REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 618 OF 2016

IN THE MATER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....1ST RESPONDENT

STUDENTS DISCIPLINARY COMMITTEE KENYA UNIVERSITY...2ND RESPONDENT

SENATE-KENYATTA UNIVERSITY.....3RD RESPONDENT

GATETUA MACHARIA KENNEDY.....EXPARTE APPLICANT

JUDGMENT

1. By a notice of motion dated 30th January 2017 and filed in court on 1st February 2017, pursuant to the leave of court granted on 18th January 2017, the exparte applicant in this case **Gatetua Macharia Kennedy** seeks from court Judicial Review orders of:

a) Certiorari calling into this court for purpose of being quashed the decision of the students Disciplinary Committee Kenyatta University of 26th March, 2015 and that of the Student Appeal Committee Kenyatta University of 5th October 2016 as against the exparte applicant herein.

b) Mandamus compelling the 1st and 3rd respondents to clear the exparte applicant for graduation and issue him with his degree certificate.

c) Costs of the application be provided for.

2. The motion is predicated on the grounds set out on the face of the application, the statutory statement and verifying affidavit accompanying the application for leave dated 13th December 2016 and annextures thereto.

3. The exparte applicant's case is that at all material times to these proceedings, he was a student of Kenyatta University and that he had completed his studies awaiting graduation .

4. However, on 11th July 2012 the applicant was by a letter dated the same day summoned to appear before the Students Disciplinary Committee on 25th July 2012 to answer charges of influencing the tampering with online examination grades in eleven units.

5. The applicant appeared before the said Students Disciplinary Committee as scheduled where he was accused of paying a university employee to access online portal where students could among other things view examination results,so that the employee could interfere with the said results. The applicant denied the charges and that vide a letter dated 5th October 2012 he was informed that he had been found guilty of influencing tampering with online examination data in twelve units.

6. The applicant was discontinued from the University but given an opportunity to appeal to the Chairman of the Senate within 21 days of the date of receipt of the notification. The applicant appealed to the Students Appeals Committee(the Appeals Committee) in a letter dated 25th October 2012 and vide a letter dated 18th February 2013, he was informed that his appeal was unsuccessful.

7. The applicant then commenced Judicial Review proceedings before the High Court vide JR 264/2013 in which he sought Judicial Review orders of certiorari to bring into the court for purposes of quashing the decision of the Students Disciplinary Committee of 25th July 2012 vide its letter of 5th October 2012 and that of the Student's Appeal Committee of 10th January 2013 as against the exparte applicant; and mandamus to compel the 1st and 3rd respondents (University and Senate) to issue the exparte applicant with his degree certificate and costs.

8. The Judicial Review proceedings were heard and determined on merits interpartes before Honourable W. Korir J vide his judgment dated 3rd December 2014 wherein the Learned Korir J after hearing the exparte applicant and the respondents found inter alia, that there was no University Rule or Regulation outlawing "*influencing tampering with online examination grades"* and at page 14 of 19 of the judgment the learned judge stated:

> ***" The applicant has correctly pointed out that the particular regulation or rule that created the offence with which he was charged was not pointed out. No student should be charged and convicted for an offence unknown to the regulations of the University….."***

9. The learned judge further found that there was evidence of non-compliance with the rules of natural justice by the fact that the applicant was found guilty of tampering with the results of 12 units whereas he had been accused of tampering with the results for 11 units, and that no explanation was given to him about the change in the number of the units he allegedly interfered with.

10. The learned Korir J in the end issued Certiorari quashing the decisions of the Student's Disciplinary Committee made on 25th July 2012 and the decision of the Student's Appeal Committee made on 10th January 2013.

11. The court further ordered that the applicant's case be remitted back to the 1st respondent Kenyatta University for commencement of fresh disciplinary proceedings not later than 60 days from the date of the judgment.

12. The exparte applicant in these proceedings claims that in blatant disregard of the court's directions in JR 264/2013, the 2nd respondent, The Student's Disciplinary Committee (SDC) Kenyatta University commenced fresh disciplinary proceedings after the 60 days period had long lapsed and proceeded in violation of cardinal rules of natural justice in that:

a) They issued the applicant with insufficient notice, the letter being delivered on Friday 6th March 2015 and the applicant being required to appear at the hearing on Monday 9th March 2015;

b) Declining the applicant's request for an adjournment to enable him prepare for the hearing.

c) Giving scanty details of the charge against the applicant without sufficient particulars to enable him mount a defence .

d) Simply detailing the grades attend without stating whose grades by whom they were and by what means they were tampered with.

