REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS CIVIL APPLICATION NO. 114 OF 2013

IN THE MATTER OF THE APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SUSPENSION OF ISAYA KAMAU KAGWIMA ON THE

18TH NOVEMBER, 2013

REPUBLIC…….……...……..….APPLICANT

-VERSUS-

KIRINYAGA UNIVERSITY COLLEGE & ANOTHER…….....1ST RESPONDENT

UNIVERSITY COLLEGE……..2ND RESPONDENT

ISAYA KAMAU KAGWIMA……..……..EX PARTE APPLICANT

JUDGMENT

1. **INTRODUCTION:**

The 1st Respondent is a university college (hereinafter to be referred to as the college) established as a constituent college of Jomo Kenyatta University of Agriculture and Technology established under an act of Parliament to provide learning and education to its students. The 2nd Respondent is a disciplinary body established by the University College to regulate conduct and the discipline of students while studying at the college. The exparte applicant is a student at the college and was a student leader during the material time when the riots by students of the college occurred on 15th October, 2013.

2. Following the strike and riots by students the University was closed for some period of time and later opened upon which disciplinary action was taken against the students the college felt participated or organized the strike. The exparte applicant was among the students who were disciplined by the 2nd Respondent and for his part, he was suspended for 3 years. The exparte applicant felt aggrieved and sought leave to challenge the decision in this Court vide Summons

dated 21st November, 2013 and was granted the leave on 4th December, 2013 and through a substantive Notice of Motion dated 10th December, 2013, the exparte applicant sought the following orders of Judicial Review:

i. ***That an order of certiorari do issue to remove to this court for purposes of quashing the decision of the disciplinary committee of the Kirinyaga University College of 18th November, 2013 suspending the Applicant from the University.***

ii. ***Costs of the application.***

3. The application was supported by statement of facts and verifying affidavit that accompanied the application for leave to file judicial review against the said decision to suspend the applicant for 3 years as a disciplinary measure. The Applicant further filed a Supplementary Affidavit sworn on 27th January, 2014 to support his case. He also filed submissions through his counsel Mr. Magee.

4. The Respondents opposed the application through a replying affidavit by **WALLACE KAMAU**, an Ag. Registrar of Academic Affairs and a further affidavit by same person and also submissions filed by Kamotho Njomo advocate for Respondents.

5. **The exparte Applicant's Case**

The exparte applicant stated that he was a 1st year student at the college pursuing a degree in Bachelor of Commerce when he was unfairly and unprocedurally suspended for taking part or organizing a strike that led to disruption of programmes at the university.

6. The exparte applicant opined that the suspension did not follow due process and infringed on his fundamental rights and freedoms. He faulted the decision by the college for picking him out among entire student community saying that the same amounted to inhumane and degrading punishment. He also faulted the decision by the Respondents to suspend him stating that the same amounted to criminalization of his right to participate in a peaceful demonstration. His view was that only a court of law could punish him for any crime, if any, and that the respondent could not usurp that role. In any event, the Applicant submitted that he never committed any offence and no evidence in regard to a criminal case was presented to the 2nd Respondent during the disciplinary proceedings on **14th November, 2013** and that the criminal case was not a subject of the said proceedings. The exparte applicant viewed the response by the Respondents as clear demonstration of their bias against him for the reason that he was an elected student leader championing the interests of the students at the college. He submitted no witness positively identified him and that the allegations against him were too general and ambiguous.

7. The exparte Applicant further challenged the disciplinary proceedings against him saying that the same breached his right to a fair hearing since he was expressly denied legal representation by the Respondents during the disciplinary proceedings conducted on 14th November, 2013. While citing the provisions of ***Article 47*** as read together with ***Article 50 (1) (2) (a) (b) (c)*** and ***(g)*** of the **Constitution**, the exparte Applicant submitted that his right to legal representation is a fundamental right and sacrosanct to the Constitution and could not possibly be denied and in view of the express denial the disciplinary proceedings were rendered unprocedural, unconstitutional and therefore null and void.

