REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 116 OF 2017

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI, PROHIBITION

AND MANDAMUS

AND

IN THE MATTER OF: THE UNIVERSITIES ACT NO. 42 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE CABINET SECRETARY, MINISTRY OF EDUCATION, SCIENCE &

TECHNOLOGY….....1ST RESPONDENT

THE CO-OPERATIVE UNIVERSITY OF KENYA.....2ND RESPONDENT

THE ATTORNEY GENERAL ……......3RD RESPONDENT

PROFESSOR PHILIP ODUOR OWINO.....INTERESTED PARTY

EX PARTE..... NJOMO JOHN

JUDGMENT

1. The Applicant, **NJOMO JOHN** is an Advocate of the High Court of Kenya.

2. The 1st Respondent, **THE CABINET SECRETARY, MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY** is the Cabinet Secretary for the time being responsible for matters related to university education.

3. The 2nd Respondent, **THE CO-OPERATIVE UNIVERSITY OF KENYA** is a chartered University established by the Co-operative University of Kenya Charter dated 7th October 2016 and Section 13 of

the Universities Act.

4. The 3rdRespondent, **THE ATTORNEY GENERAL** is the Principal Legal advisor to the Government of Kenya.

5. The Interested Party **PROFESSOR PHILIP ODUOR OWINO** is a male adult residing in Kisii and is currently the Registrar-Academic and Student Affairs of the 2nd Respondent University.

6. By a Notice of motion dated 23rd March, 2017brought under the provisions of Section 8 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules, the exparte applicant John Njomo who is an advocate of the High Court of Kenya seeks from this court the following judicial review orders:

i. An Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the decision of the 1st Respondent appointing the Interested Party as the 2ndRespondent's Deputy Vice Chancellor; Finance, Planning and Administration as contained in the 1st Respondent's letter dated 1stFebruary 2017 and accepted by the Interested Party by the letter dated 22nd February 2017;

ii. An Order of *Prohibition* do issue to prohibit the 1st Respondent by himself, agents or whomsoever from appointing any other person, other than the person recommended by the 2ndRespondent's Council for appointment as the 2nd Respondent's Deputy Vice Chancellor; Finance, Planning and Administration by the letter dated 17th January, 2017 addressed to the 1st Respondent by the 2nd Respondent's Council;

iii. An order of *Mandamu*s do issue to direct the 1stRespondent to appoint the 2nd Respondent's Deputy Vice Chancellor; Finance, Planning and Administration in accordance with the 2nd Respondent's Council's recommendation contained in the letter dated 17th January, 2017 addressed to the 1st Respondent by the 2nd Respondent's Council;

iv. An Order of *Prohibition* do issue to prohibit the 1st Respondent by himself , agents or whomsoever from appointing any other person, other than the person recommended by the 2ndRespondent's Council for appointment as the 2nd Respondent's Vice Chancellor by the letter dated 17th January, 2017 addressed to the 1st Respondent by the 2nd Respondent's Council;

v. An Order of *Mandamus* do issue to direct the 1st Respondent to appoint a Vice Chancellor of the 2nd Respondent in accordance with the 2nd Respondent's Council's recommendation contained in the letter dated 17th January, 2017addressed to the 1st Respondent by the 2nd Respondent's Council;

vi. An Order of *Prohibition* do issue to prohibit the 1st Respondent from interfering with the laid down statutory procedure for the recruitment and appointment of the 2nd Respondent's Vice Chancellor and Deputy Vice Chancellors;

vii. An Order of *Prohibition* do issue to prohibit the 2nd Respondent's Council from altering or making amendments on its recommendations as contained in the letters dated 17th January, 2017 addressed to the 1st Respondent on the appointments of the 2nd Respondent's Vice-Chancellor and Deputy Vice-Chancellor Finance, Planning & Administration;

viii. An order of *Prohibition* do issue to prohibit the 2nd Respondent's Council from executing contracts of employment with the Interested Party in respect of the position of Deputy Vice Chancellor; Finance, Planning and Administration or with any other persons to the office of the Vice-Chancellor and Deputy Vice Chancellor; Finance, Planning and Administration other than the

persons set out in the 2nd Respondent's Council's letters dated 17th January, 2017 addressed to the 1st Respondent;

ix. Costs of and incidental to this suit.

7. The Notice of Motion is based on the grounds supported by the Statutory Statement dated 14th March 2017 and a Verifying Affidavit sworn on 14th March 2017, both filed in court on 14th March 2017.

8. The exparte applicants' case as stated in the statutory statement and verifying affidavit is that the 2nd Respondent Cooperative University of Kenya [CUK] was awarded its Charter on 7th October 2016 and in a bid to ensure that the positions of the 2nd Respondent's Vice-Chancellor, Deputy-Vice Chancellor Co-operative Development Research & Innovation, Deputy Vice-Chancellor; Finance, Planning & Administration and Deputy Vice-Chancellor; Academic Affairs have been filled through a fair and competitive recruitment process, the 2nd Respondent advertised for the aforesaid positions.

9. It is alleged by the exparte applicant that various individuals submitted their applications to the 2nd Respondent's Council and interviews for the aforesaid positions were conducted by the 2nd Respondent's Council on diverse dates as set out below;

a) 10th January 2017 -Vice-Chancellor.

b) 10th January 2017 -Deputy Vice-Chancellor; Finance, Planning & Administration.

c) 11th January 2017- Deputy Vice-Chancellor; Academic Affairs.

d) 12thJanuary 2017-Deputy-Vice Chancellor; Co-operative Development Research & Innovation.

10. The exparte applicant claims that following a fair and competitive recruitment process, the 2nd Respondent's Council made recommendations for various individuals to be appointed to the position of Vice-Chancellor, Deputy-Vice Chancellor Co-operative Development Research & Innovation, Deputy Vice-Chancellor; Finance, Planning & Administration and Deputy Vice-Chancellor; Academic Affairs.

11. further, that via four (4) letters, each dated 17th January 2017, the 2nd Respondent's Council communicated to the 1st Respondent its recommendations on the appointment of various persons to the positions of the 2nd Respondent's Vice-Chancellor, Deputy-Vice Chancellor Co-operative Development Research & Innovation, Deputy Vice-Chancellor Finance, Planning & Administration and Deputy Vice-Chancellor, Academic Affairs.

12. According to the exparte applicant, the 2nd Respondent's Council made the recommendations on the appointments as set out and it communicate its recommendations to the 1st Respondent pursuant to the provisions of Section 35 (1) (a) (v) and Section 39 (1) (a) of the Universities Act, 2012.

13. It is alleged that in accordance with the letter and spirit of the above clear statutory provisions on appointments of Vice Chancellor and Deputy Vice Chancellors, by letters dated 1st February 2017, the 1st Respondent Cabinet Secretary appointed the Deputy-Vice Chancellor Co-operative Development Research & Innovation and Deputy Vice-Chancellor Academic Affairs in accordance with the recommendation of the 2nd Respondent's Council as set out in the Council's letters dated 17th January, 2017 addressed to the 1st Respondent.

