



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**JUDICIAL REVIEW NO: 15 OF 2014**

**IN THE MATTER OF AN APPLICATION BY KENYA NATIONAL PARENTS ASSOCIATION  
(THROUGH MUSAU NDUNDA- SECRETARY GENERAL)**

**FOR JUDICIAL REVIEW AND FOR THE ORDERS OF CERTIORARI,**

**PROHIBITION AND MANDAMUS**

**-AND-**

**IN THE MATTER OF THE UNIVERSITIES ACT, 2012 AND THE BASIC EDUCATION ACT  
2013 9ACT NO. 14)**

**-AND-**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**-AND-**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012 AND THE PHYSICAL  
PLANNING ACT CAP. 286 LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF CANCELLATION OF TRANSFER OF LR. NO. 1087, 1087/1 & 1087/2 IN  
VIHIGA COUNTY TO REVERT TO LR NO. 1087 VIHIGA COUNTY**

**-AND-**

**IN THE MATTER OF A DOCUMENT DATED 10<sup>TH</sup> APRIL, 2014 BY COMMISSION FOR  
UNIVERSITY EDUCATION ENTITLED ESTABLISHMENT OF FRIENDS KAIMOSI  
UNIVERSITY COLLEGE AS A CONSTITUENT COLLEGE OF MASINDE MULIRO  
UNIVERSITY OF SCIENCE AND TECHNOLOGY**

**-AND-**

**IN THE MATTER OF THE PRESERVATION OF THE KAIMOSI TEACHERS' TRAINING  
COLLEGE**

**-AND-**

**IN THE MATTER OF KENYA NATIONAL PARENTS ASSOCIATION (THROUGH MUSAU NDUNDA- THE SECRETARY GENERAL.....APPLICANT**

**-VERSUS-**

**THE CABINET SECRETARY/MINISTRY OF**

**EDUCATION SCIENCE & TECHONOLOGY**

**PROFESSOR JACOB KAIMENYI.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY STATE**

**DEPARTMENT OF EDUCATION**

**DR. BELLO KIPSANG .....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY**

**OF LANDS, HOUSING & URBAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY-MINISTRY OF**

**LANDS, HOUSING & URBAN DEVELOPMENT.....4<sup>TH</sup> RESPONDENT**

**THE OFFICE OF THE PRESIDENCY.....5<sup>TH</sup> RESPONDENT**

**COMMISSION FOR UNIVESITY EDUCATION.....6<sup>TH</sup> RESPONDENT**

**MASINDE MULIRO UNIVERSITY OF SCIENCE**

**AND TECHNOLOGY.....7<sup>TH</sup> RESPONDENT**

**KAIMOSI FRIENDS UNIVESITY COLLEGE**

**(A Constituent College of Masinde Muliro**

**University of Science and Technology) .....8<sup>TH</sup> RESPONDENT**

**KAIMOSI TEACHERS TRAINING COLLEGE.....9<sup>TH</sup> RESPONDENT**

**BOARD OF MANAGEMENT**

**KAIMOSI TEACHERS TRANING COLLEGE.....10<sup>TH</sup> RESPONDENT**

**EAST AFRICA YEARLY MEETING OF FRIENDS.....11<sup>TH</sup> RESPONDENT**

**THE GOVERNOR VIHIGA COUNTY**

**GOVERNMENT- CHARLES GIMOSE.....12<sup>TH</sup> RESPONDENT**

**MEMBER OF PARLIAMENT HAMISI**

CONSTITUENCY.....13<sup>TH</sup> RESPONDENT

ATTORNEY GENERAL.....14<sup>TH</sup> RESPONDENT

## JUDGMENT

### INTRODUCTION:

1. THE KENYA NATIONAL PARENTS ASSOCIATION through MUSAU NUNDA who is its Secretary- General (hereinafter referred to as “the Applicant”) filed a Notice of Motion dated 15/09/2014 seeking the following orders: -
  - i. ***THAT this application be and hereby certified urgent and be heard expeditiously owing to its extreme urgency.***
  - ii. ***That the Honourable Court be pleased to grant an order of Certiorari to move into this Honourable Court and be quashed the decision issued and given by 6<sup>th</sup> Respondent and dated 10<sup>th</sup> April, 2014, being a resolution by Commission for University Education to upgrade Kaimosi Teachers Training College erroneously referred to as Friends Kaimosi College as a Constituent College of Masinde Muliro University of Science and Technology.***
  - iii. ***That the Honourable Court be pleased to grant an order of Certiorari to move into this honourable court and be quashed the Draft Legal Order namely KAIMOSI FRIENDS UNIVERSITY COLLEGE Order 2014 issued by the 6<sup>th</sup> Respondent.***
  - iv. ***That the Honourable Court be pleased to grant an order of prohibition to restrain the 1<sup>st</sup> Respondent from declaring the 9<sup>th</sup> Respondent namely Kaimosi Teachers Training College a constituent college of Masinde Muliro University of Science and Technology.***
  - v. ***That the Honourable Court be pleased to grant an order of prohibition to restrain the 1<sup>st</sup> Respondent and 5<sup>th</sup> Respondent either by themselves or through their agents, servants or persons acting under their authority from gazetiting in the Kenya Gazette the 8<sup>th</sup> Respondent as a constituent of Masinde Muliro University of Science and Technology.***
  - vi. ***That the Honourable Court be pleased to grant an order of prohibition to restrain the 1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> , 4<sup>th</sup> , 5<sup>th</sup> , 6<sup>th</sup> , 7<sup>th</sup> , 8<sup>th</sup> , 10<sup>th</sup> , 11<sup>th</sup> , 12<sup>th</sup> , and 13<sup>th</sup> Respondents from meddling, impeding or in any other way whatsoever interfering with the smooth running of academic and administrative programs of the 9<sup>th</sup> Respondent.***
  - vii. ***That the Honourable Court be pleased to grant an order of prohibition to restrain the 1<sup>st</sup> Respondent and 2<sup>nd</sup> respondent jointly and severally to release and forward calling/admission letters to all the successful students to join the 9<sup>th</sup> Respondent.***
  - viii. ***That the Honourable Court be pleased to grant an order of prohibition to restrain the 10<sup>th</sup> Respondent its servants, agents and any other person acting under its authority from transacting any business whatsoever on behalf of the 9<sup>th</sup> Respondent.***
  - ix. ***That the Honourable Court be pleased to grant an order of Certiorari to move into this Honourable Court and be quashed the notice by Vihiga County Government published in the Daily Nation Newspaper of 6<sup>th</sup> June 2014.***
  - x. ***That the Honourable Court be pleased to grant an order of Mandamus to compel 3<sup>rd</sup> and 4<sup>th</sup> respondents to cancel titles for L.R No. 1087.1087/1 and 1087/2 all in vihiga County.***
  - xi. ***That the Honourable Court be pleased to grant an order of Mandamus to compel the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to revert to the original registration L.R 1087 Vihiga County and revoke sub-divisions namely L.R No. 1087/1 and 1087/2 Vihiga County.***
  - xii. ***That the Honourable Court be pleased to grant an order of Mandamus to compel the 3<sup>rd</sup> , 4<sup>th</sup> and 11<sup>th</sup> respondents to sub-divide and transfer to the 9<sup>th</sup> Respondent part of the Original L.R No. 1087 and all that parcel comprising of buildings and other amenities thereof used by the 9<sup>th</sup> Respondent.***
  - xiii. ***That costs of this application be provided for.***

2. The filing of the above application was pursuant to the grant of leave of this Court (**Hon. Lenaola, J.**) on 25/06/2014 in **High Court at Nairobi Milimani Law Courts Constitutional & Judicial Review Division, Judicial Review No. 322 OF 2014** which matter was later on transferred to this Court thereby acquiring the current number. The High Court at Nairobi aforesaid had further directed that the grant of the leave to act as a stay be instead heard *inter-parties* on 03/09/2014 at Kakamega where the cause of action arose.
3. When the matter came up on the 03/09/2014 before Hon. Justice Said Chitembwe, parties recorded a consent to the effect that the academic programmes of KAIMOSI TEACHERS TRAINING COLLEGE (the 9<sup>th</sup> Respondent) herein shall not be disrupted and shall continue to run and parties were at liberty to file affidavits accordingly.
4. On 16/10/2014, the parties further agreed to and abandoned the prayer for leave to operate as a stay and instead proceeded to deal with the substantive Notice of Motion dated 15/09/2014 by way of filing written submissions. Upon the filing of the written submissions the parties tendered their highlights thereto on 18/11/2014 and the Court set the judgment for 05/02/2015 or on an earlier date thereto on notice.

