REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

JUDICIAL REVIEW DIVISION

J.R. MISC. CIVIL APPLICATION NO. 214 OF 2016

IN THE MATTER OF AN APPLICATION BY KATE KOKUMU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AGAINST

THE UNIVERSITY OF NAIROBI AND THE STUDENT ORGANIZATION OF NAIROBI UNIVERSITY (SONU)

IN THE MATTER OF UNIVERSITIES ACT, NO. 42 OF 2012 LAWS OF KENYA AND CONSTITUTION OF THE STUDENT ORGANIZATION OF NAIROBI UNIVERSITY (SONU)

IN THE MATER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

IN THE MATTER

BETWEEN

KATE KOKUMU…….....…….1ST APPLICANT

PAMELA GITOBU…….....…..……..2ND APPLICANT

VERSUS

THE UNIVERSITY OF NAIROBI……...…….1STRESPONDENT

THE STUDENT ORGANIZATION OF NAIROBI

UNIVERSITY (SONU)…….....……..…..2ND RESPONDENT

AND

SONU ELECTIONS PETITIONS PANEL....INTERESTED PARTY

JUDGEMENT

1st Applicant's Case

1. The 1st Applicant herein, **Kate Kokumu**, moved this Court by way of a Notice of Motion dated 19th

May, 2016 seeking the following orders:

1. That An order of Certiorari to issue and remove to the High Court and quash the entire ruling and decision of the Interested Party dated 5th May 2016 in Petition No. 10 of 2016

2. That the costs of this application be in the cause.

2. The 1st Applicant averred that she is a student of the 1st Respondent, **The University of Nairobi** (hereinafter referred to as "the University") and also a member of the 2nd Respondent, **Student Organisation of Nairobi University** (hereinafter referred to as "SONU") with all the attendant rights and responsibility as per the constitution provided.

3. The 1st Applicant averred that SONU held its elections on 1st April 2016 wherein the Applicant contested and won the position of Secretary, Finance with votes in excess of 10,000 while her challenger had approximately 2,000 votes and she was duly sworn in as the duly elected Secretary, Finance of the 2nd Respondent on 5th April 2016. Thereafter, she alleged that she assumed the office and has been undertaking her duties and responsibilities as such. However, on 5th April 2016, her main challenger, one **Ms. Pamela Gitobu,** the 2nd Applicant herein lodged a Petition with SONU's Election Petition Panel (hereinafter "the panel") challenging the 1st Applicant's election and seeking her disqualification from contesting executive seat in 2016. Upon being served with the Petition, the 1st Applicant did lodge her response with the panel on 11th April 2016 and the proceedings were held in one day on 11th April 2016 after which the panel delivered its decisions and orders which were served on the 1st Applicant on 5th May 2016, a period of 24 days after the hearing had been concluded. By the said decision, the panel found by a majority that the 1st Applicant was not qualified to run as a candidate under the SONU Constitution of the said position and proceeded to declare the 2nd Applicant herein the winner of the Secretary, Finance.

4. According to the 1st Applicant, SONU's Constitution only obligates the panel to forward its decision to the speaker who would then proceed and declare the seat vacant as per the Constitution and once handed over, the panel becomes *functus officio.* It was the 1st Applicant's position that the Constitution provides for by-election whenever the seat falls vacant by reasons stipulated under Article 27(1) of SONU's constitution one of which is pursuant to a successful petition.

5. The 1st Applicant challenged the said decision on the ground that the same was in excess of jurisdiction in the sense that:

a. The jurisdiction of the panel ceased at the point when it determined whether or not the petition was successful and has had the same transmitted to the speaker.

b. The panel instead abrogated the role of the speaker and the members of the 2nd Respondent who are the electorates in a by-election by proceedings to declare the petitioner as winner of the elections.

c. There is no provision in the 2nd Respondent's constitution giving the panel powers or even an iota of discretion to declare any person as winner for any position in the respondent's elections under whatever circumstances.

d. Article 22(12) of the 2ndRespondent's Constitution only provides one instances when any candidate can be declared winner being when the candidate attains the simple majority of the votes in an election or by-election.

e. Even then the declaration of the winner of any election is as per Article 22(13) reserved for the Chairman of the Commission in consultation with the Electoral Commission and NOT the

panel under any circumstances.

f. The decision of the panel in declaring the Petitioner as the winner essentially means that the speaker and the electorates are prevented from conducting their genuine functions as provides by the constitution.

