



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 61 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 52(1) NATIONAL POLICE ACT, NO. 11A OF 2011

AND

IN THE MATTER OF DIRECTORATE OF CRIMINAL INVESTIGATIONS, INQUIRY NO. 120 OF 2016 AND COMPLAINANT, WELLINGTON KIHATO WAMBURU

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

WELLINGTON KIHATO WAMBURU.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL,

NATIONAL POLICE SERVICE.....3RD RESPONDENT

EXPARTE

1. KENYATTA UNIVERSITY
2. STEPHEN NJOKA NYAGA
3. JASPER MURIITHI KARANI
4. ANDREW MUGAMBI

JUDGMENT

1. On 28th March 2017, the exparte applicants herein **Kenyatta University, Stephen Njoka Nyaga, Jasper Muriithi Karani and Andrew Mugambi** obtained leave of court to institute Judicial Review proceedings hereto. The substantive notice of motion is dated 12th April 2017 and filed in court on 18th April 2017 seeking the following Judicial Review remedies/orders.

1. Certiorari removing to the High Court for the purposes of quashing, the letter dated 9th January 2017 together with the requisitions to compel attendance of the 2nd and 3rd and 4th applicants at the Director of Criminal Investigation Headquarters, Serious Crimes Unit on 15th February 2017;

2. Certiorari removing to the High Court for purposes of quashing inquiry No. 120 of 2016 instituted by the 1st respondent;

3. Prohibition directed against the respondents prohibiting them, through their agents, from proceeding with inquiry No. 120/2016 or in any manner investigating allegations of perjury purportedly arising from Miscellaneous Application No. 101 of 2016 Republic vs Kenyatta University and Another Exparte Wellington Kihato Wamburu.

4. Costs of the application be provided for.

2. The notice of motion is predicated on the grounds stated in the statutory statement and verifying affidavit sworn by Aaron Tanui and annexures, all accompanying the chamber summons for leave to apply dated 14th February 2017.

3. The exparte applicant's case is that the 1st respondent **Wellington Kihato Wamburu** was admitted to the 1st exparte applicant Kenyatta University's School of Business on 16th February 2010 to pursue a Doctor of Philosophy Degree in Business.

4. However, in the course of his thesis proposal writing, it was discovered that he had committed some apparent irregularities in the progression thereof, which affected the integrity of his thesis.

5. The University suspected that the 1st Respondent had hired for a fee, a person to write for him the proposal and even the main thesis and this was discovered through email communication between the 1st respondent and the hired writer.

6. The discovery of irregularities was made after the 1st respondent appeared to fast track his thesis writing for graduation purposes without following the established procedures and hence it was discovered, after his thesis was taken through anti plagiarism device **turnitin** that he had plagiarized the thesis as it had a 35% similarity index thus raising a red flag. The 1st exparte applicant also received anonymous information concerning the conduct of the 1st respondent's supervisor Dr Karanja

Ngugi who reportedly allegedly employed young undergraduate students to write theses on behalf of students for a fee.

7. As a result, the University secretly investigated the matter and established that indeed the 1st respondent had not conducted the Research and or written the proposal and thesis which he was eager to present for examination, and impending graduation.

8. After verifying the facts, the 1st applicant University suspended the 1st respondent pending his appearance before the Student's Disciplinary Committee where he would know the case against him and be allowed to defend himself.

9. Following the suspension of the 1st respondent from the University, he lodged **Nairobi HCC Miscellaneous Application No. 101 of 2016 Republic vs Kenyatta University and Another Exparte Wellington Kihato Wamburu** seeking for Judicial Review orders of mandamus, certiorari, prohibition and declaration.

10. The applicant sought to compel the 1st Applicant University to release his examinations both internal and external, of his thesis for his PhD in Management Science which he had submitted on 20th March 2015 and that he be enlisted in the graduation list for the subsequent graduation. He also sought to quash the letter of suspension dated 25th February 2016 alleging that he had committed examination irregularities.

11. He further sought to prohibit the University from disseminating any defamatory matters against him for alleged examination irregularities and a declaration that refusal/by the University to release his PhD thesis examination results to enable him graduate was a violation of his rights enshrined in the Constitution.