13. The applicant also alleges that at the said fresh hearing, the 2nd respondent did not call any witnesses not adduce any material evidence to support of its case against the applicant and eventually found him culpable and discontinued him bases on the bare allegations in the charge without proof.

14. That the said determination by the 2nd respondent was reached contrary to the cardinal principles of natural justice of right of audience of an accused person and the requirement for sufficient proof by any person who alleges. It is claimed that even after appealing to the students Appeal Committee vide letter dated 15th April 2015, it took over one year for the Appeals Committee to write to him on 3rd October 2016 communicating its decision received on 7th November 2016, dismissing the appeal casually that the appeal was unsuccessful and that the Student's Disciplinary Committee's decision discontinuing the applicant from the university was upheld, without according the applicant any formal hearing or at all.

15. The applicant claims that the 2nd respondent neither gave reasons for its decision nor gave explanation why it concurred with the respondent's findings.

16. It is further alleged that the applicant having completed his studies and cleared from the University only awaiting graduation, he could not be discontinued hence the decision of the 2nd respondent as upheld by the 3rd respondent is void ab initio.

17. It is therefore claimed that the hearing was a sham as it never adhered to the court's judgment in JR 264/2013. The applicant claims that the delay in giving the determination has visited great deal of stress, frustration, mental anguish, dejection, despair and near depression to the applicant since four years have since lapsed since he became eligible for graduation hence he cannot secure any employment. He urges the court to quash the decision by the respondents and compel the 1st respondent to allow him to graduate and be awarded his lawfully hard earned degree certificate, as the respondents will not suffer any loss.

18. The above facts as contained in the statutory statement were verified by the applicant's verifying affidavit sworn on 13th December 2016 supported by the annextures which are: judgment by Korir J in 11th July 2012, 5th October 2012; 17th October 2012; 18th February 2013; 4th March 2015; 26th March 2015; 15th April 2015; 3rd October 2016; and student's clearance form dated 18th November 2011.

19. The respondents through the firm of Mohammed Muigai & Company Advocates filed a replying affidavit sworn by Professor Wangari Mwai on 23rd February 2017 and filed in court the same day contending among others, that these proceedings are incompetent and fatally defective having been instituted in a separate suit; that the exparte applicant is very familiar with the academic requirements for admission to a degree and the facts leading to the discontinuance of his studies at the university as captured in the respondent's replying affidavit filed in JR 264/2013 sworn on 17th October 2013.

20. It was deposed in contention that for one to be admitted to a degree other than an honorary degree, the Deputy Vice Chancellor – (academic) must certify such candidate as having satisfied all the conditions prescribed for such degree including, the passing in all the required units but that the 2nd respondent has a provision for one to be classified with one failed unit); must meet all the financial obligations to the 2nd respondent; must not have any disciplinary cases pending; and one's online examination data must be verified against the primary examination records as held by the respective departments.

21. It was contended that in this case, in the process of verifying the exparte applicant's graduation year, it was found that there were variances between the examination marks as they appeared on line and those held by the respective departments which showed irregularities that were subject of the disciplinary proceedings. As an example, a table was drawn showing discrepancies in examination marks as per online and those held by the relevant departments in various units such as

Unit	Department marks	online marks
ASC 303	58	62
AEC 202	47	55
AEC 300	43	56
AEC 307	46	56
SMA 160	44	57

22. That upon discovery of the discrepancies, the university appointed a committee to investigate the cause of variance and the findings were submitted to the Vice Chancellor leading to the disciplinary proceedings and that one Kevin Mwendwa, a student and an ICT clerk in the institute of Open Distance and Electronic Learning testified and revealed how the alteration of marks on the online system was being done and the persons involved, after he had received money to change examination marks from students and some staff members namely, Festus Karani, Dennis Bulali and Anthony Nyaga Mwenda.

23. That the money received was channeled to Felix Nyongesa Wasike and Edwin Njoroge for purposes of changing marks. The latter two were Systems Administrators who paid a commission to the applicant to recruit more students.

24. It was contended that the applicant would receive details of the students such as registration numbers and the units to be changed through text messages then send them to the Systems Administrator who would make the changes, using enhanced passwords of academic staff who had either died, resigned, retired, or had their term examination coordinators expired or their passwords were dormant. It was deposed that the 1st respondent also took disciplinary action against the said staff involved and that indeed, several students confessed to their involvement in the syndicate, including the units for which the exparte applicant herein faced disciplinary action.

