muranja vs Kajiado Lands Dispute Tribunal & Others, Nrb HC Misc App. No 689 of 2001,** and **Meshack Mwangi Maina & Another vs Nyandarua District Land Dispute Tribunal & Others, Nku HC Misc App. No 314 of 2004** for the position that a tribunal cannot be allowed to usurp jurisdiction that it does not possess.

20. The Respondents' Advocate, Donald B. Kipkorir Advocate, submitted that the Applicant has not demonstrated the allegation that the Respondent acted in excess of their jurisdiction. That the Respondent's actions were sanctioned by the Rules and Regulations Governing the Conduct and Discipline of Students, and the Respondents were within the ambit of their mandate in making their decision. Reliance was placed on the decisions in **Peris Wambogo Nyaga vs Kenyatta University (2014) e KLR** and **Republic vs Senate Examination Disciplinary Committee & Another Exparte Shadrack Mbau (2006) eKLR** that the Respondents have the powers to discipline students and to mete out punishment for misconduct of students.

21. I have considered the arguments made on this issue. To establish that the Respondents acted illegally, the Applicant is required to show that the Respondents failed to correctly understand, interpret and/or apply the law that was used in making its decision. The proceedings before the College Disciplinary Committee on 8th March 2016, that were attached by the Respondents to their replying affidavit as "Annexure HWM 2", show that the Applicant faced five charges under the Rules Governing the Conduct and Discipline of Students, and that he pleaded guilty to three of the charges.

22. The Applicant however did not provide the content of the rules pursuant to which he was charged and expelled, in support of his claim that they did not provide for the offence of impersonation. In addition, he has not shown how the Respondents acted in excess of those rules, to show that they exercised powers that they did not possess.

23. Section 107(1) of the *Evidence Act in this regard provides that* "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." In addition there is a presumption that official

acts are presumed to be done properly and legally as illustrated in 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). The presumption raised in favor of an official act is however rebuttable.

24. Accordingly, the burden is upon the party who challenges the administrative decision to bring enough evidence to show that the decision is invalid. The party must prove satisfactorily that the administrative action is unjust, unreasonable, unlawful, arbitrary, capricious, or an abuse of discretion. Once such proof is provided, the onus then moves to the respondent to show the legality of its actions.

25. It was held as follows in this regard in the Ugandan Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"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".**
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> **This position was also reiterated by the Kenya Supreme Court in Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017 .**

26. In the present application, there was paucity of argument on the applicable legal provisions relied upon by the Respondents in the making of the impugned decisions, and on the breach of the same by the Respondents. Specifically, no provisions of the applicable Respondents' statutes and rules were cited by the Applicant to buttress his allegations of illegality on the part of the Respondents, and this ground was thus not proved by the Applicant.

27. On the second issue on the unreasonableness and disproportionate nature of the Respondents' decision, the Applicant's counsel submitted that it is evident from the pleadings that if the alleged cheating occurred, it was not on the Applicant's own examinations which he had cleared, and for the Respondents to victimise him by expelling him thereby denied him the opportunity to graduate after hard work of four years which was extreme punishment, and that their action amounted to abuse of their power, was unreasonable, punitive and in excess of jurisdiction.

28. The Respondents' Advocate on the other hand relied on the case of **Monicah Karimi Njiru vs Egerton University (2011) eKLR,** where the applicant was found sitting an examination for her friend, and the decision to expel her was upheld as the Court found that the due process had been substantially complied with. In addition, that the Applicant is the author of his own misfortune as he committed examination malpractices, and admitted that he was sitting an examination on behalf of his colleague and asked for forgiveness. While relying on the decisions in **Republic vs Egerton University exparte Robert Kipkemoi Koskei (2006) e KLR and Albert Mandela Ogendi vs University of Nairobi (2016) e KLR,** the Respondents further submitted that judicial review concerns itself with process and not merit review.

29. The grounds of unreasonableness and proportionality as giving rise to judicial review on merits of a decision were discussed in great length by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** as follows at paragraphs 55 to 58 :

> **"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is**

undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

30. The Respondents herein explained the processes they undertook before the College Disciplinary Committee and Senate Examinations Appeals Committee, and provided the proceedings therein to show the basis of their decision to expel the Applicant. In addition, the Applicant admitted to the offences he was charged with, and to impersonating another student during an examination. It will be difficult in those circumstances to persuade this Court that the decision that the Respondents made to expel the Applicant was irrational or unreasonable.