### **THE APPLICANT'S CASE:**

5. The application is supported by a Verifying Affidavit sworn by MUSAU NDUNDA the Secretary General and Executive Director of the Applicant Association on 21/08/2014 as well as a Statement of facts duly and evenly dated.
6. According to the deponent, the Applicant is registered under the Societies Act and as per its Constitution and Rules, it is a forum for parents' associations in Schools and other institutions of basic and higher learning to participate in the development of the children at all levels of education including the infrastructural development of any such member institution in the country.
7. It is deponed that despite KAIMOSI TEACHERS TRAINING COLLEGE (hereinafter referred to as the '**Kaimosi College**') being a public institution duly registered under the Basic Education Act with registration number G/TC/005/92 mandated to train Primary School Teachers in accordance with the curriculum offered under the Kenya Institute of Curriculum Development Act 2013 (Act No. 4 of 2013) and to present the candidates to be examined under the provisions of the Kenya National Examination Council Act 2012 (Act No. 29 of 2012), the Applicant became aware sometimes in August 2014 of a letter dated the 10/04/2014 written by the Secretary/Chief Executive Officer of Commission of University Education ( hereinafter referred to as '**the Commission**') to the Cabinet Secretary for Education, Science and Technology (hereinafter referred to as '**the Cabinet Secretary**') purporting to unprocedurally upgrade Kaimosi College to be a constituent college of the Masinde Muliro University College of Science and Technology (hereinafter referred to as the '**Masinde Muliro University**').
8. The above finding did not go down well with the Applicant who holds the view that the intended upgrade would obviously interfere with the smooth running and administration of Kaimosi College and consequently affect the Applicant's members and the Kenyan students at large.
9. For clarity purposes, the said Applicant's position is based on the following grounds and as presented to this Court: -
  - a. ***That the 6<sup>th</sup> and 7<sup>th</sup> Respondents have no legal capacity either under the University Act 2012 or the Basic Education Act 2013 or the law generally to upgrade the 9<sup>th</sup> Respondent to a University or any other institution or to abolish it as they purport to.***
  - b. ***That the applicant was not consulted neither was it given any opportunity to participate in the process relating to the conversion of the 9<sup>th</sup> Respondent College to a University hence threatening the spirit of cohesion, integration, access to education and national values.***
  - c. ***That the land upon which the 9<sup>th</sup> Respondent college stands was fraudulently transferred by the***

*sponsors of the 9<sup>th</sup> Respondent, the East African Meeting of Friends (the 11<sup>th</sup> Respondent) to the 8<sup>th</sup> Respondent.*

d. *That the 8<sup>th</sup> Respondent (Kaimosi Friends University College) has not been gazetted to operate as a constituent college of a University.*

10. The Applicant is therefore of the view that unless checked or restrained by this Honourable Court, the cumulative actions of the Respondents will greatly affect the operations of Kaimosi College and will be an affront to the Constitution of Kenya and a total violation of the national values which this Court is enjoined to protect hence it is only fair and just that the prayers sought be granted.

#### **THE 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 4<sup>TH</sup>, 5<sup>TH</sup> & 14<sup>TH</sup> RESPONDENTS' CASE:**

11. Although Mr. Onyiso, Learned State Counsel appeared for the above Respondents, the said Respondents did not file any responses to the issues before Court neither did they file any written submissions nor tendered any highlights thereto.

#### **THE 6<sup>TH</sup> RESPONDENT'S CASE:**

12. On its behalf, a Replying Affidavit by Prof. David K. Some the Commission's Secretary and the Chief Executive Officer was sworn on 15/10/2014 and filed in Court on 16/10/2014.

13. The Commission admits to have authored the letter in issue herein dated 10/04/2014 to the Cabinet Secretary. It is however categorical and contends that its role in the university education in Kenya is anchored on the law and that the Applicant has failed to demonstrate how the Commission acted contrary to law. In other words, it is the Commission's position that whatever it was engaged in, was purely on its legal line of duty and did not participate on any illegality either as alleged or otherwise.

14. On the issue of the letter dated 10/04/2014, the Commission contends that the same was only a recommendation and not a decision capable of being quashed by this Court since the final decision rests with the Cabinet Secretary.

15. The Commission then proceeded to give details of how it handled the matter on its part by availing a chronology of the events from the time the 11<sup>th</sup> Respondent herein, THE EAST AFRICA YEARLY MEETING OF FRIENDS (hereinafter referred to as '*the Sponsor*'), made its first application to the Commission's predecessor, the Commission for Higher Education on 13/07/2012 until the institution of this matter. It also annexed several exhibits in support of its case. The Commission then called for the dismissal of the application herein.

#### **THE 7<sup>TH</sup> RESPONDENT'S CASE:**

16. The 7<sup>th</sup> Respondent herein, the Masinde Muliro University, filed a Replying Affidavit through Prof. Manyasa O.J Nandi sworn on 22/09/2014. The deponent describes himself as an Associate Professor of Social Sciences of Masinde Muliro University and the co-ordinator of the KAIMOSI FRIENDS COLLEGE, a proposed constituent College of Masinde Muliro University which I shall hereinafter refer to as '*the Constituent College*'. He further depones that the co-ordination of all programmes and activities at the said constituent college are among his daily duties hence he is quite conversant with the matter before Court.

17. On advise of his lawyers, the deponent raises two preliminary issues; that the Applicant is not a legal entity and as such the entire suit is incompetent in law and that the Applicant having brought a representative suit, it failed to obtain its Members' written authority as legally required thereby again rendering the entire suit incompetent.

18. The deponent further contends that the title to the property in issue was rightly and legally acquired in favour of the Constituent College and that no fraud was ever visited on its acquisition or at all. He depones that all the programmes of the Kaimosi College are running well alongside those of the Constituent College and that there is utmost harmony and co-existence of the two institutions since the Constituent College has already admitted students and learning is on-going.

#### **THE 9<sup>TH</sup> & 10<sup>TH</sup> RESPONDENTS' CASE:**

19. The 9<sup>th</sup> and 10<sup>th</sup> Respondents' filed a joint Replying Affidavit through one Onzere Benson Mudangale, the current Principal of the Kaimosi College sworn on 17/10/2014

20. It is deponed that the former Principal of the Kaimosi College one Maryclaire N. Indire was transferred and the deponent appointed as such on 26/09/2014. Having served as a Deputy Principal of the Kaimosi College for over 6 years, he remains very conversant with the matter before Court. He states clearly that Kaimosi College has no dispute whatsoever with the Constituent College since there were elaborate arrangements made and reduced into a Memorandum of Understanding between the two institutions for the sharing of the available premises as the Sponsor among others are preparing to construct modern and new structures for the Kaimosi College. Further the Sponsor has ample land for all such purposes and that the purported issue of land is a non-issue at all. To him, the Constituent College opened its doors to students on 03/09/2014 and has enrolled over 250 students and is independently, but harmoniously co-existing with the Kaimosi College.