25. That it was the above revelation that students marks had been tampered with that the graduation of those involved including the exparte applicant herein, was put on hold and the findings of investigations led to disciplinary proceedings culminating in their discontinuance of the applicant and others from the university.

26. That all evidence including a replying affidavit in JR 264/2013 were available to the exparte applicant to enable him mount a defence in the fresh disciplinary proceedings. Further, that in the disciplinary proceedings minutes attached as WM2, the applicant was given an opportunity to defend himself before the 2nd respondent, in person, his representation were considered and a decision to discontinue him from the university made.

27. That the applicant's challenge to the decision of the respondents on account that he had completed his studies, cleared with the university and was only awaiting graduation was dismissed by Honourable justice Korir in his judgment in JR 264/2013 at pages 17-18 and 12-13 of the judgment in issue.

28. The respondents urged the court to decline to grant the Judicial Review orders in the circumstances of the case and dismiss the motion.

29. The parties advocates filed written submissions which they urged the court to adopt wholly for purposes of a determination of the issues arising in this matter.

30. It is however noteworthy that the respondents did on 14th March 2017 file a notice of preliminary objection to the exparte applicant's notice of motion contending that these proceedings should have been filed in JR 264/2013 claiming for failure to be afforded fair administrative action since these proceedings are claiming that the judgment in Nairobi Miscellaneous 264/2013 was not adhered to.

31. In the ruling delivered on 31st May 2017, this court declined to uphold the preliminary and dismissed it on the basis, among others, that the preliminary objection as raised was not a pure point of law meeting the conditions established in **Mukisa Biscuit Manufacturing Company Ltd v Nest End Distributors Ltd [1969] EA 696** in that it raised matters which the respondents could adequately submit at the hearing of the main motion, so that the exparte applicant can be accorded an opportunity to ventilate his grievances and the respondents be at liberty to attack the merits of the motion at the substantive hearing.

32. Having said that, I venture into the written submissions filed by the parties' advocates to canvass the notice of motion as adopted on 10th October 2017.

33. According to the exparte applicant's submissions filed on 18th July 2017 and dated 11th July 2017, his counsel reiterated the exparte applicant's case as summarized herein and framed two issues for determination namely:

1) Whether the proceedings before the 2nd and 3rd respondents were procedurally fair.

2) Whether the orders sought herein ought to be granted.

34. On the first issue of whether the proceedings before the 2nd and 3rd respondents were procedurally fair, it was submitted that the subsequent disciplinary proceedings against the exparte applicant were commenced after the court vide JR 264/2013 had quashed the earlier disciplinary proceedings which lead to the discontinuance of the exparte applicant from the 1st respondent University. It was submitted that the respondents gave the applicant inadequate notice, denied him an adjournment and gave him no details of witnesses to be called. It was submitted that a letter dated 6th March 2015 giving the applicant only two days to appear before the Students Disciplinary Committee (SDC) on 9th March 2015 was not a sufficient notice to enable the applicant mount a defence to the allegations and that despite the applicant seeking for an adjournment, the request was turned down which offends Article 50(2) (c) of the Constitution; and Section 7(2) (a) (v) of the Fair Administrative Action Act, 2015 on the right to be heard in defence.

35. It was submitted that trial by ambush deprives the applicant accused person of the opportunity to defend oneself meaningfully. It was submitted that albeit the respondent contends that the charges facing the applicant were known to him before hand as they were contained in the replying affidavit filed in JR 264/2013; that replying affidavit was not mentioned in the letter calling the exparte applicant for disciplinary proceedings. In addition, it was submitted that the said letter does not disclose the witnesses if any that would be called yet from the minutes annexed to the response in these proceedings, the 2nd respondent called a witness and amended the charge.

36. Reliance was placed on the decision by Odunga J in **Republic v Truth Justice and Reconciliation Commission & Another exparte Beth Wambui Mugo [2016] e KLR** where the learned judge dealt with the full extent of fair hearing as enshrined in the Constitution. It was submitted that the 2nd respondent's failure to accord the applicant an adjournment compromised fair trial and that the fresh disciplinary proceedings were for the sake of meeting the legal criteria as there was no fair hearing meeting the constitutional threshold.