6. The 1st Applicant asserted that since Article 25(7) of the SONU's Constitution obligates the panel to determine petitions expeditiously, but within no more than 14 days after lodging the petition, the proceedings commenced on 11th April 2016 and the panel legally had a period up to 25th April 2016 to render their decision. However, in flagrant breach of this Article of the Constitution, it delivered their verdict on 5th May 2016, way outside the contemplated period.

7. It was contended that Article 25(2) of SONU's Constitution gives power to the Senate of the University to provide for the procedure for handling election petitions and the said provision and indeed the entire constitution does not grant the Elections Petition Panel power to equally provide a procedure for handling election petition.

8. It was contended by the 1st Applicant that whereas the Senate has not provided rules of procedure as contemplated in the 2nd Respondent's constitution, the Panel acted without jurisdiction and outside their powers by proceeding to draft its own rules of procedure. To the 1st Applicant, the panel cannot abrogate and assume the powers reserved for the Senate and prior to the hearing of the petition, there was no express and documented request by the panel to the Senate to draft the rules of procedure and there is no evidence that the Senate out-rightly and expressly refused to so draft the rules of procedure. To the 1st Applicant, the panel's mandate as outlined in Article 25 (4-11) does not and cannot be read to include drafting its own rules of procedure and the same was done without jurisdiction.

9. The 1st Applicant disclosed that after the decision was delivered, she had her counsel on record to bring to the attention of the Respondents the fact of existence of the dispute while calling for the invocation of the provisions of Article 35 of the 2nd Respondent's Constitution and made it clear that she was readily available to participate in any alternative dispute resolution mechanism if initiated by the Respondents but received no response.

10. In response to the 2nd Applicant's case, it was averred by the 1st Applicant that the remedy sought in the Notice of Motion is radically different from that in the Statutory Statement and it is unclear in what manner the order of Mandamus and Prohibition is sought and this has also brought a confusion as regards how to effectively answer to their application. It was therefore averred that the conflict between the statement and the Motion renders the 2nd Applicant's application fatal to her application as no leave was sought for the prayers now being made in the Notice of Motion.

11. According to the 1st Applicant, the prayers sought in the Statement dated 17th May 2016 are as follows:

(a) An order of Mandamus to issue to compel the 1st and 2nd Respondents to enforce the 2nd Respondent's election committee panel decision and ruling declaring the Applicant as legitimate and lawful winner of the 2nd Respondent's election conducted on 1st April 2016 and to be sworn in as the finance secretary official for the Respondent. (underline added for emphasis)

(b) An order of prohibition to issue to compel the Respondents to discontinue and not to allow the current 2nd Respondent's officials in the position of finance secretary one KATE KOKUMU to cease occupying the office and from discharging any responsibilities of the said office.

12. On the other hand the Notice of Motion dated 26th May 2016 prays for the following:

(a) ***THAT writ of Mandamus do issue to compel the 1st and 2nd Respondents to enforce and***

comply with the ruling delivered on 5th May 2016 by the 2nd Respondent's Election panel committee declaring the Ex parte applicant the winner of the finance secretary post

(b) THAT a writ or order of prohibition to issue to prohibit the 1st and 2nd Respondent's from allowing any person to discharge duties in the position of finance secretary and the Ex parte applicant be sworn in as the duly elected official of the 2nd Respondent in the position of finance secretary as ruled on 5th May 2016 by the 2nd Respondent's election panel.

13. The 1st Applicant therefore contended that it is fatal for the Ex parte applicant to choose to include and abandon prayers at will and depart from the prayers for which leave was granted and instead pursue radically different prayers. To the 1st Applicant, one principal and fatal error is that in the prayer for Mandamus in the Statement, she directs that the nature of mandamus enforcement she requires is to be sworn in office **BUT** in the Notice of Motion application filed subsequently, she abandons that and there is no direction in the manner of enforcement he requires from the court as regards the decision of the Election Panel. Even in the prayer of prohibition, while in the Statement, she requires that a named individual be prohibited from occupying an office, in the Notice of Motion, she abandons that and omits to name the person and wildly prays to prohibit *'any person'* without being clear on who occupies the position that she wants to prohibit.