31. A proportionality review on the other hand will entails a further analysis to determine whether the decision of the Respondents interfered with the right of the Applicant to the least extent necessary to achieve a legitimate aim, and whether there was fair balance between the aim sought to be achieved and the means invoked to attain the aim.

32. The imposition of penalties in particular will always interfere with certain rights such as those to livelihood, and in the present application the Applicant was expelled from the 1st Respondent University, and this not only interfered with his graduation, but also the prospects of his future employment. He says that this punishment was not proportionate to the offence he committed, which was impersonating another student during an examination, as it did not relate to his own examinations. However, the Applicant failed to show, as already found in the foregoing, that the Respondents did not have the powers to impose such a punishment, and it is also my view that the punishment meted upon him was not disproportionate in light of his admitted misconduct, and also in light of the objective of preventing and deterring any such future misconduct.

33. On the third issue on breach of the rules of natural justice, the Applicant submitted that the actions of the Respondent lacked fair administrative action, and should therefore be quashed, as some of the members who sat at the Disciplinary Committee Meeting on the 8th March 2016 are the same who also dealt with the appeal at the Senate Examination Appeals Committee. The Applicant pointed out the members as P.O Kobonyo and Dr. Antony Wambugu, and that this created unfairness to the Applicant, as it was not expected that having found him guilty in their first declaration the said members would change their position.

34. That the right to fair hearing which is a cardinal principle of natural justice was thus not given to the Applicant. Further, that the rules of natural justice are inherent in all proceedings be they judicial or administrative and should be observed at all times. The decision in **Barclays Bank of Kenya vs City Council of Nairobi, Nrb HC Misc App. No 1261 of 2005** was cited in this regard.

35. The Respondents on their part refuted that they had violated the Applicant's right to fair hearing, and submitted that they went to great lengths to ensure due process was followed and that the Applicant was given an opportunity to be heard. Reliance was in this regard placed on the cases of **Linus Simiyu Wamalwa vs University of Nairobi and Another, *(*2015) eKLR** and **Moses Nandalwe Wanjala vs Kenyatta University (2015) eKLR** .

36. It is not in contention that due process was followed by the Respondents and that the Applicant was given an opportunity to be heard before the decision to expel him was reached. What he alleges was that there were two members who appear to have predetermined the decision at the Senate Examinations Appeals Committee, because they also were members of the College Disciplinary Committee that first recommended the Applicant's expulsion.

37. However, other than being members of the two Committees, the Applicant did not bring any other evidence to show any personal interest these two members had in the disciplinary proceedings, and/or if they were in a position to, or did exert undue influence on the other members of the Senate Examinations Appeals Committee. It is notable in this regard that a perusal of the said Committee's proceedings show that none of the two members chaired the Senate Examinations Appeals Committee, and that there were five additional members present in the said Committee during the hearing of the Applicant's appeal. I find that these circumstances did not give rise to the possibility of actual or apparent bias on the part of the Senate Examinations Appeals Committee.

38. Lastly, on the remedies sought by the Applicant, the Respondents cited the decisions in **Frederick Mukasa vs Director of Public Prosecution and 3 Others,(2016) eKLR, Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge and Others, (1997) eKLR, Republic vs Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 Others, (2017) e KLR, and Mureithi & 2 Others vs Attorney General and 4 Others (2006) 1 KLR (E&L) 70***7*** where the courts set out the threshold to be met for the grant of prerogative orders of certiorari, prohibition and mandamus, and in the submissions that the Applicant does not merit the said orders.

39. I am guided by the parameters for the grant of judicial review orders, as set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, Civil Appeal No. 266 of 1996** thus:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue,

to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

40. This Court has found that the Applicant has not established that the Respondents acted in excess of their jurisdiction, or unreasonably, or in breach of the rules of natural justice; and that the decision to expel the Applicant was justified. The orders of certiorari, prohibition and mandamus sought by the Applicant cannot therefore lie. While the Court sympathises with the situation of the Applicant, he will have to seek other interventions and options with the Respondents or other educational institutions to enable him complete his studies and graduate.

41. In the premises, I find that the Applicant's Notice of Motion dated 29th November 2017 is not merited, and it is accordingly dismissed. Considering that the Applicant was a student of the Respondents, I will order that each party bears their own costs of the said Notice of Motion.

42. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JULY 2018

P. NYAMWEYA

JUDGE