21. Whereas the deponent admits that Kaimosi College had selected its first year students to join the institution for the year 2014/2015, he explains that an understanding was reached, and implemented, between the Kaimosi College and the Ministry of Basic Education where those students were distributed among other colleges nationally and that no complaint has ever arisen out of the said arrangement. He further depones that he is aware that Kaimosi College shall select first year students in 2015 for the academic year 2015/2016 since the necessary facilities are being put in place.

To this end, the County Government of Vihiga (hereinafter referred to as '**the County Government**') has committed Kshs. 25 Millions further to Kshs. 10 Millions from the Hamisi Constituency Development Fund hereinafter referred to as '**the CDF**'). Equity Bank has also offered to partner in putting up hostels for the students and is ready to finance the project in the event this litigation successfully comes to an end.

22. The deponent further takes issues with the Applicant contending that it lacks any legal capacity to sustain the case and that the Applicant is not known to the Kaimosi College except through the media and further that the Applicant has never been to the Kaimosi College neither does it have any membership therefrom hence it remains a busy body.

23. The deponent is of the further view that the grant of the orders sought would not serve any meaningful purpose since the arrangement already in place for the accommodation of both the Kaimosi College and the Constituent College are elaborate and founded on legally-binding instruments which do not require Court Orders to execute and in the absence of any dispute at all, calls for the dismissal of the case.

#### **THE 11<sup>TH</sup> RESPONDENT'S CASE:**

24. Rev. Ephraim Konzolo swore a Replying Affidavit on 15/10/2014 on behalf of the 11<sup>th</sup> Respondent herein, the Sponsor, in his capacity as its General Secretary. He confirms that the Sponsor is the main sponsor of the Kaimosi College and as such sits on the Board of Management which has been sued as the 10<sup>th</sup> Respondent. He also indicated that his said affidavit is in further

support of the Kaimosi College and its Board of Management's position in this matter.

25. It is further deponed that the Sponsor has all along been desirous of furthering educational pursuits and has taken deliberate steps to come up with a University and that to its utter shock and surprise the issues raised in this case do not have any place at all since both institutions are running smoothly without any disruption. It is also confirmed that the Sponsor has ample and sufficient land in excess of 1000 acres and can accommodate all the institutions without any inconvenience or at all. It is contended that the Applicant is guilty of material non-disclosure of the fact that the Constituent College and the Kaimosi College have been sharing the premises without any complaint under a written agreement long before the Constituent College opened its doors to the public. The suit, is further deponed, is ill- advised and brought in bad faith. On that background, the Sponsor calls for the dismissal of the suit.

#### THE 12<sup>TH</sup> AND 13<sup>TH</sup> RESPONDENTS' CASE:

26. The 12<sup>th</sup> and 13<sup>th</sup> Respondents also filed a joint Replying Affidavit through Linnet K. Abdalla the Vihiga County Secretary and the Head of the Public Service.

27. It is also contended that the Applicant is not an entity in law and hence lacks the capacity to bring this suit and that that the two institutions have harmoniously co-existed with no interference of the programmes or at all. She confirmed that the County Government had allocated Kshs. 25 Millions in support of the infrastructural development needs as well as the CDF had already set-aside Kshs. 10 Millions to that effect.

28. These Respondents called for the dismissal of the suit with costs.

#### SUBMISSIONS BY THE APPLICANT:

29. On behalf of the Applicant, it was submitted that the Applicant has requisite *locus standi* to institute and sustain the suit given that even leave was granted by the Court on 26/08/2014. While reiterating the contents of the Verifying Affidavit it was submitted that the Commission being a statutory body only operates through resolutions and that it lacked the legal mandate to make the decision it did which was communicated to the Cabinet Secretary through the letter dated 10/04/2014 albeit purporting to upgrade the Kaimosi College to be a Constituent College of the Masinde Muliro University.

30. The Applicant further contends that the Constituent College continues to operate illegally and in contravention of Section 14 of the Universities Act 2012 for want of issuance of an interim authority letter by the Cabinet Secretary as to enable it operate as such. This is in further contravention of Regulation 6(10) of the Universities Regulations 2014 which require in mandatory terms that the letter of authority must be published in the Kenya Gazette, it was submitted. It is further submitted that the Commission contravened Section 43(2) of the Basic Education Act, 2012 in its purport to upgrade the Kaimosi College to be a constituent college.

Further, the Applicant is of the view that since Kaimosi College is a public institution then it cannot be upgraded into a private institution since the same has been funded through the tax payer and that also that the Masinde Muliro University lacks any legal capacity to operate the Constituent College.

31. On the issue of the transfer of the land, the Applicant submitted that the same was hurriedly done and in total contravention of the law leading to the illegal taking over of the Kaimosi College facilities by the Constituent College thereby rendering the students, parents and staff of the Kaimosi College trespassers hence effectively killing the said Kaimosi College. It is further submitted that the above position is compounded by the fact that no commitment has been rendered in Court by the County Government and the CDF on their pledges and further that no evidence is before Court on the particulars of students admitted by the Constituent College and the

nature of the courses being pursued by the said students. The Court has therefore been called to grant the orders sought.

#### THE 6<sup>TH</sup> RESPONDENT'S SUBMISSIONS:

32. On behalf of the Commission, it was submitted while reiterating the contents of the Replying Affidavit and the Applicant's Notice of Motion dated 15/09/2014 and the Affidavit of Musau Ndunda sworn on 21/08/2014 that the Commission acted pursuant to its statutory mandate and did not make any decision that is capable of challenge by the Applicant since its role is to recommend to the Cabinet Secretary that an institution be declared a constituent college, but the final decision rests with the Cabinet Secretary. In essence it was submitted that a mere recommendation with no finality is not amenable to judicial review. The Commission relied on Section 20(1)(d) of the Universities Act, 2012 and Regulations 40 and 41(1) made thereunder in support of this submission. In any event, it was submitted that the Cabinet Secretary rejected the recommendation through his letter dated 06/05/2014.

In support of the above, the Commission relied on the judicial authorities in **Nairobi HCC Misc Application No. 379 of 2013 R vs Director of Physical Planning ex parte Peter Kuguru and Republic Vs Commissioner of Administrative Justice & Another ex-parte John Ndirangu Kinithia (2013) eKLR.**

33. It is the Commission's further submission that since the Cabinet Secretary is statutorily required to make a decision under Regulation 41(1) on receipt of a recommendation from the Commission, it would amount to gagging the Cabinet Secretary in performing his statutory duties on purely speculative grounds if the prayers are to be granted. It was also submitted that the notice in the local daily was purely a public notice and does not constitute a decision amenable to being quashed. The decision in **Nrb. HCCC No. 368 of 2013, In the matter of the National Transport and Safety Authority Act exparte Metrotrums (E.A) Ltd** was cited in support of the proposition.

The Commission further took issue with the way the Applicant challenged the aspect of the immovable property. It was submitted that judicial review is not concerned with private rights and since the Sponsor is not a public body and has no public duty then the remedy sought cannot be granted as it is a subject of civil proceedings. The judicial decisions in **Nairobi JR Misc Application No. 379 of 2013, Nairobi HC Misc Civil Applicant No. 413 of 2007 - In the matter of an application by Eliud Cheptoo & 6 Others (2011) eKLR** and **Commissioner of Lands versus Krust Hotel, Civil Appeal No. 234 of 1995** were relied upon on this argument.