12. The above case was heard and determined interpartes before Honourable Odunga J who delivered his judgment on 19th September 2016 in the presence of all parties' advocates.

13. The learned Judge issued certiorari quashing the decision of the applicant University made on 25th February 2016 to suspend the exparte applicant on account of examination irregularities.

14. The learned judge also directed that the disciplinary proceedings be undertaken in accordance with the law within 14 days of the date of the judgment and in default, mandamus to issue compelling the University to release for examination both the 1st Respondent's internal and external the applicant/1st respondent's thesis for his doctor of Philosophy Degree in Management Science submitted on 20th March 2015. The 1st respondent was also awarded costs of the Judicial Review proceedings.

15. In the course of those proceedings in **Miscellaneous 101/2016**, the 1st respondent herein who was the exparte applicant in the matter sought, vide notice dated 27th May 2016, to cross examine the deponent of the replying affidavit sworn by **Professor Wangari Mwai** Acting Vice Chancellor (Administration), which affidavit was sworn on 10th March 2016. However, it is alleged that the 1st respondent never cross examined the said Acting Vice Chancellor.

16. After the decision in Miscellaneous No. 101/2016 was made, the 1st respondent being dissatisfied with the judgment of Odunga J filed a notice of appeal dated 26th September 2016 on 26th September 2016, seeking to challenge the judgment thereof.

17. To the surprise of the exparte applicants herein, the 1st respondent lodged a complaint with the Directorate of Criminal Investigations at the DCI Headquarters Serious Crime Unit alleging that there was perjury committed by the exparte applicants herein vide the relying affidavit sworn on 10th May 2016 by Professor Wangari Mwai, the then Acting Vice Chancellor (Administration).

18. As a result, the Director of Criminal Investigations opened an inquiry file vide Inquiry No. 120 of 2016 and wrote to the exparte applicants herein Nos. 2,3 and 4 requiring them to attend at the Directorate of Criminal Investigations Headquarters' Serious Crime Unit to answer to allegations of perjury.

19. In the letter dated 9th January 2017, the Director of Criminal Investigations through John N. Kariuki wrote to the legal officer of the 1st exparte applicant notifying him that the Director of Criminal Investigation was inquiring into allegations of perjury that reportedly arose in Miscellaneous Civil Application No.101/2016 a matter that was before the Constitutional and Judicial Review Division, Milimani, whereby the identified annexed documents in the replying affidavit had become subject to the said investigations.

20. The Director of Criminal Investigations mentioned the 2nd, 3rd and 4th applicants herein as working in the 1st applicant's University to be featuring in the alleged perjury and therefore he needed to record their statements and clarification on emerging key issues.

21. The 1st Exparte applicant's Legal Officer was requested to inform the said 2nd-4th applicants herein to report to the Directorate of Criminal Investigations Headquarters Serious Crime Unit on 15th February 2017 at 10.00a.m. to assist the Director of Criminal Investigations on the same. It is the said letter that enclosed requisitions to compel attendance for the 2nd, 3rd and 4th exparte applicants.

22. That is the letter which prompted the filing of these proceedings on 14th February 2017 seeking leave of court to institute Judicial Review proceedings challenging the decision of the Director of Criminal Investigations.

23. The exparte applicants aver that the letter by the Director of Criminal Investigations at the instigation of the 1st respondent smacks bad faith, and improper motive because the DCI is purporting to investigate an alleged perjury that occurred in proceedings which were determined by the court, upon which proceedings the 1st respondent (now complainant) even sought to cross examine the deponent of the alleged perjured replying affidavit but elected not to carry on with the cross examination, and that after the said judgment was delivered, the 1st respondent (complainant) filed a notice of appeal.

24. It is also averred that furthermore, the 2nd, 3rd and 4th exparte applicants who are sought to be investigated were never parties to the proceedings in Miscellaneous Application 101/2016 and that neither were they deponents of the replying affidavit subject of investigation by the Director of Criminal Investigations hence the requisition to compel their attendance at the DCI served on the applicants is an attempt to intimidate and harass the 1st applicant University officials and an abuse of the 2nd and 3rd respondent's powers of investigations because there is no way persons who were never parties to court proceedings which are already determined, and who never swore any affidavits in those proceedings could be alleged to have perjured themselves in those proceedings.