37. It was further submitted that the respondents considered factors that ought not to have been considered in that: In the disciplinary proceedings, the exparte applicant was found culpable of two irregularities namely, forgery of a letter to enable him be awarded an incomplete unit and plagiarism, which two charges were never set out in the notice inviting him for the fresh hearing. It was submitted that in relying on the two charges to convict and discontinue the applicant from the university, the respondent considered an irrelevant consideration which two charges did not form part of the notification and which were sneaked into the proceedings at the hearing to unsettle and intimidate the applicant to admit all the allegations leveled against him.

38. In addition, it was submitted that the adjudication on the two charges negates the respondent's contention that the charge in the previous proceedings and the proceedings subject of this application were the same.

39. It was further submitted that albeit the respondents claim that one witness Kevin Mwenda was called and that he identified several students involved in the alleged tampering of results scheme, the minutes of the Student's Disciplinary Committee do not reflect this and neither was the fact of Mr Mwenda being called as a witness made known to the applicant in good time to enable the applicant challenge the evidence allegedly adduced by Mwenda.

40. Further, that there is no evidence to show that the said witness Mr Kevin Mwenda mentioned the applicant herein to be part of the tampering scheme.

41. It was further submitted that the respondents applied Regulations retrospectively in that the minutes of the Student's Disciplinary proceedings show that the University Senate had revised the Examination Regulations to include ***"involvement in and or influencing tempering with examination data"***

42. It was submitted that the above revised Regulations are a clear admission that the exparte applicant had previously been convicted of a non-existent offence. In addition, that the charge of the revised Regulation was never made known to the exparte applicant until the hearing.

43. Accordingly, it was submitted that the proceedings before the 2nd respondent were procedurally unfair and in violation of Section 7 of the Fair Administrative Action Act, 2015.

44. It was further submitted that the 3rd respondent did not give reasons for its decision communicated vide letter marked WM3 which simply regurgitated the history of the matter and pleadings and concluded that the applicant did not appear before it and that the grounds

of appeal did not provide new evidence and information for upholding the 2nd respondent's decision.

45. It was therefore submitted that the 3rd respondent never invited the applicant for a hearing and neither did it provide reasons for them agreeing with the 2nd respondent's decision. It was submitted that the Disciplinary proceedings before the respondents were unfair and appear to have been conducted just for the sake of it before reaching a predetermined outcome.

46. On the second main issue of whether the orders sought ought to be granted, it was submitted that the proceedings by the 2nd and 3rd respondents were manifestly unfair. Reliance was placed on the Court of Appeal decision of **Nyongesa & 4 Others vs Egerton University College [1990] e KLR** where the Court dealt with the issue of fair hearing on a dispute similar to the instant case.

47. It was submitted that a decision made without according the applicant a fair hearing must be brought before the court for quashing and be quashed by certiorari.

48. On whether mandamus should issue, it was submitted that the respondents having failed to adhere to the court's decision in JR 264/2013 that a fresh disciplinary process be commenced within 60 days in accordance with a fair procedure, the respondents proceeded to conduct the proceedings in the exact same manner prompting the current application. That failure to hold fair proceedings aimed at reaching a predetermined conclusion gives no assurance that even if the court would once again order a fresh hearing, the applicant will be accorded a fair hearing.

49. It was further submitted that the respondent's collective conduct smacks of bad faith against the applicant whom they have presumed to be a dishonest student and will do anything to have him discontinued hence an order of mandamus is the only relief that can cure this injustice.

50. It was also submitted that the prayer for mandamus is founded on the doctrine of legitimate expectation that when the applicant cleared with the university, he expected that he would be awarded the degree certificate. That the respondents having failed to conduct a fresh hearing in a procedurally fair manner, this court should order the respondents to award the applicant his degree certificate as per the grades reflecting at the time of clearance.

51. Reliance was placed on the case of **Republic vs Attorney General & Another exparte Ongata Works Ltd[2016] e KLR** citing with approval **Republic vs Kenya National Examination Council exparte Gathenji with others.**

52. On the purpose of the remedy of mandamus, it was submitted that the applicant having undergone two sham hearings should now be allowed to graduate and earn his degree certificate.

53. In opposing the exparte applicant's notice of motion, the respondents' counsel filed submissions dated 28th February 2017 reiterating the contents of the replying affidavit sworn by Professor Wangari Mwai.