34. Further submissions were made that there is no law which requires that the Applicant to be specifically consulted in order to meet the prescription of public participation. According to the Commission adequate participation took place since the Sponsor being a faith-based organization has members nationally who all took part in the decision-making process. Also the County Government which represents the interests of the County residents together with the Area Member of Parliament were all consulted and took an active role in the process, further to the other Respondents institutions herein and the Ministry of Basic Education.

On the other hand, it is argued that since the membership of the Applicant and extent of its actual representation and impact in the basic education sector remains unknown, the Applicant cannot purport that failure to consult it is deemed as lack of public participation. A calling was made that since the concept of public participation is still nascent in our laws and given that there is no working model of how this is to be determined then the Court has to be guided by the principle of reasonableness and consideration of public interest. The decision of **Thuku Kiuri & 4 Others -vs- The County Government of Murang'a (2014) eKLR** was cited.

35. And, on the issue of public interest it was submitted that Vihiga County has no single University and under Section 26 of the Universities Act, the Commission is required to ensure the

establishment of at least a single public university in each of the county, giving priority to those that do not have any.

The Commission the rested its submissions by calling upon the Court to be vigilant to discourage meddlesome interlopers or mere busy bodies from engaging it and other litigants in unnecessary litigations which end up draining the limited judicial resources. A reference to the cases of **Mumo Matemu vs. Trusted Society of Human Rights Activists & 5 Others (2013) eKLR** and **Republic Vs Commissioner of Police & 2 Others ex parte Kenya Commercial Bank (2014) eKLR**. Was made.

#### **THE 7<sup>TH</sup> & 8<sup>TH</sup> RESPONDENTS' SUBMISSIONS:**

36. The 7<sup>th</sup> and 8<sup>th</sup> Respondents submitted that the Notice of Motion remained incompetent and ought to be struck out on three main grounds namely; It is fundamentally defective for want of compliance with the law since the same was instituted in the Applicant's own name instead of the Republic, the Applicant being non-existing in law cannot sustain the suit and the fact that there is no dispute on the ground as all institutions are co-existing harmoniously.

This court was referred to the judicial authorities of **Bungoma HCC Misc Civil Application No. 79 of 2002** and **Kakamega HC Misc Civil Application No. 71 of 2003**.

#### **12<sup>TH</sup> & 13<sup>TH</sup> RESPONDENTS' SUBMISSIONS:**

37. On behalf of the 12<sup>th</sup> and 13<sup>th</sup> Respondents, Counsel took Court through the substance of Judicial Review in underpinning that the orders sought are discretionary and are not guaranteed. A reference to the case of **Republic vs County Council of Nairobi exparte Rajin Velji Shah (2014) eKLR** was made.

The Respondents further ventured into the circumstances where the remedies in judicial review can be granted and made a reference to the case of **Polycarp Wathuta Kanyago & 2 Others -vs-the County Government of Kirinyaga (2014) eKLR**. It was submitted further that the Applicant had failed to show any illegality, irrationality or anything done *ultra-vires* to warrant the issuance of the orders sought and the case of **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another (2014) eKLR** referred to.

38. On the submission that Judicial Review is about the procedure and not the merits of the case, the Respondents relied on the decision made in **Republic vs. Land Registrar Muranga & 6 Others exparte Isaac Maina Kahacho & Another (2014) eKLR** and while dealing with the issue of consultation of the Applicant the Respondents borrowed heavily from the case of **Republic vs Cabinet Secretary Responsible for Labour and Micro & Small Enterprises & 2 others (2013) eKLR**. The Respondents called for the dismissal of the application with costs.

#### **ANALYSIS & DETERMINATIONS:**

39. On this part, the Court will in the first instance deal with the preliminary issues on the *locus standi* and the competency of the Notice of Motion and therefore venture into the substantive analysis of the main issues.

#### **ON THE PRELIMINARY ISSUES:**

##### **a. The issue of locus standi**

40. It is contended that the Applicant is not a legal entity and as such it does not have the requisite legal standing to institute and sustain the suit.

It is on record that the Applicant is duly registered under Section 10 of Societies Act and as evidenced by the copy of the Certificate of Registration No. 19345 annexed as “**Exhibit MN1a**” in the Verifying Affidavit of Musau Ndunda.

41. The Constitution of the Republic of Kenya, 2010 (hereinafter referred to as “**the Constitution**”) defines a person under Article 260 as under:

**“person” includes a company, association or other body of persons whether incorporated or unincorporated;**

The Applicant therefore being a duly registered Society under the Kenyan law is a person as recognized by the Constitution hence deriving its legal entity.

42. The membership of the Applicant pursuant to Section 4 (under Article 3 of its constitution) comprises of any person with a child in a public school, a school or any educational institution including colleges. However to attain such membership, appropriate entrance fee must be paid. Under By-laws Article 1 (Section 15)(i) of the Applicant’s constitution, a member who falls in arrears with his/her contribution for more than 6 months automatically ceases to be a member and shall have its name struck off the register of members.

Under Section 3 (Article 2) of the Applicant’s constitution, the Applicant was formed to achieve a total of 17 objectives all relating to furtherance of good educational pursuits and highest possible standards by students of Kenya and under Section 3(d) in particular the Applicant aims to achieve the following: -

**“3(d) The association shall represent the interest of parents and children on all matters relating to pre-primary, primary, college and adult education and any other matter relating to the infrastructural development of any institution of basic and higher education in the country.”**

43. From the reading of Applicant’s documentation as filed in Court, although the Applicant does not come out so clearly, it appears to have brought the proceedings on behalf of its members and on public interest. A look at the grounds appearing on the Statement of facts dated 21/08/2014 and filed in Court on 25/08/2014 reveal the Applicant’s challenge to the Respondents’ actions on *inter alia* grounds that the Constitution has both been contravened and is further threatened with contravention.

44. The subject of locus standi is covered under Articles 22 and 258 of the Constitution. Article 22 deals with the enforcement of the Bill of Rights under Chapter 4 whereas Article 258 deals with the enforcement of the entire Constitution. The same is tailored in the following manner: -

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

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

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

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

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

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

45. The above Articles have greatly broadened the issue of locus standi in instances where the Constitution is either contravened or threatened with such contravention, but in any event this Court remains alive to the fact that the standard guide for locus standi in any matter touching on the Constitution must always remain the command in Article 258 of the Constitution.

46. The joy is that this issue is now well stated in our jurisprudence. **The Court of Appeal at Nairobi in Civil Appeal No. 290 of 2012** consisting of a 5-Judge Bench of Honourable Justices Kihara Kariuki (PCA), Ouko, Kiage, Gatembu-Kairu and Murgor reported as **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** in dealing with an argument that the Respondent, an NGO (Trusted Society of Human Rights Alliance) whose mandate includes the pursuit of constitutionalism lacked *locus standi* to challenge the appointment of Mumo Matemu as the Chair of the Ethics and Anti-Corruption Commission, firmly stated as follows: -

***“26. It is hard to maintain the argument that the first respondent did not suffer any injury to warrant this standing to lodge the Petition before the High Court. It is equally hard to maintain the position that he first Respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethic and Anti-Corruption Commission.***

***27. Moreso, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the Courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was filed before the High Court by an NGO whose mandate includes pursuit of constitutionalism and we therefore reject the arguments of lack of standing by Counsel for the Appellant. We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we argue with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.....***

***28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28<sup>th</sup> June 2013..... “the Mutunga Rules” to inter alia, facilitate the application of the right of standing..... The rules reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated in infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of the Constitution.***

***29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or***

*determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.*

*30. It is in consideration that in filing the Petition the 1<sup>st</sup> Respondent was acting not only on behalf of the members and in accordance with the stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1<sup>st</sup> Respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.”*

In view of the foregone analysis and considering the nature of the proceedings before Court, this Court holds that the Applicant has the requisite locus standi to institute the said proceedings on behalf of its members and also in public interest and that the Respondents are denied the joy of winning the race by taking a short-cut; the cause of action at hand ought to be determined on its merits.