14. However, it is averred that contrary to the letter and spirit of the said statutory provisions, by a letter dated 1st February 2017, the 1st Respondent in total disregard of the 2nd Respondent's Council's recommendation appointed the Interested Party herein **PROFESSOR PHILIP ODUOR OWINO** as the

Deputy Vice-Chancellor Finance, Planning & Administration.

15. The exparte applicant laments that the aforesaid appointment of the interested party was made by the 1st Respondent, notwithstanding the fact that the Interested Party had been interviewed by the 2nd Respondent's Council and failed to meet the qualifications set by the Council for appointment to the position of a Deputy Vice-Chancellor Finance, Planning & Administration.

16. That by a letter dated 22nd February 2017 addressed to the 1st Respondent, the Interested Party communicated his acceptance on his appointment to the position of the 2nd Respondent's Deputy Vice-Chancellor Finance, Planning & Administration.

17. It is further alleged that despite the 2nd Respondent's Council having submitted its recommendation to the 1st Respondent by a letter dated 17th January 2017 regarding the person to be appointed as the 2nd Respondent's Vice-Chancellor, the 1st Respondent has declined to effect the appointment.

18. For the reasons set out hereunder, the exparte applicant avers that the 1st Respondent's decision appointing the Interested Party as the 2nd Respondent's Deputy Vice-Chancellor; Finance, Planning & Administration is illegal, ultra vires, unreasonable, irrational, is in bad faith, is in breach of the rules of natural justice, constitutes an abuse of power and discretion and is in excess of jurisdiction and in breach of the legitimate expectation that the 1st Respondent would adhere to the law.

19. In addition, it is averred that the decision by the 2nd Respondent to appoint the Interested Party as the 2nd Respondent's Deputy Vice-Chancellor Finance, Planning & Administration is illegal and constitutes usurpation of power by the 1st Respondent.

20. Further, that since the decision by the 1st Respondent appointing the Interested Party as the 2nd Respondent's Deputy Vice-Chancellor Finance, Planning & Administration offends the provisions of Section 35 (1) (a) (v) of the Universities Act, 2012, the aforesaid decision is **ultra vires** and hence null and void.

21. The exparte applicant maintains that under section 7 (2) (a) (i) and (ii) of the Fair Administrative Action Act, 2015, a court may review an administrative action or decision if the person who made the decision:

a. was not authorised to do so by the empowering provision,

b. acted in excess of jurisdiction or power conferred under any written law.

22. In the view of the exparte applicant, the Universities Act, 2012 does not contain any provision allowing the 1st Respondent to appoint persons other than those recommended by the Council of a University to the position of Vice-Chancellor or Deputy Vice- Chancellors and that therefore by appointing the Interested Party to the position of the 2ndRespondent's Deputy Vice-Chancellor; Finance, Planning & Administration without the recommendation of the 2nd Respondent's Council, the 1st Respondent acted **in excess of his jurisdiction**.

23. It is also averred 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 Interested Party had been interviewed by the 2nd Respondent's Council and failed to meet the qualifications set by the Council for appointment to the position of a Deputy Vice-Chancellor; Finance, Planning & Administration which was a **relevant consideration.**

24. Further, it is alleged that the 1stRespondent did not give the 2nd Respondent the reasons as to why he failed to appoint the Deputy Vice-Chancellor; Finance, Planning & Administration in accordance with the

recommendation by the 2nd Respondent's Council and that in failing to appoint the 2nd Respondent's Vice- Chancellor in accordance with the recommendation set out in the 2nd Respondent's Council's letter dated 17th January 2017, the 1st Respondent has failed to comply with the provisions of the Universities Act, 2012 and thus has acted **unlawfully.**

25. The 1ST & 3RD respondents opposed the application for judicial review orders and filed a replying affidavit sworn by JAMES KIBURI, the Deputy Director of Education of the Ministry of Education and who is well versed with the matters giving rise to these proceedings and thereby competent and duly authorized to swear the affidavit.

26. According to the depositions by Mr Kiburi, the 2nd respondent in October 2016 declared various vacancies advertised in the Daily Nation. Qualified applicants were invited to apply for the positions of Vice Chancellor, Deputy Vice Chancellor Academic Affairs, Deputy Vice Chancellor Finance Planning and Administration and Deputy Vice Chancellor Research and Innovation.

27. That the 2nd respondent through its University Council shortlisted candidates and forwarded three names to the Cabinet Secretary including that of Prof. Esther Njoki Gicheru, Prof Esther Magiri, and Prof Phillip Oduor Owino for the position of Deputy Vice Chancellor Finance Planning and Administration.

28. That the mandate of the Council of the 2nd respondent is strictly that of making recommendation of at least three names for the Cabinet Secretary to pick any one of them on the basis of gender, regional balance among other considerations.

29. That the mandate to appoint the Vice Chancellor and the Deputy Vice Chancellors is vested in the office of the Cabinet Secretary by dint of section 39 of the Universities Act 2012 as amended, after a competitive recruitment process conducted by the 2nd respondent's council.

30.That the Cabinet Secretary, in exercise of the statutory powers conferred by the Universities Act, appointed the interested party as Deputy Vice Chancellor; Finance, Planning & Administration vide letter dated **1st February, 2017**.

31. That the Cabinet Secretary appointed **one of the three candidates** listed in **the minutes** as required by law and that the appointment of the interested party was in accordance with the Article 10 of the Constitution and the enabling legislation to ensure that the University Management reflected the face of Kenya.

32. That under Section 39 of the Universities Act, the Cabinet Secretary has discretionary powers to make such appointments and that in so doing, he is not always bound by the recommendation of the University Council.

33. That the appointment of the interested party was in line with the national values of social justice, inclusivity, equity, equality and integrity.

34. That the candidate the Cabinet Secretary appointed was a candidate on the forwarded minutes which indicated the list of three candidates.

35. That the action by the Council to bind the Cabinet Secretary to only one candidate was illegal and contrary to the spirit and letter of section 39 of the Universities Act.

36. That in the circumstances the Notice of Motion is therefore baseless, misconceived and devoid of any merit because the application is an abuse of the court process.

37. The 1st respondent urged the court to dismiss the exparte applicant's application with costs.

38. The 2nd Respondent filed a Replying affidavit sworn by **DR. GLADYS MWITI** the Council

Chairperson of the 2nd Respondent University.

39. The 2nd respondent in full support of the notice of motion herein filed by the exparte applicant contends that the 2nd Respondent was awarded its Charter on the 7th of October, 2016 by His Excellency, President Uhuru Kenyatta.

40. That in a bid to fill various positions that are mandatory for the governance of the University, the 2nd Respondent advertised for vacancies in the following positions;

i. Vice-Chancellor

ii. Deputy Vice Chancellor-Finance, Planning and Administration

iii. Deputy Vice Chancellor-Academic Affairs

iv. Deputy Vice Chancellor-Co-operative Development, Research and Innovation

41. That the 2nd Respondent received numerous Applications from prospective candidates and after stringent short listing, interviews were carried out by the Council on various dates between 10th January, 2017 and 12th January, 2017.