14. To the 1st Applicant, the confusion is very important and may lead to a miscarriage of justice since the 2nd applicant needed to clearly identify the person sought to be prohibited so the person can be added as an Interested Party since she stands to be affected by the decision of this Court and ought not to be condemned unheard since this is an election dispute that involves every party that took part in it.

15. It was averred by the 1st Applicant that there exists other prerequisite steps that the 3rd Respondent ought to have undertaken before the 1st and 2nd Respondents can be called upon to enforce the decision of the Panel key important function is that the Panel submits the decision to the Speaker as per Article 25(10) whereupon the speaker upon receipt of the decision nullifying the elections declare the seat vacant. It was averred that this is the only procedure set out for implementing the decision of the Panel and there is no other alternative procedure as per the Constitution of SONU that is compellable by an Order of Mandamus. It was contended that the decision has not been submitted to the speaker and the Panel being an Independent body as per Article 24(1) of the SONU Constitution is not under the direction of either the 1st or 2nd Respondent.

16. The 1st Respondent therefore contended that due to lack of clarity in the prayers sought, it cannot be discerned from the nebulous prayers of Mandamus in the Notice of Motion what is required to be performed by the 1st Respondent and what is required of the 2nd Respondent to enforce the decision of the Panel that they have each failed to do and which can only be compelled by an order of Mandamus. Further, the 1st and 2nd Respondents are not legally bound to implement the decision of the 3rd Respondent where the decision has not been submitted to the speaker to declare the seat vacant and the non-declaration of the seat as vacant also affects the prayer of prohibition since how can the 1st and 2nd Respondents be prohibited from allowing any person to carry out the duties without first declaring the seat vacant by the speaker? It was therefore contended that the 2nd Ex parte applicant seeks to have the court by pass such an important provision since it is clear that submission of the decision of the speaker will automatically lead to the declaration of the seat vacant and it is an abuse of the process of the court to seek mandamus order whose effect is to bypass some critical procedures as outlined in the very Constitution.

17. It was contended that from the ruling of the Panel, it is clear that the 2nd applicant is the one who brought a Petition against the 1st Applicant after the 1st Applicant was declared a winner by the Electoral Commission as per Article 20 of SONU's Constitution and was duly sworn in by the 1st Respondent before the Petition was brought. The 1st Applicant therefore asserted that she can only be removed if her seat is declared vacant as per the Constitution and not through a remedy of prohibition or Mandamus.

18. It was the 1st Applicant's case that the post of Secretary Finance of SONU to which the 2nd Ex parte applicant seeks to compel and occupy is a Student's Council position and as the 2nd Applicant did not win in the elections of SONU conducted on 1st April 201, she has not been elected as per the SONU Constitution and Section 41 (3) of the ***Universities Act*** which provides that:

> ***Every University shall have a Students' Council <u>elected</u> by the Students Association, and not more than one-third of the Council shall be of the same gender where applicable.***

19. In the 1st Applicant's view, the Section is clear that no member can occupy or be part of the Student's Council by any other means other than being elected by the Student's association and no order of mandamus can compel the 2nd Respondent to include the ex parte Applicant as a member of its Student's Council through a process that does not accord with that contemplated and expressed by section 41(3) of the Constitution. To the 1st Applicant the functions of the 3rd Respondent is clearly stipulated in the Constitution and none of which is to conduct elections, count the votes, declare results and declare a winner as a result for which it will have abrogated the roles of Electoral Commission, the Speaker, the Members of the 2nd Respondent, the roles of the 1st Respondent and this Court was urged not to command that such a decision that seriously violates the Constitution is given a lease of life by compelling its implementation.