**b. On the competency of the Notice of Motion:**

47. It is also contended that the Notice of Motion dated 15<sup>th</sup> September 2014 is fundamentally defective as the same should have been instituted in the name of the Republic and the name of the Applicant as the party seeking the reliefs specifically named in the said application as the exparte Applicant. I have carefully considered the submission alongside the two judicial decisions in support thereof. I have further looked at the Notice of Motion in issue and it is true the same has been instituted in the name of KENYA NATIONAL PARENTS ASSOCIATION as the Applicant instead of the Republic.

48. Whereas this Court agrees with the persuasive findings of the learned judges (as they were) in their separate decisions on the issue, this Court with outmost respect, notes that the said decisions were made in 2002 and 2004 respectively long before the promulgation of the Constitution. Today, this Court is constitutionally obligated under Article 159 to administer substantive as opposed to technical and procedural justice and moreso expeditiously. If this Court is to allow the objection and strike out the Notice of Motion as prayed then the Applicant will possibly come back to Court with another appropriately done application and the result will be that both the parties and the Court will be taken aback. I therefore hold that since the error does not go to the root of the matters before this Court but is only on form the same can be and is hereby overlooked in the spirit of Article 159 of the Constitution with a view to an expeditious disposal of this matter. And as I so find, this therefore takes us to the next set of analysis on the substantive issues.

**ON THE SUBSTANTIVE ISSUES:**

49. Under this limb I propose to deal with two main areas being the province of the judicial review followed by an examination of the legality of the Respondents' actions as complained of by the Applicant.

**On the province of the judicial review:**

50. Judicial review has over time been a subject of litigation and the Court of Appeal in the case of **Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd** in **Civil Appeal No 185 Of 2001** stated its parameters as follows: -

*“Judicial Review is concerned with the decision making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court*

*should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions.”*

The above position was restated in the case of **Republic –vs- Kenya Revenue Authority exparte Yaya Towera Ltd (2008) eKLR** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision making process itself.

51. **The Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. (1)(1) at paragraph 60** gives a caution that it must always be remembered that in every case the purpose of Judicial Review is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

52. Be that as it may, the grounds on which the Court exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300**, the Court citing with approval the cases of **Council of Civil Unions vs Minister for the Civil Service (1985) AC 2** and **An application by Bukoba Gymkhana Club (1963) EA 478** held as follows: -

*“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example , illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision is usually in defiance of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”*

53. This Court is alive to the truism that the grounds upon which it exercises its judicial review jurisdiction are incapable of exhaustive listing due to the developing jurisprudence and as so stated by the Court of Appeal in the case of **David Mugo -vs- The Republic , Civil Appeal No. 265 of 1997(unreported)** that as long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue to extend so as to meet the changing conditions and demands affecting administrative decisions.

54. The above analysis is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) (2005) & EA 43** where the development of judicial review was equated to the Biblical mustard seed which a man took and sow in his field and despite being the smaller of all seeds, it grew to become the bigger shrub of all and became a tree so that the birds of the air came and

sheltered in its branches.

Judicial review stems from the doctrine of *ultra-vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality or impropriety of procedure (the three “I’s”) and has become the most powerful enforcement of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It is said that the grounds of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs Stephenson** in the last century.

55. The above position was also captured by Nyamu, J (as he then was) in **Republic vs Commissioner of Lands exparte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998** (unreported) when he held as follows: -

*“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..... The High Court has the same power as the High Court in England upto 1977 and much more because it has the exceptional heritage of another constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a straight jacket... Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectation... Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigid chained to the past defined situations of standing and look at the nature of the matter before them..... Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”*

56. The above analysis therefore lays a basis for an examination of the other remaining aspects in this suit.

**On the legality of the Respondents’ actions:**

57. This limb will be considered in the following manner and as under: -

a. **The decision by the Commission (6<sup>th</sup> Respondent):**

58. It is the Applicant’s contention that the Commission authored the letter dated 10/04/2014 in a bid to take over the affairs of the Kaimosi College and eventually kill it in favour of the Constituent College. On its part the Commission contends that it only discharged its statutory mandate and it has no interest in the matter whatsoever.

I will reproduce the said letter verbatim so as to clearly lay the issue bare. The same was authored as follows: -

CUE/8/52/VOL.4/6

10<sup>th</sup> April 2014

Prof. J.K. Kaimenyi

Cabinet Secretary,

**Ministry of Education, Science & Technology**

**Jogoo House**

**NAIROBI**

**Thro'**

**Dr. Belio Kipsang**

**Principal Secretary**

**State Department of Education**

**Ministry of Education, Science & Technology**

**Jogoo House**

**NAIROBI**

**Dear Prof. Kaimenyi**

**RE: ESTABLISHMENT OF FRIENDS KAIMOSI COLLEGE AS A  
CONSTITUENT COLLEGE OF MASINDE MULIRO UNIVERSITY OF  
SCIENCE & TECHNOLOGY.**

**The Commission for University Education during its 2<sup>nd</sup> meeting held on 9<sup>th</sup> March 2014 made a resolution to upgrade Friends Kaimosi College to a constituent college of Masinde Muliro University of Ministry of Science & Technology. This was after a thorough evaluation of facilities of the institution for adequacy and appropriateness for degree level education.**

**In view of the above, and in line with Section 20(1) of the Universities Act 2012 and Section 45 of the Draft Universities Regulations 2013, I write to request you to declare the above institution a constituent college of Masinde Muliro University of Science & Technology.**

**Attached please find a brief on the institution and a draft Legal Order for your perusal.**

**Yours Sincerely,**

**PROF. DAVID K. SOME**

**COMMISSION SECRETARY/CEO**

**CC. Professor Corretta Suda**

**Principal Secretary**

**State Department of Science & Technology**

**Ministry of Education, Science & Technology**

**Jogoo House**

**NAIROBI.**

59. This letter solicited the Cabinet Secretary's response which was communicated to the Commission vide the letter dated 06/05/2014 annexed and marked as "Exhibit DKS 1" in the Replying Affidavit of Prof. David K. Some. In effect the Cabinet Secretary declined the Commission's request citing various reasons.

60. The Commission is a creation of the Universities Act, No. 42 of 2012 (hereinafter referred to as "***the Act***") and under Section 4 the Commission is body corporate with defined functions as enumerated under Section 5 of the Act. The Masinde Muliro University is a University as established in law under the repealed Chapter 210F of the Laws of Kenya, that is the Masinde Muliro University of Science & Technology Act 2006.

61. As a fully-fledged University in law, the Masinde Muliro University is empowered under Section 20 (1) of the Act to establish campuses and constituent colleges and it is on this legal background that the said University in liaison with the Sponsor made an application to the Commission for the establishment of its constituent college. The Applicant's argument that the Masinde Muliro University has no legal mandate to create a constituent college is therefore erroneous. The above application process eventually gave rise to the letter dated 10/04/2014.

62. Upon the application, the Commission is legally duty-bound to evaluate it pursuant to Regulation 40 of the Universities Regulations 2014 published as Legislative Supplement No. 31 of 12<sup>th</sup> June 2014 and thereafter pursuant to Regulation 41(1) to communicate with the Cabinet Secretary.