42. That on the 10th of January, 2017, the Council interviewed two candidates for the position of Vice Chancellor and that the Council had already resolved that the pass mark for this position would be 70%. Upon interviewing several candidates, only one, Prof Ngamau Kamau, attained and surpassed the pass mark set. The other Candidate Prof. Reuben Muasya attained 64%.as shown by minutes of ***the 2nd Respondent's Special Council meeting held on 10th January, 2017.***

43. That on the 10th of January, 2017 from 2.00 PM, the Council interviewed candidates for the position of Deputy Vice Chancellor-Finance, Planning and Administration. The Council had already resolved that the pass mark for this position would be 65%. Upon interviewing several candidates, two candidates, Prof Esther Njoki Gicheru (71.5%) and Prof. Esther Magiri (65.4%) attained and surpassed the pass mark set as shown by an annexed ***copy of the minutes of the 2nd Respondent's Special Council meeting held on 10th January, 2017.***

44. That on the 11th of January, 2017 the Council interviewed candidates for the position of Deputy Vice Chancellor- Academic Affairs. The Council had already resolved that the pass mark for this position would be 65%. Upon interviewing several candidates, three candidates, Prof Kamau Ngamau (74.4%), Prof. Esther Magiri (65%) and Prof. Emily Akuno (70.5%) attained and surpassed the pass mark set as shown by a ***copy of the minutes of the 2nd Respondent's Special Council meeting held on 11th January, 2017.***

45. That on the 11th of January, 2017 the Council interviewed candidates for the position of Deputy Vice Chancellor- Co-operative Development, Research and Innovation. The Council had already resolved that the pass mark for this position would be 65%. Upon interviewing several candidates, five candidates attained and surpassed the pass mark set with the three (3) top candidates being, Prof. Isaac Nyamongo (76.8%), Prof. Esther Njoki Gicheru (69.9%) and Prof. Christopher Luchebeleli Kanali (69.6%) as shown by an annexed ***copy of the minutes of the 2nd Respondent's Special Council meeting held on 11th January, 2017.***

46. That following the fair and competitive recruitment process, the 2nd Respondent's council as mandated by Section 35 (1) (a) (v) of the Universities Act, No. 42 of 2012 wrote to the 1st Respondent communicating its recommendations on the appointment of various persons who had managed the required scores as follows;

i. Vice-Chancellor-***Prof. Ngamau Kamau***

ii. Deputy Vice Chancellor-Finance, Planning and Administration-***Prof Esther Njoki Gicheru***

iii. Deputy Vice Chancellor-Academic Affairs-***Prof Emily Akuno***

iv. Deputy Vice Chancellor-Co-operative Development, Research and Innovation-***Prof Isaac Nyamogo.***

as shown by annexed copies of the letters addressed to the 1st Respondent all dated 17th January, 2017.

47. That the minutes for the 2nd Respondent's Council Special meetings held 10th and 11th of January, 2017 were forwarded to the 1st Respondent to show that the council did indeed carry out a competitive recruitment process.

48. That in evaluating the candidates who had submitted their Applications for various posts, the 2nd Respondent's Council was guided by the provisions of Chapter 6 of the Constitution on Principles of Leadership and Integrity.

49. That the 1st Respondent vide the letter dated 1st February, 2017 appointed Prof. Emily Akuno to the position of Deputy Vice Chancellor-Academic Affairs as per the recommendation of the 2nd Respondent's council as shown by a ***copy of the said letter.***

50. That the 1st Respondent also appointed Prof. Isaac Nyamogo to the position of Deputy Vice Chancellor-Co-operative Development, Research and Innovation as per the recommendation of the 2nd Respondent's council as shown by a***nnexed copy of the said letter.***

51. That for the position of Deputy Vice Chancellor-Finance, Planning and Administration, the 1st Respondent appointed the interested party herein, **Prof. Philip Oduor Owino**. The said candidate had come in third during the interview process and scored 63.9% ***as shown by a copy of the said letter.***

52. That the 2nd Respondent's Council was shocked to receive the letter appointing the interested party as the Deputy Vice Chancellor-Finance, Planning and Administration as he had not attained the pass mark of 65% set by the Council for that position.

53. That no explanation was given by the 1st Respondent on the failure to appoint the candidate recommended by the 2nd Respondent's council.

54. That the interested party wrote to the 1st Respondent accepting the said appointment on the 22nd February, 2017 as shown by a copy of ***the said letter annexed.***

55. That on the 23rd of February, 2017, the deponent, on behalf of the 2nd Respondent's Council wrote to the 1st Respondent returning the Interested Party's original appointment letter which had mistakenly been forwarded to the Council.

56. That in the said letter, the deponent informed the 1st Respondent that the 2nd Respondent's council had carried out a competitive recruitment process and observed ethnic and gender balance in all appointments.

57. That to date, the 2nd Respondent has not received any communication from the 1st Respondent following the recommendation made for the position of the Vice Chancellor.

58. That in light of the above stated, the 2nd Respondent's Council fully executed its mandate in accordance with the law which is clearly spelt out under Section 35 (1) (a) (v) and Section 39 (1) (a) of the Universities Act, No. 42 of 2012.

59. That the 1st Respondent is the appointing authority under Section 35 (1) (a) (v) of the Universities Act, No. 42 of 2012, which appointment can only be done after a competitive recruitment process and subsequent recommendation by the 2nd Respondent's Council.

60. The 2nd respondent also filed a further affidavit sworn by Dr Gladys Mwiti on 5th May, 2017 in response to the replying affidavits sworn by the 1st and 3rd respondents' Director of Education James Kiburi stating that in 2016 the National Cohesion and Integration Commission carried out an ethnic and diversity audit of all public universities and their constituent colleges and out of 20 audited public universities and colleges, the 2nd respondent was found to have complied with the requirements of ethnic, diversity and gender balancing under the National Cohesion and Integration Act hence the issues raised by the 1st and 3rd respondents do not reflect the true position of the matter.

61. That the 1st and 3rd respondents had mis interpreted section 35(1)(a)(v) of the Universities Act as there is no provision for recommendation of three names for appointment of one by the Cabinet Secretary as alleged by the 1st respondent .

62. That in carrying out its mandate during the recruitment process the Council followed the law to its letter.

63. The interested party Professor Phillip odour Owino filed a replying affidavit. On 24th April, 2017 asserting and contending that he applied for and was shortlisted for the positions of DVC F,P&A and that of DVCAA of the 2nd respondent and that he was interviewed on 10th January, 2017 and 11th January, 2017 respectively.

64. That albeit his name was not submitted to the CS for consideration as DVCAA, his name was submitted for consideration as DVCF,P&A and that on 1st February, 2017 he was appointed to the latter position by the appointing authority 1st respondent.

65. That when he reported to the 2nd respondent's institution, he was advised to wait for formal letters of appointment from the 2nd respondent's Council only for him to receive an order of stay of his appointment from this court on 22nd March, 2017 via email.

66. According to the interested party, the 1st respondent had the mandate to appoint him and therefore the Council should comply since in making its recommendations, the Council failed to comply with constitutional requirements.