20. On swearing in, it was averred that Article 20 of SONU's Constitution establishes an Electoral Commission and at Article 22(12) is the only article that governs when a candidate can be declared as winner of elections which is garnering a simple majority of votes and upon such gathering, Article 22(13) of the 2nd Respondent's Constitution provides that the Chairman of the Commission and the Electoral Commission shall announce the election results and declare a candidate a winner. It was contended that this role has not been delegated to any other body established under the SONU Constitution and the 3rd Respondent cannot seek to grant itself that power or jurisdiction. Since Article 26 of the Constitution provides the elected officials shall be sworn in by the Chief Legal Officer of the University of Nairobi, the only time the 1st Respondent can be said to have failed to perform his duties as contemplated by the law is where there exists an elected official declared as such by the Electoral Commission and the 1st Respondent fails to swear him as such but not otherwise.

<u>The 2nd Applicant's Case</u>

21. The 2nd Applicant on the other hand moved this Court vide a Notice of Motion dated 26th May, 2016 seeking the following orders:

> **1. That a writ or order of MANDAMUS do issue to compel the 1st and 2nd Respondents to enforce and comply with the ruling delivered on 5th May 2016 by the 2nd Respondent election panel committee declaring the Ex parte Applicant the winner of finance secretary post.**
>
> **2. That a writ or order of PROHIBITION do issue to prohibit the 1st and 2nd Respondents from allowing any person to discharge duties in the position of finance secretary and the Ex-Parte Applicant be sworn in as the duly legally elected official of the 2nd Respondent in the position of finance secretary as ruled on 5th May 2016 by the 2nd Respondent's election committee panel.**
>
> **3. That the Honourable court be pleased to make further such orders as it may deem fit and just.**
>
> **4. That cost of the Application be provided for.**

22. According to the 2nd Applicant, she is a duly registered member of the 2nd Respondent currently in 2nd year pursuing a degree course in Environmental Sciences. She averred that as a normal routine in

every year the 2nd Respondent conducts elections for officials in various positions. During this year's elections in the month of April 2016 the 2nd Respondent conducted its elections and the 2nd Applicant contested in the position of finance secretary against many contestants one of whom was the 1st Applicant.

23. According to the 2nd Applicant, SONU's Constitution has clearly outlined the rules, conditions, requirements and regulations to be fulfilled by all candidates in order to be eligible for any elective post amongst which under Article 19 (5), (6) & (7) and other provisions it is spelled out that a candidate for any elective post must not be in his/her final year and must have at least completed one academic year. It was averred that the 1st Applicant herein did not meet the set down qualifications but despite that was cleared to contest in the elections which were conducted on 1st and 2nd April 2016 respectively and the 1st Applicant was illegally declared as the winner and the 2nd Applicant the runner-up for the post.

24. Being dissatisfied with the results and the manner the elections were conducted for the finance secretary docket, the 2nd Applicant filed a complaint and petition with the 2nd Respondent's election committee panel to amicably have the dispute resolved which petition was conducted by all the fourteen (14) members and in the presence of all the parties. It was averred that upon all the parties presenting their submissions before the 2nd Respondent's election committee panel, the members heard and determined the matter, and gave a ruling nullifying the election of the 1st Applicant as the duly elected official of SONU for having not qualified to participate in the elections as per Article 19 of the SONU's Constitution and further proceeded to declare the 2nd Applicant the winner for the position of secretary-finance director. In its ruling, it was disclosed, the election committee panel ordered and directed that the 2nd Applicant was the winner and directed that she be sworn in as SONU's finance secretary.

25. The 2nd Applicant contended that despite the order and ruling the 1st Applicant has continued to be illegally in the office as SONU's finance secretary despite the several attempts by the 2nd Applicant follow-ups on the issue including writing an official letter to the vice- chancellor.

26. It was therefore the 2nd Applicant's case that it is in the interest of justice, fairness, rule of law and enforcement of SONU's constitution, that her Application be allowed and she be sworn in as the finance secretary official of SONU.

1st Respondent's Case

27. From the record, it seems that the 1st respondent herein, **The University of Nairobi,** (hereinafter referred to as "the University") only opposed the 2nd Applicant's application since no replying affidavit was filed with respect to the 1st Applicant's Application.

28. It was averred by the 1st Respondent that the said suit is bad in law for contravening section 41 of the ***Universities Act*** No. 42 of 2012 and urged the Court to strike out and/or dismiss the same on that ground.