54. According to the respondents, the fact that the subsequent current application was prompted by the respondent's failure to adhere to the judgment of Honourable Korir J in JR 264/2013 between the same parties is a clear indication that the orders sought herein cannot lie. It was submitted that the applicant should have filed contempt proceedings in the previous JR 264/2013 as was held by Onguto J in **Eliud Nyauma Omwoyo vs Kenyatta University & Others [2016] e KLR** where Onguto J when called upon to decide a case involving former students of the university who had been subjected to prior disciplinary proceedings the students had challenged the proceedings before Lenaola J who quashed the proceedings for failure to comply with the Rules of natural justice in a limited respect, the learned Judge ordered the university to conduct fresh disciplinary proceedings in compliance with the law. That the university repeated the exercise after which one of the students went to court and through a new constitutional petition, complained that the subsequent proceedings disregarded Lenaola J's directions in various aspects.

55. In dismissing the petition, Onguto J held that the right forum to file the suit was the one within which the orders emanated and that even if the petitioner was of the view that the respondents did not follow the law by affording the petitioner the requisite fair administrative action then that too ought to form or constitute a ground for the contempt application and not commence another suit.

56. It was submitted that albeit the applicant herein does not seek contempt prayers but that the **Omwoyo** (supra) case is applicable to this case as the reasoning is the same. Further, that this court would end up with the same orders as those made by Korir J in JR 264/2013.

57. It was submitted that the argument that the respondents had no authority to discontinue the applicant's studies as he had already completed them was conclusively adjudicated upon by Honourable Korir J at pages 12-13, 17-18 of the judgment in JR 264/2013. It was further submitted, relying on the case of **Alice Njeri Ngichiri v Kenyatta University [2012] e KLR** by Mumbi Ngugi J wherein *the learned judge captured the competing interests which is that the interest of the student who has undergone a course of study at the University to realize the purpose of that course of study in a timely and efficient manner must be balanced with the interests of the University in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no cheating or tampering with grades which could undermine the credibility and integrity of degrees awarded by the institution.*

58. It was submitted that a University student must comply/meet all conditions/requirements for conferment of degree certificates and that a student only ceases to be such student upon conferment of the degree, regardless of the fact that he/she has completed their studies.

59. It was submitted that the respondents put in place a system of verifying the students' online examination data against their primary records as held by the relevant departments and that it was in the process of such verification that several irregularities were discovered involving students and staff tampering with academic grades.

60. It was submitted that the tampering with exam grades was to the benefit of the applicant to qualify with a higher grade than that which he actually attained which point Honourable Korir J made it clear that the applicant had not satisfactorily answered on who upgraded his online marks.

61. It was submitted that there were investigations into the scandal which led to confession from students and staff on how they conducted the tampering at a fee, to benefit students who had performed poorly hence the disciplinary proceedings.

62. It was submitted that the charges which the applicant faced were the same as those which gave rise to proceedings which were quashed by Korir J and that in the subsequent disciplinary proceedings unlike in the initial proceedings, the applicant had all the relevant information available in the replying affidavit of the respondent hence the subsequent proceedings were conducted in accordance with the law.

63. The respondents urged the court to adopt the holding in the **Nyongesa & Others v Egerton University** (supra) case and exercise restraint in interfering with the respondent's decision concerning the exparte applicant.

64. On whether mandamus would issue, the respondents urged the court to decline to issue mandamus as declined by Korir J as it will amount to the court usurping powers and making a decision that is entirely within the province of the respondents.

DETERMINATION

65. Having considered all the foregoing, in my humble view, the main questions/issues for determination are:

1) Whether these proceedings should have been instituted in JR 264/2013 and therefore whether the issues in these proceedings are the same issues which were determined by Korir J in JR 264/2013.

2) Whether applicant is entitled to the prayers sought.

3) What orders should this court make.

4) Who should bear costs of these proceedings?

66. On the first issue of whether these proceedings should have been instituted in JR 264/20 13 as contempt of court proceedings and therefore whether the issues in these proceedings are the same as those issues which were determined by Korir J in JR 264/2013, the ancillary question that goes with the above issue is the allegation that the applicant having completed his studies and cleared with the university was no longer subject to the university's disciplinary process. This same issue was considered by Honourable Korir J at page 12-13 of 19 of his judgment of 3rd December 2014 in JR 264/2013. The Learned Judge found and held that:

> ***" I am indeed persuaded by the respondent's argument that only deserving students should be awarded degrees. No student should be allowed to benefit from a study process that is tainted with examination irregularities. No student should get grades higher than what he or she had sweated for. I agree that upon discovering the tampering with the grades online, Kenyatta University had a duty to investigate and discipline those who were found to be culpable.The applicant's argument that he ought to have been allowed to graduate based on tainted grades is untenable. His argument that he could not be discontinued therefore fails."***

67. From the above holding, it is clear that the means justifies the end. This court is not an appellate court over the decision of another superior court with concurrent jurisdiction. I cannot therefore be called upon to decide on the same issue that my learned brother Korir J conclusively determined in similar proceedings between the same parties and over the same subject matter.