25. The applicants therefore pray that the court grants them the orders sought in the notice of motion.

26. The 1st respondent (complainant) never appeared to respond to the notice of motion.

27. The 2nd, 3rd and 4th respondents filed a joint replying affidavit on 10th May 2017 sworn by **No.100584 PC James Kalama** attached to the Directorate of Criminal Investigations Serious Crime Unit, Directorate of Criminal Investigation Headquarters.

28. PC Kalama deposes that on 7th October 2016 the head on investigations branch assigned the subject complaint to Chief Inspector Charity Rop to investigate allegations of perjury against the applicants herein, which complaint had initially been reported to Kasarani Police Station vide OB No. 42/4/10/2016 but referred to the Directorate of Criminal Investigation Headquarters.

29. That the complainant **Mr Wellington Kihato Wamburu** recorded a statement citing false

testimony by the respondents (applicants herein) in their replying affidavit filed in Miscellaneous Civil Application No. 101/2016 on 11th May 2016 which he believed amounted to a criminal offence.

30. That the complainant quoted paragraphs in the affidavit which annexed copies of email communication that he believed was a frame up to avert the course of justice and hence became the subject of investigations and therefore the Director of Criminal Investigation opened inquiry file No. 120/2016 on 11th October 2016 wherein an interview with the persons who featured in the said emails was sought because it was discovered that the email addresses cited belonged to the 2nd, 3rd and 4th exparte applicants herein and another, Vincent Muli who are all employees of the 1st applicant University, except Vincent Muli.

31. That the deponent sought an interview with the said 'witnesses' but his efforts were suppressed and hence the writing of the letter of 10th February 2017 to the Legal Officer of the 1st applicant University and requisitions to compel attendance in accordance with Section 52(1) of the National Police Service Act.

32. That the requisition to compel attendance was not made in bad faith or for an improper motive as alleged but was made in the normal course of investigations in a bid to establish the authenticity of allegations raised by the complainant.

33. Further, that there is no abuse of power of the Director of Criminal Investigations but that he is exercising power lawfully conferred on him to compel attendance of persons who have refused to be interviewed in the normal course of investigations.

34. That no finding of perjury has been made and that the applicants will suffer no prejudice if they attend the interview to give their version of the story hence there is no ground for Judicial Review orders sought and therefore the motion as filed should be dismissed with costs to the respondents.

SUBMISSIONS

35. The parties' advocates agreed and filed written submissions which they wholly adopted as canvassing the substantive notice of motion. They also relied on various authorities.

36. The exparte applicant's submissions were filed on 21st July 2017 reiterating the grounds and depositions in support of their motion.

37. It was submitted on behalf of the exparte applicants that this case is in pari materia with the case of **The Commissioner of Police and DCI & another vs KCB Ltd & 4 Others [2013] e KLR** where the senior officials of KCB Ltd were issued with a requisition to compel their attendance for purposes of criminal investigations into alleged fraud on a complaint of a borrower when there were several civil suits between the borrower and the bank concerning the advancement of financial facilities. That the Court of Appeal held that the actions of the appellants amounted to serious abuse of power, harassment and persecution. Further, that an oppressive or vexatious investigation is contrary to public policy and that police in conducting criminal investigations are bound by the law and the decision to investigate a crime or prosecute in the case of the Director of Public Prosecution must not be unreasonable or made in bad faith or intended to achieve ulterior motive or used as a tool for personal score settling or vilification and that in such a case, the court has inherent power to interfere with investigation or prosecution process.

38. It was submitted that the alleged perjury relates to a replying affidavit sworn by Professor Wangari Mwai who is not a party to the alleged investigations and that therefore an attempt to investigate persons allegedly mentioned in another person's affidavit for perjury offends the provisions of Section 108(1) of the Penal Code Cap 63 Laws of Kenya which defines perjury to mean giving false testimony touching any matter which is material to any question in a pending judicial proceedings or intended to be raised in those proceedings.