29. According to the University, SONU is formed pursuant to section 41 of the said Act as an organization to secure for students' academic freedom, excellence, liberty and welfare and that in line with the SONU Constitution, the Respondent's student's fraternity held elections on 1st April 2016 to elect the leaders of SONU for the 2016/2017 academic year. On 2nd April 2016, election results in respect of the said elections were declared and the 2nd applicant herein who was a candidate for the position of Finance Secretary came second while the 1st Applicant was declared the newly elected Finance Secretary of SONU.

30. To the University, the 2nd Applicant's application is incompetent, is brought in bad faith and unsustainable. The university contended that the prayers sought in the application are against section 41 (3) of the ***Universities Act No. 42 of 2012*** which provides that it is only elected students who are

supposed to be official of the University of Nairobi Students Association. It was therefore averred that the Applicant, as second runners up, has no sufficient legal interest in the position he vied for and should be subjected to the students' popular mandate. It was further contended that the prayers sought are unconstitutional and offend section 41(3) of the ***Universities Act No. 42 of 2012*** and as such should be dismissed

31. In addition the University contended that swearing in of elected SONU Officials is a ceremonial function as opposed to statutory responsibility, and in the circumstances orders sought cannot issue hence the University cannot be compelled by orders of mandamus and prohibition to perform a non-statutory function.

32. In the University's view, the Applicant has the alternative remedy of vying for the seat through SONU electoral process rather than seeking elective posts through backdoor mechanisms which backdoor process is contrary to section 41(3) of the ***Universities Act No. 42 of 2012***. It was therefore the University's position that the application as filed is pre-mature as the Applicant has not exhausted or even attempted to vie for a second time as provided in the SONU Constitution 2015. To the University, the Applicant has not demonstrated irreparable injury and or exceptional circumstances to warrant granting of the orders sought, and failed to exercise the right of other method of relief available to him.

33. According to the University, granting orders sought by the Applicant is disruptive and would disenfranchise student's rights to choose a leader of their own through SONU electoral process.

2nd Respondent's Case

34. According to SONU, the 1st Applicant, **Kate Kokumu**, was validly elected into office of Finance Secretary on 1st April 2016 with votes of over 10,000 and validly occupies the seat as against the 2nd ex parte applicant who garnered 1,000 votes. To the 2nd Respondent, it has serious reservations with the ruling of the Panel of 5th May 2016 and associates itself with the 1st Applicant's grounds and prayed that a certiorari issues to quash the decision.

35. To the 2nd Respondent, the Panel cannot assume jurisdiction it does not have, however convenient and it cannot declare any person a winner without having to pass through the will of majority.

36. In the 2nd Respondent's view, all bodies formed under SONU's constitution must seek to exercise powers within their space and should not encroach on the duties of other bodies.

37. It was SONU's position that the 2nd Applicant's application is an abuse of the process of court. Although by its ruling delivered on 20th June 2016, the court dismissed an application by the 3rd respondent that sought the applicant to first comply with section 35 of the constitution on alternative remedies on account of the finality clause in section 25, SONU contended that the situation of the 2nd ex parte applicant is different as she seeks to enforce not challenge the decision of the Panel hence agrees with the finality clause of section 25 and ought to demonstrate how she has attempted to exhaust the alternative remedies before seeking Mandamus and Prohibition before this court.

38. To SONU, Article 35 of its constitution provides that the 2nd ex parte applicant in an effort to have the decision of the Panel implemented ought to first adopts good offices, mediation, conciliation and negotiation and it goes further to provide that if the methods were to fail, parties shall proceed to arbitration. However, the 2nd ex parte applicant has not even attempted any of these methods and even if it was her view that they have failed, parties must resort to arbitration and this court has severally ruled that where a subject is already covered by an arbitration clause, this court ceases to have jurisdiction and parties must be compelled to resort to such without any exceptions. Similarly Section 9(2) of the ***Fair Administration Action Act*** provides that this court shall not have jurisdiction over an administrative action unless and until the dispute resolution mechanisms are exhausted by the 2nd ex parte applicant.