68. Accordingly, I decline jurisdiction to answer that question and find and hold that this court lacks the requisite jurisdiction to sit as an appellate court over the decision in JR 264/2013 on that question of whether the respondents could discontinue the applicant who had completed his study and cleared with the university only awaiting graduation.

69. The other question that I must answer in line with the first issue above is whether the applicant was taken through a fair disciplinary process in accordance with the decision in JR 264/2013 by Honourable Korir J.

70. The respondents have argued that the applicant having sought in his prayer No. 1 that the court do grant an order of certiorari and having complained in his grounds in support thereof that the respondents had failed to adhere to the judgment of Korir J in JR 264/2013 in the manner of holding fresh disciplinary hearings within 60 days of the date of judgment with strict adherence to rules of natural justice, any allegations of non-compliance with the judgment of Korir J could only be filed within the said file namely JR 264/2013 as contempt proceedings.

71. The exparte applicant disagrees with the above argument and maintains that the respondents introduced new charges of forgery of a letter to enable him be awarded an incomplete unit and plagiarism; that the fresh hearing gave him insufficient notice to appear for disciplinary proceedings within 2 days of the notification and refused to accord him an adjournment to enable him adequately prepare for the defence; that the University Senate revised the Examination Regulations to include the offence of involvement in and or influencing tampering with examination data which regulation never existed prior to JR 264/2013; that no reasons were given for the 3rd respondent's decision which upheld the 2nd respondent's decision; and that the unfair proceedings were predetermined; that Mwenda was never called as a witness and that there was delay in determining his appeal which was deliberate to frustrate his bid to pursue his right to

graduate with a degree he had earned.

72. I have examined the above arguments *vis a vis* the decision by Honourable Korir J delivered on 3rd December 2014. Honourable Korir at page 14/19 of his well-reasoned judgment found that the offence of influencing tampering with online examination grades was not existing in the regulations which had nonetheless not been placed before him. He made it clear that no student should be charged and convicted for an offence unknown to the regulations of the University. He also made it clear that even if the offence fell under general offences, the Regulation creating the general offence ought to have been pointed out to the applicant.

73. *Further, that if the indiscretion was one unknown to the University's regulations, then the applicant ought to have been awarded his degree, if he had qualified, based on the marks held by various departments. Thereafter, the 1st respondent could have proceeded to amend its regulations so as to cover this kind of irregularity. From the evidence placed before the court, I find that the process to which the applicant was subjected did not meet the basic standards of fairness."*

74. From the above except of Honourable Korir's judgment, it is clear that the applicant is complaining that the respondents did not adhere to the judgment of Korir J in JR 264/2013 in the subsequent rehearing of the disciplinary case against the applicant and that they even introduced fresh charges and went ahead to amend regulations and apply them retrospectively.

75. Assuming that the above alleged actions of the respondents are as described by the exparte applicant, they would no doubt be inacceptable in law and would be contrary to the judgment of Honourable Korir J. However, as earlier stated, this court would at the end of this hearing end up with the same decision as that of Honourable Korir J in JR 264/2013 if it entertained the complaints separate from JR 264/2013 proceedings. Where an order or judgment of the court is flouted like it was alleged in this case, the proper way of laying a challenge to the breach is by bringing contempt of court proceedings before the same court (proceedings) and in this case, the relevant proceedings are in JR 264/2013 between the same parties. This is so because the learned judge after quashing the first disciplinary proceeding directed the University to commence fresh disciplinary proceedings not later than 60 days from the date of the judgment.

76. The applicant laments that the fresh disciplinary proceedings were commenced after the 60 days ordered by the Honourable Korir J. That alone, in my view, would be sufficient ground to seek further orders of the court in JR 264/2013 and not to institute fresh proceedings complaining that the judgment of Korir J in JR 264/2013 had not been adhered to (see grounds Nos 2,3,4 of the exparte applicants submissions dated 13th December 2016 which materially replicates grounds 2,3, and 4 of the statutory statement dated 13th December 2016.