8. The exparte Applicant faulted the respondent's regulations regarding "representation" arguing that the same was legally and grammatically misplaced and that the same was mischievously placed in the regulations to deny the exparte applicant his constitutional and statutory right to legal representation. He faulted the response by the college through the affidavit of Wallace Kamau for holding that the right to legal representation only applies to criminal proceedings. According to the Applicant, a right to legal representation is inimitable and inherent and is never granted but belongs to citizens of Kenya as of rights. He further responded to the Respondents' contention

that he should have filed a constitutional petition if he felt that his constitutional rights had been infringed, by stating that the denial of that right can be challenged by Judicial Review. He relied on the authority in the case of **OLIMA -VS- R (1991) KLR** where it was held that since the accused person had been denied legal representation through no fault of his making, the attendant conviction was quashed and set aside.

9. The exparte applicant also grounded his motion on the alleged fact that the

Respondents denied him a fair hearing by introducing new/fresh allegations at the disciplinary hearing other than those that were contained in the suspension letter dated 25th October, 2013 and for which he was invited to answer. He submitted that the charges that were read to him when he appeared before the disciplinary committee were materially different from those set out in the Notice to appear. He drew this Court's attention to minute 7/11/2013 an argued that he was subjected to trial by ambush that rendered the whole process an abuse to the cardinal principle of natural justice.

10. The exparte applicant further alleged that the disciplinary process was flawed and unfair as it did not show how the decision to suspend him for 3 years was arrived at and further that he was denied access to the evidence that were to be used against him before hand. He accused the Respondents of sneaking in new evidence at the disciplinary hearing contrary to the procedural rules and thereby denied the exparte applicant fair hearing. He relied on the authority in the case of **GATHIGIA -VS- KENYATTA UNIVERSITY (2008) KLR 587** to buttress his position that withholding evidence was a breach of his right to a fair hearing.
11. The exparte applicant in addition to the above further faulted the Respondents for holding the disciplinary hearing in camera and further that the disciplinary committee that heard and decided the case was not properly constituted as per the regulations of the college. He opined that 2nd Respondent lacked quorum and that in the light of the same any deliberations and/or decisions were a nullity and irregular.
12. **The Respondents' Case**

The Respondents averred that the exparte applicant as a student at the college subscribed to the rules and regulations that ensures discipline and good conduct of students at the college. They averred through a sworn affidavit by Wallace Kamau that students are expected to read and understand the regulations upon admission to the college. Mr. Njomo, counsel for the Respondents argued that the exparte applicant was denied legal representation because the regulations of the college bans legal representations and that proper channels for communication on academic and welfare issues are provided by the college. He faulted the exparte applicant for not following those channels but instead got involved with destruction of property belonging to the college.

13. In their written submissions in objection to the motion before Court,

the Respondents held that as an institution, it had powers to discipline students to ensure that their conducts are regulated in line with the objectives of the college. They maintained that the 2nd Respondent strictly followed the laid down procedures and the exparte application had no merit.

14. On the ground of denial of right to life by the 3 year suspension, the Respondents observed that the suspension itself was not unconstitutional as the applicant cannot argue that he has been denied right to education. They argued that the rights of exparte applicant cannot override the rights of other students or can it justify destruction of property or eviction of lecturers from lecture halls. They relied on the authority in the case of **Trusted Society of Human Rights Alliance -VS- ATTORNEY GENERAL & 2 OTHERS** which was quoted with approval by Justice Lenaola in the case of **MICHAEL MUTINDA MUTEMI -VS- PERMANENT SECRETARY MINISTRY OF EDUCATION & 2 OTHERS [2013] eKLR** where it was held that a constitutional petition must state with precision the provisions of the Constitution which are alleged to have been contravened and the manner in which the rights have been infringed. The Respondents submitted that it is not enough for the Applicant to claim that his rights have been

infringed but must provide material particulars of the infringements and in their view the same had not been demonstrated.