39. To SONU, unlike the case of 1st ex parte applicant where the office under Article 35 cannot entertain the challenge of the Panel's decision, there is nowhere indicated that the offices and avenues under Article 35 cannot entertain an issue as regards implementation of the decision of the Panel.

Determinations

40. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed herein.

41. In my view since the 2nd applicant seeks to compel the Respondents to implement the decision of the Panel while the 1st Applicant seeks to quash the very same decision, it is prudent to deal with the 1st Applicant's application first. This is due to the recognition that if the Panel's decision is quashed, there would be nothing remaining to be implemented. It is only if the 1st Applicant's application fails that the Court would then proceed to deal with the 2nd Applicant's application.

42. On the other hand if the Court were to deal with the 2nd Applicant's application first and grant the same, it would lead to absurdity if the 1st Applicant's application was to be considered subsequently and the same was to be found merited.

43. According to the 1st applicant, SONU's Constitution only obligates the panel to forward its decision to the Speaker who would then proceed and declare the seat vacant as per the Constitution and once handed over, the panel becomes *functus officio.* It was therefore the 1st Applicant's position that the jurisdiction of the panel ceased at the point when it determined whether or not the petition was successful and had the same transmitted to the speaker. By declaring who was elected, it was submitted that the Panel abrogated the role of the speaker and the members of the 2nd Respondent who are the electorates in a by-election. According to the 1st Applicant, there is no provision in the SONU's constitution giving the Panel powers or discretion to declare any person as winner for any position in SONU's elections under whatever circumstances.

44. In this case, Article 25(10), (11) and (12) of the SONU Constitution provides that:

> ***(10) The decision of the panel shall be final and binding and shall be submitted to the speaker.***
>
> ***(11). The Speaker shall upon receiving the Panel's decision nullifying the election declare the seat vacant.***
>
> ***(12) The by-election shall be conducted under the provision on vacancy and by-elections, and the relevant provisions of the Constitution.***

45. From the Constitution, there is no provision expressly dealing with the nature of the orders that the Panel may grant. Accordingly, one cannot state with certainty that the Constitution bars the Panel from declaring a candidate as the winner of the elections. What is, however clear is that in certain circumstances, the decisions of the Panel are not self-executing and can only be referred to the Speaker for the next course. It would seem that the drafters of the SONU constitution intended that the steps to be taken at the determination of the hearing of the challenge to an election under the SONU constitution mirrors that under section 86 of the ***Elections Act*** which provides that:

(1) An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission which shall then notify the relevant Speaker.

(2) Upon receipt of a certificate under this section, the relevant Speaker shall give the necessary directions for altering or confirming the return, and shall issue any notification which may be necessary.

46. If that was the intention, then the SONU constitution is a very poor imitation of the ***Elections Act***. That the said constitution suffers from serious mal-drafting was noted by this Court in **Antony Munene Maina vs. University of Nairobi & Another [2015] eKLR** where this Court noted that such terms as "good offices" may well be meaningless without a definition clause.

47. Whereas the ***Elections Act*** in section 102 of the ***Elections Act*** provides for the powers of the Elections Court when hearing an election petition, the SONU constitution does not seem to provide for the nature of the orders that the Panel can grant. This problem was appreciated by this Court in **Republic vs. Attorney General & Anor. ex parte Kenya Airports Authority Staff Retirement Benefits Scheme Nairobi JR. Miscellaneous Application No. 381 of 2013**, where the Court expressed itself *inter alia* as follows:

> **"It must however be appreciated that a Tribunal must necessarily have powers to effectuate its decisions. As was correctly appreciated in Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval (supra), the exercise of the powers to exercise jurisdiction in all civil matters implies the power to adjudicate on the matters investigated and a duty imposed or power granted by the legislature carries with it the power necessary for its performance and execution. The implied power must be read into the statute in order to enable the express power or jurisdiction expressly conferred, to be effectually exercised. It is difficult to see what useful purpose mere advice, legally unenforceable, would serve in disputes of the kind covered. Similarly in Khimji Gordhandas & Another vs. Chanrasen Narotam & Others [1957] EA 223, it was held that the implied power must be read into the Statute in order to enable the express power, or the jurisdiction expressly conferred, to be effectually exercised. It is therefore clear that where there are express powers donated to a Tribunal, it must necessarily be implied that the Tribunal also has the powers to effectually exercise the expressly conferred powers. In this case, however the Act does not expressly confer on the 2nd Respondent the jurisdiction to grant substantive reliefs. In an appeal as opposed to a review, the powers of the appellate Tribunal must be expressly conferred."**