39. It was submitted that as the 2nd -4th applicants were not parties to HC Miscellaneous Application No. 101 of 2016, and as neither did they testify in those proceedings nor swear any affidavits, the Director of Criminal Investigations has exercised his powers unreasonably, in bad faith and with an intention to achieve an ulterior motive by issuing the applicants with requisitions to compel attendance.

40. It is further submitted that the complainant in the alleged perjury case had the opportunity to test the veracity of the said replying affidavit vide a notice of cross examine the deponent thereof issued yet he opted not to pursue his quest only to use the criminal process to harass and intimidate the applicants and that those acts amount to abuse of power, is *malafides* and intended to achieve an ulterior motive hence these proceedings should be allowed.

41. On the part of the 2nd, 3rd and 4th respondents, submissions were filed on 17th October 2017 and raising the issue of: (a) whether the 2nd respondents' decision to commence inquiry No. 120/2016 was taken in bad faith and with improper motive.

42. The respondents submitted that the 1st respondent is the complainant in the inquiry and the successful litigant in High Court Miscellaneous Application No.101/2016 against the 1st applicant herein Kenyatta University and another.

43. The 2nd – 4th respondents deny that the investigations or inquiry were commenced in bad faith or with ulterior motive. Reliance was placed on **Halsbury's Laws of England 5th Edition, Volume 61 page 475 paragraph 621** on the meaning of improper purpose and bad faith. In this case, it was submitted that the applicants had not demonstrated and or adduced any evidence of dishonesty or malice on the part of the DCI and or his officers and that the requisition to compel attendance was issued in the normal course of investigations.

44. On the exparte applicant's reliance on the case of **Commissioner of Police & DCI & Another v KCB Ltd & 4 Others**, it was submitted that the facts were different from this case in that the case involved over 18 parties unlike in this case where infact, there are no pending proceedings as there is no record of Appeal filed after lodging the Notice of Appeal.

45. It was further submitted that unlike in the cited case, in this case there is no order for stay barring the 2nd respondent from conducting any investigations into the complaint of perjury lodged by the 1st respondent.

46. The 2nd -4th respondents also submitted that there is no place for cross examination in Judicial Review proceedings and that therefore it is immaterial whether the 1st respondent had filed a notice to cross examine which he later abandoned. Reliance was placed on **Republic v Mbooni Boys High School exparte Jackson Kiio Miscellaneous Application No. 144/2016** where the court held that Judicial Review proceedings are only concerned with the process followed in arriving at the impugned decision and not to dwell on whether documents held by either side are genuine or otherwise as that is an issue which can only be resolved in a merit hearing before a civil court.

47. Further, that the court in the above **Republic v Mbooni Boys High School exparte Jackson Kiio** (supra) case held that the case was not a proper one for Judicial Review where there was need to test evidence through cross examination. The 2nd-4th respondents concluded that the applicants will suffer no prejudice by subjecting themselves to lawful investigations as they will have an opportunity to give their version of the story. Further, that no decision has been made to charge anyone yet hence, these Judicial Review proceedings are premature and ought to be dismissed with costs to the respondents.

DETERMINATION

48. I have considered all the foregoing and in my view, the main issue for determination is whether the prayers sought by the exparte applicants are available.

49. Concerning with the prayers for Certiorari to quash the letter dated 9th January 2017 together with the requisitions to compel attendance of the 2nd, 3rd and 4th applicants at the Directorate of Criminal Investigations Headquarters Serious Crime Unit on 15th February 2017, I note that the date on which the applicants were required to attend the inquiry as requisitioned is long gone and therefore the prayer touching on the impugned date is spent. It would accordingly be superfluous and a waste of judicial time and resources to belabour on prayer No. 1 and whether or not it is merited.

50. What remains valid is the second prayer for Certiorari seeking to quash Inquiry No. 120 of 2016 instituted by the 1st respondent; and the third prayer seeking to prohibit the respondents from proceeding with Inquiry No. 120 of 2016 or in any manner investigating allegations of perjury purportedly arising from **HC Miscellaneous Application No. 101 of 2016 Republic vs Kenyatta University & Another ex parte Wellington Kihato Wamburu**.