77. It is for those reasons that I fully agree with the respondent's argument, relying on the decision in **Petition 408/2015 Eliud Nyauma Omwoyo vs Kenyatta University & 3 Others** that ***…" the petitioner could not simply commence another suit. Substantially the parties would have to go through a repeat of the same process and trial and if vindicated the petitioner would end up with much the same orders…"***

78. In the instant case, the exparte applicant also argued that he had not, unlike in the **Eliud Nyauma Omwoyo** (supra) case, alleged contempt of court. I disagree. The provisions of Order 53 Rules are clear that the applicant can only rely on the grounds which are stipulated in the statutory statement accompanying the application for leave, in support of the substantive notice of motion.

79. In this case, the applicant sought for orders of certiorari and mandamus and the grounds relied on as cited above are clearly spelt out in the statutory statement dated 13th December 2016. Nos 1-14 at ground 2, the exparte applicant says:

> ***"The applicant filed Nairobi Miscellaneous Application No. 264/2013; Republic vs Kenyatta University & 2 Others exparte Gatetua Macharia Kennedy where the court in its judgment of 3rd December, 2014 quashed the said disciplinary proceedings for failing to adhere to rules of natural justice and ordering the respondent to be held fresh disciplinary hearing within strict regard to rules of natural justice.***
>
> ***With the 60 days having lapsed, the 2nd respondent by letter dated 4th March 2015 and received by the applicant on 6th March 2015, commenced fresh proceedings in blatant disregard of the court's judgment and in gross violation of cardinal rules of natural justice to wit……***
>
> ***The University has unreasonably and unfairly refused to make good its impropriety made decision despite numerous requests and demands made to it and held a sham hearing without adherence to the courts judgment in Nairobi Miscellaneous Application No. 264/2013 Republic vs Kenyatta University & 2 Others Exparte Gatetua Macharia Kennedy thus necessitating this application.***
>
> ***The respondent's collective action to inordinately delay hearings and thereafter holding sham hearings with a view of wearing out the applicant and side stepping the court's judgment are their predetermined position to discontinue the applicant was in bad faith and has visited a great deal of stress, frustration, mental anguish, dejection, despair and near depression to the applicant since four(4) years have since lapsed since the applicant became eligible for graduation but has never graduated nor obtained his degree and he cannot therefore secure any employment."[emphasis added].***

80. The above cited grounds are only but among the grounds relied on by the exparte applicant in support of the substantive notice of motion seeking for certiorari and mandamus. Clearly, the grounds show that the applicant is attacking the respondent's failure to adhere to the judgment and directive of Honourable Korir J in JR 264/2013 and is in no unclear terms, saying that the reasons why he is seeking for certiorari and mandamus against the respondents is because the latter have blatantly disregarded and violated the judgment of Korir J in JR 264/2013.

81. Violation or brazen disregard of court order or judgment of a court of law or tribunal is what contempt of court order is.

82. The consequences of disobedience of court orders, as stipulated in law, whether under the Civil Procedure Rules with regard to Order 40 on injunctions, or applying the provisions of Section 5 of the now (repealed) Judicature Act, or the provisions of the newly enacted Contempt of Court Act, 2016 which nonetheless became operational in January 2017 are now well settled.

83. Certiorari and mandamus or any of the judicial review remedies are not by law, remedies for contempt of court orders or judgments. It follows that in as much as the applicant's prayer is not to declare the respondents to be in contempt of court judgment of Korir J in the earlier JR 264/2013 as was the case in the **Eliud Nyauma Omwoyo** (supra) case, I have no hesitation in finding that the applicant is improperly before this court wherein he seeks for certiorari and mandamus against the respondents on the principal grounds that the respondents have blatantly violated/disobeyed/disregarded the judgment of Honourable Korir J in JR 264/2013.

84. As correctly stated by Honourable Onguto J in **Eliud Omwoyo** (supra) case, contempt of court is defined by ***Black's Law Dictionary as " conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment……***

The cardinal aim of contempt application or offences is to basically arrest all conduct which are aimed at or reasonably feared to be aimed at interfering with the proper administration or cause of justice. Contempt proceedings also ensure that there is compliance with court orders when the contemnor is forced to purge the contempt. There is no doubt that one of the essential condition for the proper administration of justice is that there should prevail not only discipline in court but also subservience and obedience to the court process and court orders. This condition will certainly be undermined if any party to a case is allowed with impunity to defy court orders or simply ignore process. How then should an application for contempt be instituted."