67. That the Cabinet Secretary is expected to ensure that there are balanced competencies, gender equity, and the inclusion of persons with disabilities, the marginalized and other minority groups in making appointments of DVs of public Universities.

68. That the CS had power to appoint any person who was interviewed by the Council to the position of DVC as he did appoint the interested party herein from the three persons hence he was not bound by the recommendations of the 2nd respondent's Council.

69. That having been in the University leadership since 2001 as DVC among other high level positions, he was highly qualified and experienced to be appointed to the position of DVC F,P AND A noting that he had a been a Professor for over 10 years as opposed to the person recommended for appointment who had been an Associate Professor shortly before the vacancies for the posts were advertised hence this court should not interfere with the discretion exercised by the Cabinet Secretary as it will be perpetuating acts against the Constitution.

SUBMISSIONS

70. All the parties' advocates' filed written submissions which they agreed to highlight on 15th May, 2017.

EXPARTE APPLICANT'S SUBMISSIONS

71. On behalf of the exparte applicant, Miss Nyaga submitted relying on both statutory, Constitutional and case law while reiterating the depositions by her client and the grounds upon which the motion was predicated. She maintained that her client had the necessary locus standi to institute these judicial review proceedings and relied on the celebrated Mumo **Matemu v Trusted Society** case wherein Articles 22 and 23 of the Constitution were cited .

72. She also relied on the case of RV Ministry of Education and state that where the rule of law has been violated, any person has the constitutional right to defend the Constitution hence these proceedings are not an abuse of the court process.

73. On the allegations that the Sate Corporations Act was applicable to this case, Miss Nyaga submitted that Article 15(2) of the Universities Charter is clear that the Vice Chancellor of a University ids the Chief Executive Officer of the University and the Deputy Vice Chancellors are under the general authority of the Vice Chancellor hence the State Corporations Guidelines are not applicable since section 16 on competitive sourcing of the Chief Executive must be complied with. In her view, the Interested party having failed in his interview for the position he was not recommended for appointment and so the 1st respondent cannot appoint him. Further, that the Cabinet Secretary had not given any reasons for not appointing the Vice Chancellor in accordance with the recommendations of the Council, which failure was affecting the University as it requires a Chief Executive Officer.

74. Counsel relied on Section 35 (1) (a) of the Universities Act, which states;

> ***"In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent:-***
>
> ***(a) a council which shall;***
>
> ***i. employ staff***
>
> ***ii. approve the statutes of the University and cause them to be published in the Kenya Gazette***
>
> ***iii. approve the policies of the University***
>
> ***iv. approve the budget***
>
> ***v. <u>in the case of a public university, recommend for appointment of the Vice-Chancellor, Deputy Vice-Chancellors and principals of constituent colleges through a competitive process</u> and***
>
> ***vi. undertake other functions set out under this Act and the Charter "***

75. In her view, it follows that under Section 35 (1) (a) (v) of the Universities Act, the council of a University is mandated to conduct a competitive recruitment process of persons to the positions of Vice-Chancellor, Deputy Vice-Chancellors and principals of constituent colleges and thereafter make a recommendation for the appointment of the aforesaid persons.

76. Counsel further cited Section 39 (1) (a) of the Universities Act which provides;

"(1) The Vice-Chancellor of a university shall be appointed;

(a) In the case of a public university, competitively by the Cabinet Secretary on the recommendation of the Council."

77. The exparte applicants' counsel submitted giving the history of the matter leading to institution of these proceedings and restated the statutory statement and the verifying affidavit and maintaining that despite the 2nd Respondent's Council having submitted its recommendations to the 1st Respondent for appointment of DVC FP&A and by a letter dated 17th January 2017 regarding the person to be appointed as the 2nd Respondent's Vice-Chancellor, the 1st Respondent had instead appointed the interested party who was never recommended for appointment and had also declined to effect the appointment of the Vice Chancellor for the University.

78. It was therefore submitted that the 1strespondent acted ultra vires in appointing the interested party as the 2nd respondent's Deputy Vice-Chancellor, Finance, Planning & Administration contrary to the recommendations of the 2nd respondent.

79. Reliance was placed on under section 7 (2)(a)(i) and (ii) of the Fair Administrative Action Act, which stipulates that 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.

80. It was therefore submitted that the decision by the 1stRespondent to appoint the Interested Party as the 2nd Respondent's Deputy Vice-Chancellor, Finance, Planning & Administration notwithstanding the fact that the Interested Party was not recommended by the 2nd Respondent's Council for appointment is **illegal and ultra vires**.

81. Further, that since the decision by the 1st Respondent appointing the Interested Party as the 2nd Respondent's Deputy Vice-Chancellor Finance, Planning & Administration offends the provisions of Section 35 (1) (a) (v) of the Universities Act, 2012, the aforesaid decision is **ultra vires** and hence null and void.

82. The exparte applicant's counsel further submitted that the Universities Act, 2012 does not contain any provision allowing the 1st Respondent to appoint persons other than those recommended by the Council of a University to the position of Vice-Chancellor or Deputy Vice- Chancellors. Therefore, that by appointing the Interested Party to the position of the 2ndRespondent's Deputy Vice-Chancellor Finance, Planning & Administration without the recommendation of the 2nd Respondent's Council, the 1st respondent acted ultravires and illegally.

83. Reliance was placed on Section 51 (2) of the interpretation and General Provisions Act which provides as follows;

"Where the power or duty of a person under this section is exercisable only upon the recommendation or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent".

84. Further reliance was placed on the case of **Josphat K. Z. Mwatelah –Vs- Technical University of Mombasa Council & 2 others [2017] eKLR, where** the court held as follows;

"The appointment of VC in Public Universities like the Technical University of Mombasa is provided for under section 39 (1)(a) of the Universities Act which provides that:

"39. (1) The Vice Chancellor of a University shall be appointed

(a) in the case of a Public University, competitively by the Cabinet Secretary on recommendation of the Council"

After considering the provisions of section 39(1)(a) of the Universities Act and section 51(1) and (2) of the Interpretations and General Provisions Act, I agree with the claimant that the CS lacks the power to either appoint a VC of any Public University in Kenya without recommendation to appoint."

85. It was further submitted that the 1st respondent ought to be compelled to appoint the 2nd respondent's vice-chancellor in accordance with the recommendations of the 2nd respondent's council. Reliance was placed on Section 39 (1) (a) of the Universities Act which provides that the Vice-Chancellor of a university shall be appointed, in the case of a public university, competitively by the Cabinet Secretary on the recommendation of the Council.

86. Therefore, it was averred that the 2nd Respondent's recommendation on the appointment of a Vice-Chancellor having been communicated to the 1st Respondent by a letter dated 17th January 2017, yet, to date, the 1st Respondent has not appointed a Vice-Chancellor of the 2nd Respondent; by declining to appoint the 2nd Respondent's Vice-Chancellor, the 1st Respondent has declined to act in accordance with the law and hence the 1st Respondent has acted illegally. That the 1st Respondent ought to be compelled to appoint the 2nd Respondent's Vice-Chancellor in accordance with the recommendation by the 2nd Respondent's Council.