Regulation 41(1) states as under: -

***"41(1) Where the Commission is satisfied that an application for the establishment of a constituent college has complied with minimum requirements as determined in Regulation 40, the Commission shall recommend to the Cabinet Secretary for the declaration of the institution as a constituent college through a legal notice".*** (emphasis added).

Regulation 41(2) states as follows: -

***"41(2) Where the Commission is not under paragraph (1) satisfied, it shall communicate its decision to the Cabinet Secretary and the proposed mentoring University with reasons."***

63. Whereas Masinde Muliro University did not avail a copy of the application it made to the Commission for the establishment of the constituent college, the process of evaluation of the application is governed by Regulation 40 as read with Regulation 5. Regulation 5 principally deals with the requirements which must be in place for the establishment of a University which includes, among many others, those set out in regulation 5(1)(c) thus: -

***"5(1) An application under regulation 4(2) shall be accompanied with a proposal setting out-***

- a. ....
- b. ....
- c. ***The resources, including land, physical facilities, finances, staff, library services and equipment appropriate to and adequate for the proposed academic programmes to be conducted at that University which have been or can be procured and the manner in which there shall be maintained on a long term basis."***

64. It is imperative to note that although the requirements in Regulation 5 are meant for the

establishment of a University, the same are equally important to the establishment of a constituent college since a constituent college acquires a separate legal entity with an independent governance structure upon declaration as so clearly provided for in Regulation 42. Further after a period of 3 years or within such a period as the Cabinet Secretary may deem fit such a constituent college may attain the status of a fully-fledged University. Further the argument by the Applicant that the constituent college requires an interim letter of authority to legally operate is equally erroneous in law since under Regulation 6 that requirement is only meant when a university is being established. A constituent college instead derives its life from the mentoring university.

65. In order to fulfill the above requirements, among others, the Masinde Muliro University in liaison with the Sponsor of the Kaimosi College appeared to have agreed to use the facilities then prevailing at the Kaimosi College as those to be used by the constituent college. However, this arrangement was done in such a manner that both the Kaimosi college would still continue with its programmes alongside the constituent college. Differently put, the Masinde Muliro University and the Sponsor were killing two birds with a single stone.

This position is clearly vouched by the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents who confirm on oath that the two institutions are co-existing with each running its own independent programmes and to that end none is raising any complaint against the other. The only effect this arrangement brought was to suspend the entry of the Kaimosi College first year students for the academic year 2014/2015 who were absorbed in other colleges nationally. Be that as it may, the second year students at the Kaimosi College are continuing with their programmes and already plans are in place for putting up new and modern facilities for Kaimosi College which shall admit students for the academic year 2015/2016 during this year. This is a joint effort of the Sponsor, the County Government, the CDF, Equity Bank and not forgetting the National Government through the Masinde Muliro University.

66. The upshot is therefore that Kaimosi College is not near collapse or being killed in favour of the constituent college but in less than 12 months from now it would have its own independent and modern facilities and shall continue to fully operate as before. It therefore appears that the Applicant's fears are properly and fully taken care of by the Respondents.

67. Now let's get back to the letter dated 10/04/2014, which is fully reproduced hereinabove. It is true that the said letter conveyed a resolution of the Commission which was reached at its 2<sup>nd</sup> meeting held on 07/03/2014 for the establishment of a constituent college. This is because the Commission is a body corporate and only operates through resolutions. However, that resolution when communicated to the Cabinet Secretary and pursuant to Regulation 41(1) becomes a recommendation instead. The Cabinet Secretary remains legally entitled to accept or reject the said recommendation. In other words, the resolution of the Commission is not binding on the Cabinet Secretary and that is why in this instant case the Cabinet Secretary declined to accept the recommendations accordingly.

68. A further careful look at the letter in issue reveals that the same does not talk about any attempt of taking over Kaimosi College, but it is on an upgrade of the institution known as Friends Kaimosi College, and not the Kaimosi College to the status of a constituent college. Logically speaking if the institution was to be upgraded then it means that the same was already in existence and what was sought was just an upgrade as opposed to taking over an institution and setting it up. In this case the constituent college has been up and running. It is therefore possible that this distinction may have escaped the Applicant who appears not to see the two distinct institutions being Kaimosi College and Friends Kaimosi College, the latter being the intended constituent college.

69. That the letter dated 10/04/2014 was written by the Commission in its statutory capacity is not in doubt. It is also clear that the letter was in effect conveying the Commission's resolution as a recommendation and that its contents were not binding. It is therefore my considered finding that the contents of the letter dated 10/04/2014 did not amount to a decision capable of being

challenged and which is amenable to judicial review. The same remained just recommendations without any finality. My above finding is fortified by the persuasive holding of my brother Hon. Justice G.V. Odunga in the case of Republic vs The Commission of Administrative Justice & another ex parte John Ndirangu Kariuki (2013) eKLR where he explored a similar issue and presented himself thus: -

**“ The central issue that the court is called upon to decide is therefore whether a recommendation as opposed to a decision or proceedings is capable of being quashed. It must be pointed out that a recommendation may take two forms. Where the Commission making the recommendation is acting judicially it must act in accordance with its mandate and if it arrives at a recommendation after an inquiry has been made its in which the recommendation is final in nature that would amount to a determination for the purposes of judicial review. That was the position in Republic vs. Attorney –General ex parte Biwott (2002) 1KLR 668, Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, ex parte George Saitoti (supra). However in Njoya & 6 others vs. Attorney General & another (2004) 1 KLR 232 it was held that as regards the justiciability, recommendations or report of any other commission (whether established by an Act of parliament or administratively) are not justiciable for it is a long standing principle of administrative law that only decisions impacting on the rights of individuals (and not recommendations) are amenable to judicial review if they do not confer or take away anyone’s right. Dealing with the issue Warsame, J (as he then was) in Paul Kiplagat Birgen & 25 others vs. Interim Independent Electoral Commission & 2 others(supra) expressed himself as follows;-**

*“It is clear that the letter dated 12<sup>th</sup> July 2011 was written by the 1<sup>st</sup> respondent in its statutory capacity. It is also clear the letter as rightly pointed out by the applicants was requesting or recommending the revocation of the nomination of the applicants and others not before court....It is therefore my decision that there is no decision capable of being challenged and which is amenable to judicial review that was made by the 1<sup>st</sup> respondent against the applicants herein.”*

**Similarly, it is not contended that the 1<sup>st</sup> Respondent had no duty to undertake what it did. The applicant’s contention is simply that it was undertaken in breach of the rules natural justice.... I am not satisfied that the recommendations of the 1<sup>st</sup> respondent amounted to a determination for the purposes of judicial review. They were simply recommendations and the 2<sup>nd</sup> respondent was not under any obligation to act upon them since the 2<sup>nd</sup> respondent is expected to undertake its constitutional and statutory mandate independently and without any directions from any persons. Without the 2<sup>nd</sup> respondent admitting them as part of the material upon which it would determine the ex prate applicant’s eligibility, 1<sup>st</sup> respondent’s views remain just that- recommendations.”**

And as said since the recommendation lacked finality, I say no more.

70. Lastly it remains clear in this Court’s mind that the contents of the letter in issue were rejected by the Cabinet Secretary.

**b. On the role of the 1<sup>st</sup> Respondent (Cabinet Secretary):**

71. Under Regulation 41(1) aforesaid, the Cabinet Secretary is statutorily empowered and upon being satisfied that all the requirements have been met to proceed to declare an institution as a constituent college. This, however, has to be done through a legal Gazette Notice. It is on record that upon the rejection of the recommendation the Respondents took the necessary steps towards compliance and vide its letter dated the 14/08/2014 the Commission wrote to the Cabinet

Secretary recommending the establishment of the constituent college. However the record is silent on the outcome of the said letter.