48. The matter before the Panel was however not an appeal. In my view, it was more in the nature of a review hence I would be reluctant to hold that its powers did not encompass making a recommendation for declaration of a particular candidate as having won the elections. In other words there is no basis going by the provisions of the SONU constitution upon which this Court can determine what reliefs the Panel can grant and which ones it cannot.

49. Consequently, I am unable to hold that the Panel had no power to direct that the 2nd Applicant had won the elections for the subject position.

50. The second ground for impugning the decision of the Panel was that the Panel delivered its decision outside the period stipulated under the SONU constitution. In my view, provisions relating to limitation are not mere procedural provisions. Rather they are substantive provisions as they go to the jurisdiction of the Tribunal. Accordingly, they cannot be treated as a mere technicality. This was the position adopted in **Tzamburakis and Another vs. Rodoussakis Civil Appeal No. 5 of 1957 (PC) [1958] EA 400** where it was held that:

> **"No procedural defect can relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a Judgement given to a plaintiff in respect of a time barred cause of action… An abandonment of a plea of limitation cannot relieve the Court from taking notice of it."**

51. The same position was adopted by the Court of Appeal in **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998** where it was held that:

> **"A preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction."**

52. An issue of jurisdiction may arise in one of two instances or both. The first scenario is where the Court has no jurisdiction to embark upon the investigation of the matter before it *ab initio*. The second scenario is where though the Court was seized of jurisdiction at inception subsequent events have occurred or circumstances intervened to remove the dispute from the jurisdiction of the Court or the Tribunal. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

> **"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…"**

53. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics.

54. Article 25(7) of the SONU constitution provides that:

The Panel shall determine petitions expeditiously, but within not more than 14 days after the lodging of the petition.

55. From the decision of the Panel at page 5, the 2nd Applicant filed her petition on 5th April, 2016. Going by the above cited Article the Panel had until 19th April, 2016 to determine the said petition. However the Panel's decision is dated 5th May, 2016 which was clearly out of time. The issue of making a decision after the time stipulated was dealt with by the Court of Appeal in **Wasike vs. Swala [1985] KLR 425** where the Court in dealing with arbitral proceedings expressed itself as hereunder:

> **"…the award had to be filed in court not later than June19, 1981 but was filed in the senior Resident Magistrate's Court on September 10, 1981. There is no evidence that an application was made pursuant to Order 45 rule 8 of the Civil Procedure Rules for the court to extend the time for the making of the award. The Senior Resident Magistrate accepted and acted on the award, which had been filed in his court long after the time fixed under Order 45 rule 4(2) for the making of the award. But the award was a nullity."**

56. This was the position in the Nigerian Supreme Court decision in **Senator John Akpanudoedehe & 2 Others vs. Godwill Obot Akpabio & 3 Others SC 154/2012** where the said Court dealt with section 285(6) of the Country's Constitution which provides as follows:

An election Tribunal shall deliver its judgement in writing within 180 days from the date of the filing of the petition.

57. That Court expressed itself as follows:

> **"Once 180 days elapsed the hearing of the matter fades away along with any right to fair hearing. There is nolonger a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever. Put in another way fair hearing provided by section 36 of the Constitution is only applicable when the petition is alive. In this case the petition is died by effluxion of time and so the issue of fair hearing cannot be raised. A petitioner who is unable to argue his petition to his satisfaction within 180 days as provided by section 285(6) of the Constitution or finds the time too short should approach the National Assembly with an appropriate bill to amend section 285(6) of the Constitution. If this court**

extends the time provided in section 285(6) for the hearing of election petitions it would amount to judicial legislation and that would be wrong. The National Assembly is to make laws and that includes amending existing laws and the Constitution. The role of the judiciary is to interpret what the National Assembly has done."