85. In no uncertain words if the respondents failed to adhere to the judgment of Korir J in JR 264/2013 then they are said to have committed contempt of court and therefore whether the applicant claims that he is seeking certiorari and mandamus based on the fresh outcome of the disciplinary proceedings initiated by the respondents is immaterial. This is because the respondents were ordered to conduct the fresh disciplinary proceedings in accordance with the Rules of Natural Justice and within the 60 days of the date of judgment. If they proceeded to conduct the fresh disciplinary proceedings outside the 60 days stipulated by the court and or completely ignored or failed to adhere to the Rules of natural justice or fair hearing as espoused in Articles 47 and 50 of the Constitution respectively and the Fair Administrative Action Act, then, whichever way one would wish to look at these proceedings, the main complaint is that the respondents are in contempt of the judgment of Korir J in JR 264/2013 and that therefore the remedy for such contemptuous acts is certiorari and mandamus.

86. All other grounds in support of the motion are, in my humble view, subsidiary to the grounds of contempt of court. And contempt of court, seriously, does not give rise to a new cause of action to be remedied by certiorari or mandamus.

87. It would therefore have been appropriate, under the circumstances, for the exparte applicant to approach the court vide JR 264/2013 and assert that the court's own judgment of 3rd December 2014 had been violated or breached upon which the court would hear and determine whether indeed, the fresh disciplinary proceedings were conducted in the manner directed by the court or not.

88. Even issues of new charges, retrospective regulations and delayed determination of the appeal or failure to accord the applicant a fair hearing, an adjournment, or giving him inadequate notice of hearing would all fall into the category of failure to adhere to the judgment of Korir J.

89. I fully adopt Honourable Onguto J's holding in the **Eliud Omwoyo** (supra) case that ***"The essence of filing of contempt proceedings where the judgment or order is made is to avert filing multiple suits and dissuading litigants from litigating afresh. While it may be true that disobedience of court orders may raise constitutional issues like fidelity to the law, it is important to note that that would not result in a new cause of action. Contempt proceedings have to be commenced to enforce the court orders and it has to be before the right forum."***

> ***36. In the instant case, the right forum to file such a suit is the suit within which the orders emanated. This averts the question of Resjudicata and multiplicity of suits, essentially what the doctrine seeks to cub…***
>
> ***37. I would hasten to add that even if the petitioner is for the view that the respondents did not follow the law by affording the petitioner the requisite fair administrative action then that too ought to form or constitute a ground for the contempt application. The court decreed on 12th September 2014 in Petition No. 365 of 2012 that the respondents must follow the law in the reconvened disciplinary proceedings. In the process the court also set out clear directions in the judgment. Failure to follow the law or indeed the directions in the judgment would itself constitute a ground for contempt proceedings subject only to proof."***

90. The above position in the ***Eliud Omwoyo*** case is in parimateria with this case and it is for that reason that I agree that the parties would have to go through a repeat motion or process and trial and if vindicated, the petitioner would end up with the same orders, given that the exparte applicant still maintains in these proceedings, as he did before Honourable Korir J in JR 264/2013 that having completed his studies at the 1st respondent University and having been cleared by the said university, the university had no power to discontinue him from the institution and that what remained was for him to graduate and be conferred with the degree that he had worked so hard to attain.

91. It is for the above reasons that I find and hold that the judicial review orders of certiorari and mandamus sought in the motion by the applicant are not available to him as the remedies are sought in a manner and on the grounds which demonstrate contempt of court order in JR 264/2013. The prayers are accordingly declined.

92. Having so found, in my humble view, the appropriate remedy for the applicant should have been, and he still has an opportunity to approach the court in JR 264/2013 subject to any other written law of limitation, to enforce the judgment of Honourable Korir J.

93. In the end, I find that the order that commends itself in this matter is to dismiss the exparte applicant's notice of motion dated 30th January 2017.

94. As the exparte applicant has been taken through a cycle which was unnecessary by his legal counsel out of desperation for justice, I will spare him the costs of these proceedings. I order that each party shall bear their own costs of these proceedings.

Dated, signed and delivered at Nairobi this 29th day of November 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Muriuki for the exparte applicant

Mr Mwangi for the Respondent

CA: George