72. To agree with or reject the recommendations of the Commission contained in its letter dated 14/08/2014 is a legal preserve of the Cabinet Secretary as long as it acts within the law. If this Court is to restrain the Cabinet Secretary from considering the letter in issue and to make a decision thereto without any legal justification, then it will in effect be curtailing the Cabinet Secretary from discharging its lawful statutory duty. In any event it cannot be taken for granted that the Cabinet Secretary will agree with the recommendations.

Going by this Court's analysis of the first issue herein above on the letter dated 10/04/2014 and its subsequent holding, I find no justification whatsoever in impeding the Cabinet Secretary from discharging its statutory duty as the Applicant has failed to furnish any. In any event the Applicant remains at liberty to challenge the decision which may be reached by the Cabinet Secretary. I therefore rest this issue with holding of Hon. Justice Edward Miriithi in the case of **John Florence Maritime Services Limited & another vs Cabinet Secretary for transport and infrastructure & 3 others (2014) eKLR** when concurring with the holding in **Mombasa HC Judicial Review case No 130 of 2013** presented himself as under: -

*“20. The court further made a determination in its judgment that;-*

*“(t) he above analysis leads this court to reach the conclusion that the imposition of FERI and COD is with a legal basis. The statutory bodies implementing it are doing so in the discharge of their statutory duties. This court is not persuaded that they have acted ultra-vires or in breach of statutory duty. It has not been demonstrated how the implementation of that procedure is unfair, unreasonable or discriminatory.”*

73. And, Hon. Justice Ngaah Jairus had this to say in **Thuku Kirori & 4 others –vs- The County Government of Murang'a (2014) eKLR**.

*“...Moreso, where a statute or the constitution for that matter, has expressly delegated specific functions, duties, or responsibilities to particular organs, state officers or otherwise, the court will be hesitant to intervene and curtail these organs efforts to exercise their statutory or constitutional mandates;...”*

(c) **On public participation and consultation:**

74. It is the Applicant's case that as a major shareholder in the education sector, it was neither consulted nor did it consent to the action of the Respondents touching on Kaimosi College. On the other hand, the Respondents are of a contrary view. They hold the view that adequate consultations were made and the public participated in the process. They are not of the view that the Applicant was to be particularly consulted neither was the Applicant to give its consent to validate the process.

75. The decision in this matter to be taken by the Cabinet Secretary is whether or not FRIENDS KAIMOSI COLLEGE should be declared a constituent college of Masinde Muliro University. That decision has not been reached at so far. In that case, the matter is squarely within the ambit of judicial review since once the decision is made the Court's jurisdiction in judicial review is ousted. (**See Republic vs Cabinet Secretary responsible for Labour & Micro and Small Enterprises & 2 others ex parte (2013) e KLR**).

76. The concept of public participation is anchored in Articles 10 and 174 of the Constitution. Under Article 10 the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies or interprets any law or makes or implements public policy decisions. Under Article 10(2) of the Constitution, the national values include participation of the people,

human dignity, equity, social justice, inclusiveness, equality, human rights among others.

77. The principal purpose of public participation is to accord an opportunity to the public to participate in the decision making processes towards enhancement of good public administration. The extent of such participation unless prescribed by a statute would mainly depend on the nature of decision to be made, but always bearing in mind the constitutional dictates, public interest among other considerations.

78. In this case, the Respondents indicate that the larger public was involved in various ways. First, the Sponsor being a faith-based Organization in Kenya has significant membership nationally who participated in the process. Second, the County Government of Vihiga County was fully involved and who represents the interests of the entire County. Indeed the County Government of Vihiga has already set-aside Kshs. 25 Million for the construction of modern facilities for Kaimosi College. Third, the Member of Parliament for Hamisi Constituency who represents the people of Hamisi Constituency also took part and has even set-aside Kshs. 10 Millions in support of the project. Fourth, Kaimosi College fraternity. Fifth, the Masinde Muliro University fraternity. Sixth other partners including Equity Bank who are ready to put up accommodation facilities.

79. Against this background is the issue of public interest. Section 26 of the Act provides as under: -

***“26. The commission shall ensure the establishment of public Universities in each of the county, giving priority to counties that do not have Universities immediately after following the coming into force of this Act.”***

The Act came into force on the 13/12/2012. It is on record that there is currently no single university within the County of Vihiga hence the deliberate efforts by the Respondents to collectively ensure that this statutory requirement is achieved.

On that footing however what needs to be clarified is whether the constituent college will be a public institution moreso given the Applicant’s contention that indeed it is a private institution. It is not in doubt that Masinde Muliro University is a public University. It is also not in doubt that the institution to be declared as a constituent college derives its legality from the Masinde Muliro University. It is also not in doubt that the Masinde Muliro University was established and is maintained out of public funds. Again it is not in doubt that the operations of all the County Government of Vihiga and those of the M.P. for Hamisi Constituency are funded from public funds.

80. Section 2 of the Act defines a public university to mean: -

***“a university established and maintained out of public funds;”***

I therefore wish not to further restate with certainty that the intended constituent college shall equally be a public institution.

81. Returning to the issue of participation and in consideration of all the circumstances in this particular case including the nature of the decision to be made, the need to at least have the maiden university in Vihiga County, the immense public interest involved, this Court is of the considered view that indeed a very large majority of the public participated in the process and the process graciously blessed with the public good. This Court would wish to fully associate itself with the sentiments of Hon Justice Ngaah Jairus in the case of **Thuku Kirori(supra)** when he stated as follows: -

***“My understanding of the concept of public participation as contemplated under Articles 10 and 174 of the constitution is that participation of the public in affairs that concern***

*then should not be normally interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer, the ultimate goal for public engagement as envisaged in the constitution is for larger public benefits...”*

**(c) On the alleged fraudulent land transfer:**

82. The Applicant has raised serious issues relating to alleged fraudulent land transfers and dealings arguing that Kaimosi College has ended up being defrauded despite raising objections in vain. This is contained in paragraphs 7 to 16 inclusive of the Verifying Affidavit of Musau Ndunda. The Respondents on their part have instead demonstrated how the land in issue which was originally registered in favour of the Sponsor was sub-divided and part of it transferred to the constituent college so as to meet the requirements towards the declaration as a constituent college. Certificates of Postal Searches in respect of the parcels of land known as L.R 1087/3 (Orig No. 1087/1/1) and L.R 1087/2 were annexed as exhibits in the Replying Affidavit of Prof, Manyasa O.J. Nandi alongside the other accompanying documents. On their part no fraud or at all was visited in the transactions.

83. The process towards the acquisition of the above titles by the constituent college was completed when the two indentures were registered on the 17/06/2014 and 18/07/2014 respectively in its favour. The issues therefore raised by the Applicant needs an in-depth analysis with the benefit of viva-voce evidence in a bid to ascertain whether fraud was committed or not and of course the resultant effect thereof.

84. As indicated earlier on, when this Court was looking at the province of the judicial review and on public participation and after referring to binding and persuasive judicial decisions, once a process culminates with a decision having been made then any challenge on the merits or otherwise of the resultant decision certainly is out of the judicial review umbrella. That is the case here.