87. Further reliance was placed on Section 15 of the 2nd Respondent's Charter which stipulates that:

1. There shall be a Vice-Chancellor of the University who shall be appointed accordance to the provisions of this Act.

2. The Vice-Chancellor shall be the Chief Executive of the University and shall be

a) The academic and administrative head of the University

b) Have overall responsibility for the direction, organization, and administration of programmes of the University and

c) Have such powers and duties as may be provided by the Statutes."

88. The exparte applicant's counsel also relied on Section 23 of the 2nd Respondent's Charter which creates the University Management Board whose Chair person is the Vice-Chancellor of the University and that the Board is responsible for among others co-ordinating and control of the development, planning, management and administration of the University and its resources in accordance with approved policies, rules and regulations.

89. Therefore, it was submitted that by the 1st Respondent declining to appoint the 2nd Respondent's Vice-Chancellor, the 1st Respondent has rendered the 2nd Respondent unable to function properly since the 2nd Respondent does not have a head. The court was urged to issue an order to compel the 1st Respondent to appoint the 2nd Respondent's Vice-Chancellor in accordance with the recommendation by 2nd Respondent's Council as communicated to the 1st Respondent by a letter dated 17th January 2017.

90. It was further submitted that in 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 Interested Party had been interviewed by the 2nd Respondent's Council and failed to meet the qualifications set by the Council for appointment to the position of a Deputy Vice-Chancellor; Finance, Planning & Administration which was a **relevant consideration. Reliance was placed on** the case of **Associated**

Provincial Picture Houses –Vs- Wednesbury Corporation [1948] 1KB 223; where it was held:

> ***"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short Vs Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she has red hair. That is unreasonable in one sense. In another sense, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."***

91. Further reliance was placed on **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, where** the High Court held :

> ***"In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it."***

92. The exparte applicant urged the court to allow the notice of motion filed herein as prayed and that as the 1st Respondent has demonstrated no respect for law, the Court to grant the Applicant costs of the suit.

THE 1ST AND 3RD RESPONDENT'S SUBMISSIONS

93. On the part of the 1st and 3rd respondents, they submitted on the following issues:-Issues for Determination:

> *i. whether the appointment of Professor Philip Oduor Owino as the Deputy Vice Chancellor; Finance, Planning & Administration of Co-operative University of Kenya, against express recommendation by the University Council was proper;*
>
> *ii. Whether the procedure followed by the Cabinet Secretary was proper;*

94. On the applicable Law the 1st and 3rd respondents relied on The Universities Act 2012 and The Constitution of Kenya 2010.

95. On whether the appointment of Professor Philip Oduor Owino as the Deputy Vice Chancellor; Finance, Planning & Administration of Co-operative University of Kenya, against express recommendation by the University Council was proper, reliance was placed on Section 35 (1) (a) (v) of the Act which gives the Council power; in the case of a public university **to recommend** for appointment of the Vice-Chancellor, Deputy Vice-Chancellors and principals of constituent colleges through a competitive process. The Cabinet Secretary receives recommendations from the Council for purposes of appointing such officers.

96. Further reliance was placed on **The Guidelines on terms and conditions of service for State Corporations CEOs.**

97. It was submitted that pursuant to Section 5(3), 10(2) and (3) of the State Corporations Act, these guidelines were developed. No. 15 and 16 of the guidelines provide for competitive recruitment of Chief Executive officers for parastatals. That the appointing authority is supposed to consider the three best candidates taking into account their interview scoring sheets and the board's recommendations.

98. In addition, it was submitted that the office of Deputy Vice Chancellor is appointive by the Cabinet Secretary. The appointment is guided by clear principles of law, but that Cabinet Secretary has discretion to appoint any of the persons recommended by the University Council.

99. It was also submitted that in carrying out his duty, the Cabinet secretary is an officer of the state and in accordance with Article 10 of the Constitution the CS had ensured that the University Council reflected the face of Kenya in **attaining regional balance.** As such he sought to attain said regional balance by appointing the interested party from another region. Article 250(4) of the Constitution further avers is that this process must reflect the regional and ethnic diversity of the people of Kenya.

100. Reliance was placed on the case of **Benson Riitho Mureithi v J. W. Wakhungu &2 others [2014]eKLR** where the court noted that:

> ***"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."***

101. Further it was submitted that in the case of **Community Advocacy and Awareness Trust and Others v Attorney General (Supra)**, the court noted that, "[110]

> "***There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself."***

102. Further, that from the foregoing, the Cabinet Secretary had the discretion to appoint whomever he pleases from the forwarded minutes/list. The Cabinet secretary is therefore not bound to appoint the individual recommended by the University Council since **Section 39 (1)** of the Universities Act 2012 clearly states that the appointment shall be on recommendation by the University Council.

103. Reliance was also placed on **Republic v Cabinet Secretary for Education, Science & Technology & 3 others [2014] Eklr where** the court stated:

> ***"In my view, this application calls for the interpretation of Section 39 of the Act. Section 39(1) (a) requires the appointment of a vice–chancellor of a public university to be done through a competitive process. The recruitment is done by the council which then recommends the appointment to the Cabinet Secretary."***

104. It was further submitted that the spirit of the Constitution and more particularly Article 250(4) is that this process must reflect the regional and ethnic diversity of the people of Kenya. That Public Universities hold an important part and as such their affairs including governance structures are of great public interest hence the application before this court is a total abuse of the court process and an attempt to usurp the constitutional and statutory powers of the Cabinet secretary.

THE 2ND RESPONDENT'S SUBMISSIONS

105. The second respondent submitted raising the flowing issues for determination:-

> *a) Whether the 1st Respondent usurped the powers of the 2nd Respondent's Council by his decision to appoint the Interested Party as the Deputy Vice Chancellor-Finance, Planning and Administration, and thus acted unlawfully and outside his jurisdiction.*

b) Whether the 1st Respondent by his decision not to appoint the candidate recommended for the position of the 2nd Respondent's Vice Chancellor, failed to exercise his mandate under the Universities Act and thus acted unlawfully.

c) Whether the reliefs sought by the Applicant should be granted.

106. On whether the 1st Respondent usurped the powers of the 2ndRespondent's Council by his decision to appoint the Interested Party as the Deputy Vice Chancellor-Finance, Planning and Administration, and thus acted unlawfully? It was submitted reiterating the depositions of the Council Chair as per her affidavit while citing sections 35 (1) (a) of the Universities Act, No. 42 of 2016 on the functions of the University Council which are to;

(i) employ staff;

(ii) approve statutes of the University and Cause them to be published in the Kenya Gazette;

(iii).....

(iv).....

*(v) in the case of a Public University, recommend for appointment of the Vice-Chancellor, **Deputy Vice-Chancellors** and Principals of constituent colleges through **a competitive process**;*

107. It was submitted that under Section 40 of the Universities Act, No. 42 of 2016 the Act recognizes the University Charter as the Primary document that provides for hiring and recruitment of members of staff of a university.