51. On this second prayer for Certiorari, it is worth noting that Certiorari is an order removing the official record of the impugned decision into the superior court issuing the certiorari or quashing order.

52. The second part of the prayer for Certiorari is the order quashing the impugned decision and the record thereof, thereby wiping the slate clean.

53. Certiorari lies for both jurisdictional and non jurisdictional errors of law appearing on the face of the record.

54. Certiorari is a discretionary constitutional remedy such that even if a substantive review ground has been established the court may decline to grant it moreso where there is an alternative remedy, as stipulated in Section 9(2),(3) and (4) of the Fair Administrative Action Act, 2015.

55. The ex parte applicants seek to quash the decision of the Director of Criminal Investigations to carry out an inquiry/investigation into the alleged perjury by the 2nd -4th applicants with regard to the replying affidavit sworn by Professor Wangari Mwai in **HC Miscellaneous Application 101/2016** wherein the 1st respondent was the ex parte applicant against the 1st applicant herein and another.

56. Part 4 of the Constitution on the establishment of the National Police Service also creates the objects and functions of the National Police Service at Article 244 of the Constitution and among the objects and functions are to (b) comply with constitutional standards of Human Rights and fundamental freedoms (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and (e) foster and promote relationships with the broader society.

57. The National Police Service Act in Section 24 donates to the National police Service the power to investigate crime, which power is not absolute. The power must be exercised responsibly and competently in accordance with the laws of the land, the Constitution and in good faith, not maliciously or capriciously. It therefore follows that it is not in the public interest or in the interest of administration of justice to use criminal justice process to harass or intimidate persons.

58. The police are empowered to investigate crime, to prevent crime and maintain law and order. It therefore follows that the court should not whimsically interfere with the power of the National Police Service to investigate and or prevent crime in our society, for, it is in so investigating and preventing crime that the National Police Service will foster and promote relationships with the broader society. It is the police that have the mandate of ensuring the security of persons and property and as agents of the state, they are obliged to create an enabling environment for citizens and all other persons to enjoy their fundamental human rights and freedoms.

59. Article 215(4) (a) of the Constitution gives to the Inspector General of Police the power to investigate any particular offence or offences. Investigation of crimes results in accountability of suspects before the law. Accordingly, courts, when faced with applications that tend to curb the powers and functions of the

police, must refrain from unnecessarily interfering with that power.

60. Section 28 of the National Police Service Act stipulates the functions of the Directorate of Criminal Investigations. However, in exercising investigate powers, the police must comply with the law, and the decision to investigate crime must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score settling or vilifications. In such instances, the court has inherent power to interfere with such flawed investigations process. This is what the Court of Appeal held in **CA 56/12 The Commissioner of Police & The Director of Criminal Investigation & Another vs Kenya Commercial Bank Limited & 4 Others[2013] e KLR**, citing with approval **Githunguri vs Republic [1985] LLR 3090**.

61. The Court of Appeal in the above CA 56/2012 further held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime(or prosecute in the case of the Director of Public Prosecutions) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score settling or vilification and that the court has residual power to interfere with such investigations process(citing **Ndama v Republic [2002] 1 EA 205 and Kuria & 3 Others v Attorney General [2002] 2 KLR 69**).

62. The question that must be answered in this case is whether the Director of Criminal Investigations in opening an inquiry file No. 120/2016 to inquire into alleged perjury by the exparte applicants regarding the affidavit sworn in High Court Miscellaneous Application No.110/2016 where the 1st respondent and the 1st exparte applicant were parties, which affidavit was sworn by Professor Wangari Mwai the Acting Vice Chancellor (Administration), the Director of Criminal Investigation was abusing his powers and or acting unreasonably, malafides abusing legal process or the inquiry was intended to achieve an ulterior motive and used as a tool to settle personal scores and vilification, intimidation or harassment of the exparte applicants.

63. The court notes that the genesis of this matter is the alleged examinations irregularities allegedly committed by the 1st respondent PhD student at the 1st exparte applicant's University. The University alleged that the 1st respondent/complainant had hired people to write for him his thesis proposal and final thesis which was an examination irregularity and so the University put his graduation on hold and suspended him pending his appearance before the Students Disciplinary Committee.