15. In response to the quoted authority in the case of **GATHIGIA –VS- KENYATTA UNIVERSITY** by the exparte applicant, the Respondents submitted that Justice Wendoh in that case in fact held that the discontinuance of a student from the university was not a denial of right to life.
16. The Respondents responded to the allegation of discrimination by the applicant who alleged that he was picked out from entire student community, by stating that the penal action taken against him did not amount to inhuman treatment.
17. On the contention by the exparte applicant that the decision to suspend him amounted to criminalizing of his right to peaceful demonstration, the Respondents contended that the demonstration was irregular for failure to seek authorization. The Respondents further contended that the demonstrations were violent and led to destruction of property. They accused the exparte applicant for not utilizing the channels of communications opened and/or informing the Police prior to the demonstrations.
18. On the question of legal representation and fair hearing, the Respondents maintained in their submissions that their regulations do not allow advocates to represent those facing disciplinary hearing before the disciplinary committee. They argued that the Constitution only guarantees representation of an "accused person" in a criminal trial in a court of law but that the same does not apply to disciplinary proceedings in a university. He relied on the authority in the case of **PATRICK MBAU KARANJA -VS- KENYATTA UNIVERSITY [2013] eKLR** where it was held that administrative disciplinary process such as Students Disciplinary Committee is not expected to conduct its proceedings like a court of law. They also relied on the authority in the case of **R -VS- KENYATTA UNIVERSITY** where Musinga J, as he then was found that there was no breach of natural justice demonstrated in the case. The Respondents opined that the Applicant had not also demonstrated to this Court that principles of natural justice had been breached by the 2nd Respondent in any substantial manner.
19. In response to the allegation by the exparte applicant that he was exposed to unfair trial and trial by ambush, the Respondents faulted the exparte applicant for not seeking clarifications on the nature of accusations that the letter dated 25th October, 2013 entailed. They further contended that the applicant did not show that he was unable to defend himself in view of the charges that were read to him.
20. On the question of holding the disciplinary proceedings in public, the respondents argued that the exparte applicant was wrong in interpreting the provision of Article 50 of the constitution and contended that the right to public hearing only applied to proceedings before a court of law and that this ground was not among the grounds contained in the statement that was filed by the exparte applicant at leave stage. They therefore asked this Court to disregard the same citing the provisions of ***Order 53 Rule 4*** of the Civil Procedure Rules. In addition to this they relied on the case of **KHOBESH AGENCIES LTD. & 32 OTHERS –VS – MINISTER OF FOREIGN AFFAIRS & INTERNATIONAL RELATIONS & 4 OTHERS [2013] eKLR** where it was held that a party is not entitled to rely on any ground or seek any relief apart from the one indicated in the statutory statement. They also cited the case of **REPUBLIC -VS- ATTORNEY GENERAL & 2 OTHERS EX PARTE ONESMUS WAMBUA KASIVO [2014] eKLR** where the Court held that new grounds after leave has been granted cannot be entertained in view of the clear provisions of ***Order 53 rule 4(1)*** of the **Civil Procedure Rules**.
21. The Respondents admitted that the disciplinary Committee lacked quorum including the Dean of Students, one representative of the Senate and two crucial students representatives. However, the Respondents averred that the exparte applicant was not granted leave on the same. They further submitted that one Rev. Allan attended the meeting as Dean of Students though his name was left out in the minutes inadvertently and that the same was to be rectified in the subsequent meetings. They have further faulted the exparte applicant for not raising the issue of the quorum hitch at the disciplinary hearing only to raise it upon reading of the minutes.
22. On the issue of lack of evidence at the disciplinary committee to show that the exparte applicant participated in the strike, the Respondents submitted that it was wrong and untenable to consider the merits of the decision of the disciplinary committee in a Judicial Review.
23. The Respondents further denied the allegations by the exparte applicant that the charges were not

fully disclosed to him when he listed them in the verifying affidavit at leave stage of the Judicial Review proceedings. On the issue of the process of arriving at a decision, the Respondents contended that the Committee was mandated to regulate and adopt its own procedure in arriving at the decision to suspend and that the same was arrived at unanimously.