108. Further, that under Section 16 of the Co-operative University of Kenya Charter, it provides that the appointment of Deputy Vice-Chancellors shall be done according to the provisions of the Act.

109. In the instant case, it was submitted that the University Council carried out a competitive recruitment process as provided for under the law, using the laid down procedure leading to the recommendation to the 1st Respondent to appoint the person found most qualified. It follows then that the 1st Respondent's duty under the Act was to make appointments of the candidates recommended and not to deviate from the recommendations.

110. It was therefore submitted that the 1st Respondent's decision to appoint the Interested Party as the Deputy Vice Chancellor-Finance, Planning and Administration instead of the Candidate recommended by the Council was illegal and ultra vires the powers granted to him by the provisions of section 35 (1) (a) (v) of the Universities Act, No. 42 of 2016.

111. On whether the 1st Respondent by his decision not to appoint the candidate recommended for the position of the 2nd Respondent's Vice Chancellor, failed to exercise his mandate under the Universities Act and thus acted unlawfully? It was submitted that the 2nd Respondent having been conferred its Charter advertised for the position of Vice Chancellor to fill the vacancy, and having received applications from desirous candidates, the 2nd Respondent's Council short listed three (3) candidates for interviews.

112. That the 2nd Respondent's Council upon completing the recruitment process wrote to the 1st Respondent recommending the eligible candidate Prof Ngamau Kamau for appointment. However, the 1st Respondent has not made the appointment for the Vice Chancellor to date.

113. It was submitted that failure to appoint the Vice Chancellor in accordance with was in violation of the Universities Act section 35 (1) (a) (v) of the Universities Act, No. 42 of 2016 which provides:

".....in the case of a Public University, recommend for appointment of the Vice-Chancellor, Deputy Vice-Chancellors and Principals of constituent colleges through a competitive process; (emphasis ours)

114. Further, that Section 39 (1) of the Universities Act, No. 42 of 2016 provides for the appointment of Vice-Chancellor of a University and states;

"The Vice-Chancellor of a University shall be appointed-

(a) in the case of a public university, by the cabinet secretary on the recommendation of the council, after a competitive recruitment process conducted by the council"

115. Therefore, it was contended that the 2nd Respondent's Council having carried out a competitive recruitment process and made the recommendation to the 1st Respondent; it is the duty of the 1st Respondent to make the appointment as provided by the law. Reliance was placed on **Josphat K.Z. Mwatelah vs. Technical University of Mombasa Council & 2 others [2017] eKLR**, where O.N.Makau held himself thus;

"After considering the provisions of Section 39 (1) (a) of the Universities Act and Section 51 (1) and (2) of the Interpretations and General Provisions Act, I agree with the Claimant that the CS lacks the power to either appoint a VC of any public University in Kenya without recommendation to appoint."

116. It was submitted that in the circumstances of this case, the 1st Respondent has failed to execute his duty and the mandate conferred upon him by Section 39 (1) (a) of the Universities Act.

117. It was therefore the 2nd Respondent's humble submission that the 1st Respondent by his decision not to appoint the candidate recommended for the position of the 2nd Respondent's Vice Chancellor, failed to exercise his mandate under the Universities Act and thus acted unlawfully and that therefore those illegal and unlawful acts by the 1st Respondent ought to be removed into this honourable court and the 1st Respondent directed to appoint the 2nd Respondent's Vice Chancellor in accordance with the 2nd Respondent's Council recommendations contained in the letter to the 1st Respondent dated 17th January, 2017 as sought by the Applicant.

118. On whether the reliefs sought by the Applicant should be granted? It was submitted that in view of the foregoing, the Council carried out its mandate under the Universities Act and the duty was then laid upon the 1st Respondent, as the appointing authority under Section 35 (1) (a) (v) of the Universities Act, No. 42 of 2012 to also execute its mandate which is the appointment of candidates recommended by the Council to various positions. Reliance was placed on **Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and another [2008] eKLR**, where Justice J. G. Nyamu (as he then was) enumerated the grounds for grant of judicial review as:

"Where there is abuse of discretion, Where the decision maker exercises discretion for an improper purpose, Where the decision maker is in breach of duty to act fairly, Where the decision maker has failed to exercise statutory discretion reasonably, Where the decision maker acts in a manner to frustrate the purpose of the Act donating power, Where the decision maker fails to exercise discretion, Where the decision maker fetters the discretion given, Where the decision is irrational and unreasonable." (Emphasis ours)

119. It was reiterated that in this instant case the 1st Respondent's actions are contrary to and frustrates Sections 35 (1) (a) (v) and 39 (1) (a) of the Universities Act, No. 42 of 2012 which donates the power to make appointments upon recommendation by a University Council.

120. Further, reliance was placed on that the broad grounds on which the Court exercises its judicial

review jurisdiction as restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 where the** Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479 and** held:

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality"***

121. It was submitted that in this case, the decision of the 1st respondent was done without jurisdiction; the 1st Respondent had no jurisdiction to appoint outside the recommendations of the 2nd Respondent's Council and in appointing the interested party to the position of Deputy Vice Chancellor-Finance, Planning and Administration, the decision was ultra vires.

122. Therefore it was submitted that in light of the facts and law relied on in these submissions, the claims against the 2ndRespondent herein be dismissed with costs.

THE INTERESTED PARTY'S SUBMISSIONS

123 The interested party filed written submissions on 5th May, 2017 backed by oral highlights made by Miss Abok who submitted, reiterating the depositions by the interested party in his replying affidavit which I need not reproduce herein as they are captured in the summary of the interested party's case above.

124. It was contended that the exparte applicant has no locus standi in this matter as he is an advocate in the law firm of Ngatia &Co. Advocates hence the firm of Ngatia and co. cannot instruct themselves. Reliance was placed on **Nature Foundation Limited v Minister for Information and Communication and another [2015] eKLR** and submitted that the exparte applicant had no sufficient interest in the matter herein to bring the application. Further reliance was placed on **Mumo MATEMU V Trusted Society of Human Rights Alliance and 5 others [2013]eKLR.**

125. Secondly, that the second respondent's recommendations of one candidate for appointment was contrary to the law and that the 1st respondent's action were not ultravires the law in appointing the interested party.

126. According to Miss Abok, the Cabinet Secretary has the power to appoint any of the three candidates submitted to him by the Council and that in this case he did so in accordance with the Constitution. Council relied of the State Corporations Act and guidelines 15 and 16 thereof. She also relied on the case of **RVs National Water Conservation and Pipeline Corporation and Pipeline &11 others**.[2015]Eklr where the court relied on the guidelines for the State Corporations in determining selection of candidates to the State Corporation. Further reliance was placed on **Kelvin Kigen Kieti v Kilifi County Public Service Board [2016] eKLR** on what would be the basis for appointment and promotion which is competition and merits in accordance with Article 232 of the Constitution.

127. On ultra vires and unreasonableness alleged by the exparte applicant, it was submitted that the interested party was among the names submitted for appointment and that he did not fall outside the recommended persons hence he was properly appointed. Reliance was placed on **Kelvin Kigen Kieti v Kilifi County Public Service Board [2016] eKLR; Suchan Investments Limited v Ministry of National Heritage and Culture and 3 others[2016]eKLR** on the principle f proportionality as espoused in Section 7(2)(1) of the FAIR administrative Action Act.