64. The 1st respondent was not satisfied with the decision of the University and sought redress in court vide Miscellaneous Civil Application No. 101/2016 seeking for Judicial Review order of certiorari, prohibition and mandamus against the University. The case was determined in his favour by Odunga J but there was no claim in that case that the University relied on false testimony to purport to discipline the 1st respondent.

65. The replying affidavit in that case was sworn by Professor Wangari Mwai (Acting Vice Chancellor Administration) wherein she annexed documents which include email communication allegedly exchanged between the 1st respondent and the people who wrote for him the proposal and the thesis at an agreed monetary fee. There is also communication from an anonymous whistle blower whose identity was not revealed to protect himself from being exposed to what appeared to be a cartel of thesis and project writers for students at the University thereby compromising academic standards at the University.

66. In the said Judicial Review proceedings, the 1st respondent had issued a notice of intention to cross examine Professor Wangari Mwai on her replying affidavit but he gave up and now the respondents claim that judicial review proceedings are not meant to be decided on the basis of evidence and documents but to challenge the decision- making process.

67. The court notes that the deponent of that affidavit which is alleged to have been a perjury, is not one of the suspects sought to be questioned for alleged perjury. The persons who are being investigated are

said to be the owners of the email addresses from which information on the 1st respondent's examination irregularities emanated or was communicated to.

68. Section 108(1) (a) of the Penal Code Cap 63 Laws of Kenya defines the offence of perjury as the giving of false testimony touching any matter which is material to any question then pending in judicial proceedings or intended to be raised in those proceedings.

69. In this case, there were and are no pending judicial proceedings since the respondents contend that in any event, the notice of appeal was never pursued as an appeal. There is also no evidence that there is any intention to use the alleged perjured affidavit in the proceedings which, in any event, were determined by Odunga J without the issue of perjury being raised. Allegations of perjury should have been raised in Miscellaneous Application No. 101/2016 **Wellington Kihato Wamburu v Kenyatta University and another**, not to be raised after the event, or the fact. Furthermore, *perjury is the giving of false testimony in judicial proceedings*.

70. In this case, it has not been demonstrated that the respondents gave any testimony or swore any affidavits which could be considered to be false testimony. The 2nd-4th applicants never swore any affidavits in Miscellaneous Application 101/2016 and neither did they give any sworn testimony therein.

71. The National Police Service is expected to demonstrate a high level of competence and integrity in their investigative role. That competence must be demonstrated in their decision making processes and conduct of investigations.

72. A competent investigation would first start with understanding the nature of the offence which is being investigated into and without understanding the nature of the offence, the investigator will be chasing the wind and wasting valuable time and scarce public resources going round the circles to end up with a civil suit for compensation for breach of violations of human rights and fundamental freedoms, or for malicious prosecution.

73. In my humble view, a reasonable investigator would, before opening an inquiry file, seek to understand the nature of the offence to be inquired into. Where it is clear that the persons being inquired/investigated for perjury did not give any evidence before a court of law or swear any affidavit which was used to or intended to be used in judicial proceedings, it would be frivolous, vexatious and abuse of power and legal process to call upon that person to answer questions as suspects in an alleged perjury!

74. It smacks of incompetence on the part of the investigator to allege that they are investigating the applicants herein on the basis of a replying affidavit sworn by a different person and used in court proceedings which proceedings were determined in favour of the applicant without the court conducting those proceedings being alerted that the said replying affidavit was false testimony and therefore seeking to have the deponent perjured.

75. In addition, nothing prevented the 1st respondent from executing his intention to cross examine the deponent of the said affidavit to establish the truthfulness of otherwise of the depositions therein, in accordance with the provisions of Order 19 of the Civil Procedure Rules, to establish the bona fides of the averments in the affidavit.

76. Further, if that affidavit contained allegations which were vexatious, oppressive and scandalous of the 1st respondent nothing prevented him from applying to have the entire affidavit or parts thereof expunged therefrom.