Further it is evident that the facts in issue are disputed and as stated hereinbefore an in-depth examination thereof is required. This aspect therefore is not a suitable case for judicial review. Hon Justice G.V. Odunga in a similar finding in the case of **Republic vs Land Registrar Murang'a & 6 others ex parte Isaac Maina Kahacho & another (2014) eKLR** held as follows:

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*“34. In this case issues of fraud have been raised by the applicants. Issues such as fraud, forgery and similar wrong doings are in my view issues which can only be determined during a proper trial and not on conflicting affidavits. It is therefore trite that fraud or negligence as the case may be, is a matter, which, unless the facts and the contents are clearly obvious, need oral evidence to establish. (See: **Trust Bank Ltd & another vs Investech Bank Ltd & 3 others Civil Appl Nos. Nai 258 and 315 of 1999** and **Westmont Power Kenya Ltd vs Bosley Fredrick & Mohammed Ali t/a Continental Traders & Marketing Civil Application No. Nai 135 of 2003 (2003) KLR357.**”*

85. Similarly in the case of **Seventh Day Adventist (East Africa) Limited (supra)** it was held, and this Court fully concurs with that: -

*“13. Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute, the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would have the parties to ventilate the merits of the dispute in the ordinary civil suits.”*

The above position was equally taken by Hon. Lady Justice C.W. Githua in the case of **Polycarp Wathuta Kanyango 2 others vs The County Government of Kirinyaga (2014) eKLR.**

86. Notwithstanding the foregoing, it is on record that this issue on the transfer of land was initially raised by Kaimosi College vide its letter dated 01/07/2014 to the County Government when it had placed a notice in the Daily Nation on 06/06/2014 calling for any representations or objections. However, the said Kaimosi College recanted the above position and filed a Replying Affidavit through ONZERE BENSON MUDANGALE, its current Principal, on 21/10/2014 where it made it clear that there exist no dispute at all between itself and/or any other Respondent or at all. This development therefore leads to the inevitable position that after all there exists no dispute for adjudication before Court on this aspect. The foregoing also rests the issue of the notice carried in the Daily Nation on 06/06/2014.

**(d) On the issue of the first year students joining Kaimosi College in the academic year 2014/2015:**

87. It is evidently demonstrated by the Applicant that Kaimosi College was invited to take part in the year 2014 P1 Selection exercise. This was vide the 2<sup>nd</sup> Respondent's letter dated 20/06/2014 which is annexed and marked as Exhibit "MN 8a" in the Verifying Affidavit. The exercise was duly carried out and several deserving students selected to join as first year students by September 2014 upon the Cabinet Secretary and 2<sup>nd</sup> Respondent releasing their appropriate letters.

The Applicant contends that as a result of the unwarranted acts of the Respondents, the said students have not been issued with the letters and have not been able to join Kaimosi College as first year students for the academic year 2014/2015.

88. The Respondents on their part hold the view that whereas the selection was duly conducted and students earmarked for joining Kaimosi College as alleged, consultations between the necessary parties led to the Cabinet Secretary and the 2<sup>nd</sup> Respondent distributing the said students to other colleges nationally and that at the moment there are no students to be admitted into Kaimosi College for the academic year 2014/2015. The Kaimosi College however confirms that it will admit students for the academic year 2015/2016.

89. This Court has been called under prayer 7 of the Notice of Motion dated 15/09/2014 to issue an order of Mandamus against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents compelling them to release and forward the calling/admission letters to all the successful students to enable them join the Kaimosi College. However, given the fact that the said successful candidates were distributed and absorbed in other colleges nationally then even if this Court issues the said order it will be tantamount to acting in vain, an action which this Court is hesitant to engage in and indeed frowns at it. I therefore hold the position that since none on the said students or their parents have raised such any concern like still awaiting to join Kaimosi College, issuing such an order is tantamount to acting in futility.

90. Since an order of Mandamus is aimed at compelling the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same, the circumstances of this case dictates otherwise since the students who were to join the Kaimosi College in the academic year 2014/2015 are not there hence the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have no such duty to discharge. In the case of **Shah -vs- Attorney General (No. 3) Kampala HC MC No. 31 of 1969(1970) EA 343** Gondie, J clearly expressed himself as follows;-

**“Mandamus is eventually English in its origin and development and it is therefore logical that the court should look at an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent...”**

In our case I wish to state that there is no such injured party in whose benefit the order can be made.

e. **On the legality of the Board of Management of the Kaimosi College:**

91. The Applicant has also sought a prohibition to restrain the Members of the Board of Management of Kaimosi College from transacting any business on its behalf. This is based on the argument that the members' tenure of office expired sometimes in March 2014 since they had been appointed on 29/03/2011 for a term of 3 years and which term has not been extended to date. Exhibit "MN-10" which comprises of their Appointment letters confirms the these appointments.

92. The said Board Members of the Kaimosi College were appointed under the repealed Education Act, Chapter 211 of the Laws of Kenya alongside the Education (Board of Governors) Order 1969. Upon the said repeal of the Education Act, Chapter 211 of the Laws of Kenya, the affairs of the Kaimosi College were therefore brought into the ambit of the **Technical and Vocational Education Training Act, No. 29 of 2013** (hereinafter referred to as '***the Training Act***') since it fell in the category of a "Vocational Training Centre" which is defined under Section 2 thereof as follows: -

***"vocational training centre" means an institution providing training leading to the awards below the level of diploma."***

The above is compounded by the fact that Kaimosi College offers P1 Teachers training leading to the award of Certificates as evidenced by the letter dated 20/06/2014 by the 2<sup>nd</sup> Respondent on the selection of students.

The Training Act also defines a 'teacher trainer college' as follows: -

***"teacher trainer college" means an institution offering technical teacher training at diploma level."***

93. Be that as it may, the Training Act re-organizes the entire arena of all training institutions in many aspects including, and in the case of the vocational training centres' category, the establishment of the Board of Governors and the appointment of members thereto. To achieve this re-organization, the Training Act given a grace period of 2 years to the institutions under its mandate to seek accreditation from the Technical and Vocational Education and Training Authority as established under Section 6 thereof.

Section 58 (1) of the Training Act provides: -

***"58(1) Notwithstanding the provisions of the Education Act or regulations made thereunder, all technical or vocational training institutions established by Orders made under that Act shall within a period of two years from, the date of commencement of this Act, seek accreditation from the Authority, in accordance with the provisions of this Act."***

The Training Act came into force on 24/06/2013 except Parts VIII and IX which commenced on 26/05/2014.

94. In recognition, inter alia, of the fact that there may be some institutions which have Board Members whose terms are likely to come to an end before the alignment of the operations of the institutions with the Training Act, the Training Act states in Section 58(2) as follows: -

***"Notwithstanding the provisions of sub-section (1) all acts, directions, orders, appointments, requirements, authorizations, other things given, taken or done under, and all funds, assets and other property acquired by virtue of those Orders shall, so far***

***as not inconsistent with this Act, be deemed to have been given, taken, done or acquired under this Act.”***

95. Pursuant to Section 58(1) of the Training Act, the Kaimosi College must be in the process of aligning itself with the new law and in doing so it requires decisions to be made which decisions can only be done by the Board of Governors. By prohibiting the Members of the Board of Governors from discharging their statutory duties the operations of the College would grind into a halt to the total detriment of the greater public at large. In view of the provision of section 58(2) of the Training Act and in the circumstances of this matter and by taking all relevant considerations thereto including public interest, this Court finds against the grant of the order as sought.

**The Prayers sought in the application:**

96. The above elaborate analysis of the various issues and aspects of the matters in controversy before Court has led to the consideration of all the prayers sought in the Notice of Motion dated the 15/09/2014. The analysis clearly reveals that the Applicant has fallen short of convincing this Court that it is deserving of any of the prayers sought in the said application.

**CONCLUSION:**

97. The upshot is that the Notice of Motion dated 15/09/2014 is for rejection and the same be and is hereby dismissed with costs.

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 22nd DAY OF January 2015.**

**A.C. MRIMA**

**JUDGE**