58. In my view once the 14 days allowed by Article 25(2) of the SONU constitution expired by effluxion of time, there was no matter pending before the panel which it could rule upon. The law as I understand it is that a decision made by a body outside the period prescribed for doing so is clearly a decision made without jurisdiction and is therefore a nullity.

59. It was contended that Article 25(2) of SONU's Constitution gives power to the Senate of the University to provide for the procedure for handling election petitions and the said provision and indeed the entire constitution does not grant the Elections Petition Panel power to equally provide a procedure for handling election petition. It was contended by the 1st Applicant that whereas the Senate has not provided rules of procedure as contemplated in the 2nd Respondent's constitution, the Panel acted without jurisdiction and outside their powers by proceeding to draft its own rules of procedure. To the 1st Applicant, the panel cannot abrogate and assume the powers reserved for the Senate and prior to the hearing of the petition, there was no express and documented request by the panel to the Senate to draft the rules of procedure and there is no evidence that the Senate out-rightly and expressly refused to so draft the rules of procedure. To the 1st Applicant, the panel's mandate as outlined in Article 25 (4-11) does not and cannot be read to include drafting its own rules of procedure and the same was done without jurisdiction.

60. A reading of Article 25(2) of the SONU constitution seems to suggest that the power to provide for rules of procedure is discretionary on the part of the Senate since it states that "Senate may provide for the procedure of handling election petitions." Does this mean that where the Senate has not provided for rules of procedure, the Panel cannot entertain a petition? On my part I am not prepared to hold that where the Senate has not exercised its discretionary powers thereunder the Panel is thereby rendered impotent. Section 48 of the ***Interpretations and General Provisions Act*** by parity of reasoning provides as follows:

Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

61. In my view unless it is shown that the rules of procedure can only be made by the Senate as opposed to mere enabling powers, this Court ought not to infer an interpretation whose effect is to render the body entrusted with the resolution of electoral disputes in-operational.

62. It was contended on behalf of the 1st Applicant that this Court cannot grant the orders sought by the 2nd applicant herein as to do so would amount to this Court stepping into the shoes of the electorates. With due respect that contention cannot be validated. This Court is Constitutionally mandated to resolve disputes that are brought before it as long as there is no more appropriate forum for doing so and where it is alleged that a person or an entity is violating its own rules to the detriment of its members, this Court must step in to rectify the situation since this court, as the custodian of law cannot shut its eyes to an allegation of illegality. It has been held that the Court as a custodian of the rights of those under its jurisdiction must make sure that justice is done to those who come before it regardless of whether or not that interferes with the management of the executive arm of the Government. See **Republic vs. Director General of East African Railways Corporation Ex Parte Kaggwa [1977] KLR 194; [1976-80] 1 KLR 654; R vs. Bishop of Sarum [1916] 1 KB 466.**

63. Therefore as the ultimate custodians of the rights and liberties of people whatever the status, there is no rule of law that the courts are to abdicate jurisdiction merely because the proceedings under review are of an internal disciplinary character. The Respondents must conduct their affairs in accordance with the laws of the land and where they transgress the same, they cannot hide under their interpretation of their Constitution to deny a person injured thereby from approaching the temple of justice. In other words the

internal rules of the SONU, while may restrict the parameters within which this Court exercises its mandate cannot purport to ouster this Court's Constitutional mandate.

64. Having considered the issues raised before me the inescapable conclusion I come to is that the Panel, by making its decision outside the timelines provided under the instrument through which it was exercising its powers, exceeded its jurisdiction and its decision cannot stand.

65. It follows that the 2nd Applicant's application must necessarily fall by the way side.

66. In the premises an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the entire ruling and decision of the Election Panel dated 5th May 2016 in Petition No. 10 of 2016 which decision is hereby quashed.

67. I further disallow the 2nd Applicant's application dated 26th May, 2016.

68. As the mistakes herein were made by the Panel, there will be no order as to costs.

69. Orders accordingly.

Dated at Nairobi this 5th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogembo for the 1st Applicant and holds brief for Mr Nyangito for the 2nd Applicant

Cc Mwangi