77. Albeit the respondents claim that Judicial Review proceedings do not require cross examination or adduction of evidence because they are concerned with decision making process not merits of the case, cross examination on an affidavit is a discretionary power vested in the court under Order 19 Rule 2 of

the Civil Procedure Rules and is not given as a matter of right. It therefore follows that any party who wishes to cross examine a deponent must satisfy the court that there is good reason for the purpose of cross examination.

78. Order 53 of the Civil Procedure Rules which is the procedural law in Judicial Review matters commenced under Sections 8 and 9 of the Law Reform Act recognize the use of affidavits in evidence, this court is not persuaded that where there is legal foundation for cross examining a deponent in Judicial Review proceedings, it would refuse to allow for cross examination of a deponent in order to enhance the course of justice. For example, where perjury, fraud or bad motive is alleged or where there is a conflict of affidavits on record.

79. In Judicial Review proceedings, inherent power can be exercised to allow cross examination of a deponent on his affidavit (see **Korir J in Republic vs CDF & Another Exparte Rober Litaramwa Ochale & 5 others [2012] e KLR.**

80. What I see in the impugned replying affidavit are averments by the Acting Deputy Vice Chancellor Administration that the 1st applicant University undertook a clandestine investigation and discovered from the sources which were disclosed, that the 1st respondent worked with Dr Karanja Ngugi his thesis Supervisor to have his thesis written for him by undergraduate students employed by Dr Ngugi.

81. If there were incorrect statements made in that affidavit amounting to perjury, nothing prevented the 1st respondent who was ably represented by an advocate at the hearing in Miscellaneous Application No. 101/2016, to raise before that court or to seek leave of court to have the deponent thereof investigated for perjury on the basis of that replying affidavit .

82. According to the 1st respondent, the inquiry is meant to establish the veracity of the emails and shed more light as to the source, the author and the veracity to the matters touching on or affecting his pursuit of PhD Thesis at the university.

83. However, the view of this court is that seeking information on the sources of the information in the affidavit is different from the perjury alleged against the applicants and which the 2nd- 4th respondents concede they were investigating.

84. Those emails are not affidavits in themselves therefore they cannot be perjured. The sources of information cannot be perjured where that source is not a testimony in itself, presented efore a court of law.

85. My humble view is that the respondents in employing criminal process to assist the 1st respondent establish the source of the information contained in the replying affidavit sworn by a person other than the persons under inquiry, the respondents were abusing the criminal process and therefore no good faith can emanate from such an investigation.

86. In my view, it isa traversity of justice for the Directorate of Criminal Investigations to be involved in the settlement of the serious dispute between the 1st applicant University and 1st respondent Student over alleged examinations irregularities.

87. In my view, that venture by the DCI was meant to intimidate the 1st applicant University to cow it from instituting investigations into the alleged examination irregularities and or from carrying out disciplinary proceedings against the 1st respondent for alleged examination irregularities.

88. As was held in **CA 56/2012**, the police should direct their energies and resources to the prevention of crime which we all know is rampant in this country and is about to get out to control instead of wading into issues which should be left to the University administration to undertake their mandate in ensuring the integrity of examinations administered to students is maintained. The police should be

kept out of matters of student discipline, unless there is apparent breach of peace.

89. For the above reasons, I have no hesitation in finding and holding that the prayers sought in the notice of motion at prayers No. 2 and 3 are merited.

90. Accordingly, I hereby grant the application dated 12th April, 2017 and call into this court for purposes of quashing and I hereby quash the inquiry No. 120 of 2016 instituted by the respondent Directorate of Criminal Investigations against the 2nd-4th ex parte applicants.

91. I further issue an order prohibiting the respondents from proceedings with Inquiry No. 120/2016 or in any manner investigating allegations of perjury arising from **High Court Miscellaneous Civil application No.101/2016 Republic vs Kenyatta University & Another ex parte Wellington Kihato Wamburu.**

92. I order that each party shall bear their own costs of these judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 18th day of December, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Miss Muema h/b for G. Mwangi for the ex parte applicants

Mr Munene h/b for the 2nd, 3rd and 4th Respondents

N/A for the 1st Respondent

CA: George