128. Counsel urged the court to dismiss the exparte applicant's claim with costs.

DETERMINATION

129. I have considered the foregoing. In my humble view, the main issues for determination are:

a. Whether the applicant has locus standi to bring these judicial review proceedings;

b. whether the 1st respondent had the power or discretion to bypass the Council's recommendations and appoint the interested party as the DVC F&A;

c. whether the Cabinet Secretary has the power to reject or refuse to appoint the Vice Chancellor as recommended by the Council;

d. whether the applicant is entitled to the orders sought;

e. What orders should the court make? And

f. Who should bear costs of these proceedings.

130. On the first issue of locus standi of the exparte applicant John Njomo, there are several authorities that speak to the issue of locus standi, both before and post 2010 constitutional dispensation. In **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, the Court expressed itself as follows:

"Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redressed of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularisof Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy… In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. **The court equally has recognized that organizations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalized and a purposeful approach took the driving seat in the area of Public Law.** ***In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be mouldedaccording to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism***

for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality.[emphasis added].

Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"

131. The Court in the above case continued:

"In the interest of the realization of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organization being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

132. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

133. In addition, Article 258 of the Constitution provides:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

134. Long before the promulgation of the 2010 Constitution, on 11th March, 1970, it was held in the case of **Shah Vershi Devji& Co. Ltd vs. The Transport Licencing Board Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289**that:

"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."

49. The question of locus standi was also deliberated by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others……Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application

relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"……..Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organized and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a strait jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them……..The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

135. From the above constitutional and judicial approvals, the question of locus *standi* has long been settled. In this case, the question is whether the applicant as an individual and a Kenyan citizen adult of sound mind cannot bring an action to challenge what he believes is an affront to the rule of law.

136. The 1st and 3rd respondents and the interested party claimed that the applicant has no *locus standi* to bring this action because either he works in the law firm of Ngatia &Co Advocates or that he has no real interest in the matter. However, there was no attempt to prove that the applicant was an advocate in the firm of Ngatia Advocates who are also representing him in this matter.

137. Moreover, the mere fact that the applicant's address of service is care of his advocates does not mean that he works in that firm. Moreso, from the plethora of case law that I have cited hereinabove, the idea of raising objections on the basis of lack of legal standing to modern litigation or public interest litigation is outmoded.

138. The applicant claims that the law governing recruitment and appointment of Managers of a public University has been violated and that the 1st respondent's actions are an affront to the rule of law, depicting impunity and abuse of power. In my humble view, it matters not, in such circumstances, who brings the action challenging the deeds or misdeeds of the 1st respondent administrator. What matters is correcting the alleged illegality and by extension, the constitutionality of the actions of the 1st respondent.

139. As was held in the **Priscilla Nyokabi**(supra) case,"***a single spirited taxpayer should not be prevented by an outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."***

140. It has not been shown that the applicant is some busybody. He is a single public spirited citizen who

is under a legal and constitutional duty to bring to the court's attention to vindicate the rule of law and get an alleged unlawful act stopped. He must therefore not be demonized for doing that noble thing.

141. In the end, I find and hold that the exparte applicant herein John Njomo has the necessary locus standi in this matter and therefore the objections raised have no basis, they are overruled.

142. On the second issue of whether the 1st respondent had the power or discretion to bypass the Council's recommendations and appoint the interested party as the Deputy Vice Chancellor Finance and &Administration, Section 51 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya however provides:

> ***Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.***
>
> ***(2) "Where the power or duty of a person under this section is exercisable only upon the recommendation or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent".***

143. Thus, in the exercise of executive power, the executive is required to justify its action on some legally recognized provision, positive law or policy. Executive power must therefore be properly exercised within the legal parameters and ought not to be misused or abused. As was stated in the learned works of **Prof Sir William Wade** ***Administrative Law***:

> ***"The powers of public authorities are…essentially different from those of private persons. A man making his will may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"***

144. Iam further fortified by the decision in **Josphat K. Z. Mwatelah –Vs- Technical University of Mombasa Council & 2 others [2017] eKLR,** where the court held as follows;

> ***"The appointment of VC in Public Universities like the Technical University of Mombasa is provided for under section 39 (1)(a) of the Universities Act which provides that:***
>
> ***"39. (1) The Vice Chancellor of a University shall be appointed***

(a) in the case of a Public University, competitively by the Cabinet Secretary on recommendation of the Council"

After considering the provisions of section 39(1)(a) of the Universities Act and section 51(1) and (2) of the Interpretations and General Provisions Act, I agree with the claimant that the CS lacks the power to either appoint a VC of any Public University in Kenya without recommendation to appoint."

145. It is thus trite that an executive body or authority has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **GullamhusseinSunderjiVirji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent a Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981**held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed; it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute.

146. Therefore, where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.

147. It is therefore clear that the powers of an executive authority must be conferred by the Statute under which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530**it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

148. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation.

149. It must be made clear that the courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority.

150. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**Where an executive authority operates outside its sphere, the Court would be entitled to intervene.

151. In the instant case, the 1st respondent Cabinet Secretary as the appointing authority of the Vice Chancellor and Deputy Vice Chancellors is dictated by statute and rules governing the management of Universities. In this case, the applicable law is the Universities Act and the respective University Charter which stipulate that the Cabinet Secretary can in the appointments of the Vice Chancellor and Deputy Vice Chancellors only act on recommendations of the Council , and not otherwise.

152. The affidavit evidence availed as supported by documents annexed to the verifying affidavit clearly demonstrate that the Council undertook a recruitment exercise as mandated by the Act and the University Charter and recommended to the Cabinet Secretary appropriate qualified candidates names for appointment by the Cabinet Secretary.

153. The Interested Party was not one of those persons who qualified for appointment but out of transparency and accountability, the Council did submit to the appointing authority, minutes of the interview and names and scores of all the interviewed persons.

154. Surprisingly, the 1st respondent appointed the interested party herein who did not even attain the qualifying mark to be recommended for appointment and the interested party gladly accepted the appointment.

155. In my humble view, the 1st respondent in appointing the interested party acted ultravires and in excess of the powers conferred on him by statute and the University Charter which excesses must be checked by this court for this court exists to check such excesses and abuse of power.

156. On the other hand I find that the interested party in gladly accepting the appointment which he was never recommended for appointment and neither was he qualified for such appointment following the competitive recruitment, was and is stealing a match on the person who was qualified for appointment as recommended by the Council and like the biblical ESAU, the interested party is was quick to take up the brother's [JACOB] blessings? This cannot and should never be allowed in the legal circles. It should never be the case that qualified and competent candidates for such high profile jobs in our country are demoralized and short changed for unqualified persons.

157. I find and hold the 1st respondent Cabinet Secretary's actions to be in bad faith and chauvinistic and goes towards massaging some stereotype male egos that women cannot and should not hold powerful top positions in society and so must be side lined and marginalized in favour of their male counterparts who have miserably failed to impress the interview panels. I say so without fear or favour in the sense that the conduct of the 1st respondent clearly demonstrate that he is gender insensitive and his actions are arbitrary as they deny the most qualified person yet there is absolutely no evidence to show that the Management of the 2nd respondent University was going to comprise of persons from the same ethnicity or region if the persons who were recommended by the Council for appointment were so appointed. I find that the 1st respondent was by his actions and inactions exercising inherent powers which are not conferred upon him by any statute.

158. The Cabinet Secretary has unfortunately not told this court on what was so special about the interested party and or what was so wrong with the person [lady] who was recommended by the Council for appointment as DVC F&A for the job as recommended by the Council, for this court to consider. There are generalised statements that he was considering gender, ethnic balance, regional balance, persons with disabilities etc. but there is no assertion that that is what he considered and where in the Act, he was mandated to appoint a different person from the recommended person, or to refuse to appoint a Vice Chancellor for the University in accordance with the Act and Charter.

159. The Guidelines under the Sate Corporations Act cannot override the parent statute for appointment of the University's top managers hence they are irrelevant as far as their applicability to this case is concerned. The applicable law in this case is sections 35 and 39 of the Universities Act which has not been found to be unconstitutional and neither has the 1st respondent and interested party sought a declaration on the constitutionality of the said sections of the Act.

160. The State Corporations Act is a general statute for all self-accounting state corporations whereas the Universities Act is a statute specific to University affairs. The Universities Act is clear that appointments must be in accordance with the recommendations of the Council. It follows that the Cabinet Secretary cannot on his own accord appoint any other person other than the recommended persons for appointment by the Council.

161. In conclusion, I find and hold that the Applicant has demonstrated that the 1st Applicant acted unlawfully by appointing the Interested Party as the 2nd Respondent's Deputy Vice-Chancellor, Finance, Planning & Administration notwithstanding the fact that the Interested Party was not recommended by the 2nd Respondent's Council for appointment.

162. I also find and hold that the 1st Respondent conducted himself in an unreasonable and irrational manner by failing to take into account the fact that the Interested Party had been interviewed by the 2nd Respondent's Council and failed to meet the qualifications set by the Council for appointment to the position of a Deputy Vice-Chancellor, Finance, Planning & Administration.

163. In the end, I find and hold that the 1st respondent exceeded its mandate in appointing the interested party to apposition of DVC F&A which the interested party had not been recommended for appointment by the University Council. Consequently, the 1st respondent had no power to bypass the recommendations of the University Council in appointing the interested party herein to the position of DVC F&A which position the latter did not merit

164. On the issue of whether the 1st respondent could refuse to appoint the Vice Chancellor in accordance with the recommendations of the University Council, Section 39 (1) (a) of the Universities Act provides that:

> ***"(1) The Vice-Chancellor of a university shall be appointed;***
>
> ***(b) In the case of a public university, competitively by the Cabinet Secretary on the recommendation of the Council."***

165. In the instant case, the Cooperative University Council did competitively carry out recruitment of a Vice Chancellor of the Cooperative University of Kenya and at the end of the process submitted the name of the most qualified person to the 1st respondent Cabinet Secretary, in accordance with the dictates of section 39 of the Universities Act. The 1st respondent has to date not appointed the Vice Chancellor to the University and neither has he given any reasons for not doing so.

166. The provisions of section 39 of the Universities Act mandate the Cabinet Secretary to appoint the Vice Chancellor on the recommendations of the Council. The Cabinet Secretary can therefore only appoint a Vice Chancellor on the recommendations of the Council and if he has any misgivings on the person who is recommended for appointment, then he must give reasons for refusal to do so. This is in line with Article 47 of the Constitution and section 4 of the Fair Administrative Action Act, 2016 which mandate that the. Administrative action to be taken expeditiously, efficiently, lawfully. And where a decision is taken to decline the appointment, then reasons for such decision not to appoint or to act on the recommendations of the University Council must be given promptly, bearing in mind the fact that under section 7 (2) (a) (i) and (ii) of the Fair Administrative Action Act, 2015, a court may review an administrative action or decision if the person who made the decision:

> *a. was not authorised to do so by the empowering provision,*
>
> *b. acted in excess of jurisdiction or power conferred under any written law.*

167. In this case, the 1st respondent duly received the recommendations of the Council to appoint the Vice Chancellor and without any reason whatsoever, refused to communicate to the Council whether he had

accepted the recommendation or not. He remained silent over the matter. he also received recommendations for appointment of a DVC -F, P&A but without giving any reason whatsoever, bypassed the person recommended for appointment and proceeded, in excess of jurisdiction or power conferred upon him by the Universities Act and the 2nd Respondent's Charter and appointed a totally different person who did not even qualify for appointment through a competitive recruitment process that was undertaken by the Council.

168. In my humble view, the 1st respondent was neither authorised to appoint any other person other than the persons who were recommended for appointment by the council, nor was he authorised to act in excess of his powers. He was also expected to perform a public duty which is to appoint the VC and DVC's following the procedure laid down in the Act and the Charter and not otherwise.

169. In the premises, I find and hold that by the 1st Respondent declining to appoint a Vice-Chancellor for the University notwithstanding the recommendation on the appointment of a Vice-Chancellor having been submitted to the 1stRespondent by the 2nd Respondent, the 1st Respondent has acted contrary to the provisions of Section 39 (1) (a) of the Universities Act and hence, the 1st respondent has acted illegally in failing to appoint the Vice Chancellor for the University in accordance with the recommendations of the Council.

170. It is for the above reasons that I further find and hold that since the 2nd Respondent's Council made recommendations on the appointment of the Vice-Chancellor and the Deputy –Vice Chancellor after subjecting the individuals who applied for consideration to the aforesaid positions to a competitive recruitment process, the 2nd Respondent's Council is hereby prohibited from making any alterations to the recommendations made to the 1st Respondent and or executing any contracts of employment with the Interested Party in respect of the position of Deputy Vice Chancellor Finance, Planning and Administration or with any other persons to the office of the Vice-Chancellor and Deputy Vice Chancellor Finance, Planning and Administration other than the persons set out in the 2ndRespondent's Council's letters dated 17th January, 2017 addressed to the 1st Respondent.

171. The 1st respondent to comply with the orders of this court within 14 days from the date of service of this judgment upon him and in default the exparte applicant is at liberty to apply.

172. In the end, I allow the notice of motion filed herein as prayed save that as this court cannot be the appointing authority, I would not make an order deeming any person as dully appointed since I have granted mandamus and as there was no prayer for declaration, I would not grant it.

173. Costs are in the discretion of the court. As this case was public interest litigation, and as all respondents are public entities, I order that each party bears their own costs of these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 31st day of May, 2017.

R. E. ABURILI

JUDGE

In the presence of:

Miss Nyaga for the exparte applicant

Mr Munene h/b for Miss Chimau for the 1sst and 3rd Respondents

Mr Mwangi h/b for Mrs Maina for the 2nd Respondent

N/ for interested party

CA: George