24. They denied withholding any evidence arguing that no witness was called and that the only evidence relied upon were annextures WK2, WK3 & WK4 exhibited in the affidavit by Wallace Kamau, the Ag. Registrar of Academic Affairs. Furthermore they argued that they were not bound by rules of evidence and no prejudice was occasioned to the exparte applicant in the conduct of the disciplinary proceedings. They further cited the authority in the case of **SIMON GAKUO –VS- KENYATTA UNIVERSITY & 2 OTHERS MISC. CIVIL APPLIC. NO. 34 OF 2009** where the court held that the *"audi alteram partem"* rule (which means "hear the other side") should not be interpreted to mean a full adversarial hearing anything or anything close to it as per court room situations.
25. The Respondents have further opposed the motion on the ground that the exparte applicant did disclose all the material facts about the case and particularly pointed out the existence of criminal case facing him, citing the authority in the case of **REPUBLIC –VS- PHILIP KISIA, THE TOWN CLERK, CITY COUNCIL OF NAIROBI & ANOR EXPARTE BESPOKE INSURANCE BROKERS LTD [2010] eKLR.** The Respondent maintained that a party who approaches the court for Judicial Review must do so with clean hands and in good faith. They argued that although the applicant is presumed innocent until proven guilty, we may be convicted making it a possibility of two conflicting orders being issued by two courts. Mr. Njomo for the Respondent further argued that the applicant did not seek orders of mandamus to compel the college to readmit him and that the remedy of certiorari is not sufficient to address the concerns of the applicant.
26. The respondent's counsel further faulted the applicant for choosing to come to court when other remedies were available. He pointed out that the college regulations provided for appeal to the Principal. In his view Judicial Review remedy was not the best option and relied on the authority of **R –VS- Birmingham CITY COUNCIL EXPARTE FERRERO LTD (1993) 1 AULER** where it was held that where alternative remedy especially where Parliament had provided a statutory procedure for appeal, Judicial Review would be granted only in exceptional cases. The Respondents' view is that the applicant should only come for Judicial Review remedy where the alternative statutory remedy is inadequate and their view was that the other alternative remedy provided in their regulations was adequate.
27. The Respondents finally urged this Court to follow the decision in the case of **REPUBLIC –VS- EGERTON UNIVERSITY EXPARTE ROBERT KIPKEMOI KOSGEI [2006] eKLR** where Justice Musinga J., as he then was, quoted on approval the decision by Justice Nyarangi in **NYONGESA & 4 OTHERS –VS- EGERTON UNIVERSITY COLLEGE** and observed that courts in Kenya have no desire to run universities or any other bodies and that courts loath to interfere with their decisions. He however, observed that courts will interfere and quash decisions of such bodies where it is manifest that the decisions are made unfairly without hearing the other parties.
28. I have considered the application, the grounds upon which it is made and the response made by the college. I have also considered the submissions very ably made by **Magee Advocates** for the exparte applicant and **Kimotho Njomo Advocate** for the Respondents who made good submissions substantively but made an erroneous observation in his closing remark which I feel deserve a comment from this Court before I embark on the issues for determination in this motion. Mr. Njomo in his closing remarks quoted a High Court decision in the case of **REPUBLIC –VS- EGERTON UNIVERSITY EXPARTE ROBERT KIPKEMOI KOSGEI** and urged this Court to be "guided" by the same authority in determining this Motion. While this Court concurs with that decision, it is important to note that courts of concurrent jurisdiction do not guide or bind one another. At best the decisions are of persuasive value and it is wrong to state that the decision of one judge binds or guides another judge in a similar court of concurrent jurisdiction. This Court is guided and bound by decisions of Courts of Appeal and the Supreme Court and it is in this respect that I agree with the Respondent's counsel that the decision of Nyarangi J.A. as he then was, in the case of **NYONGESA & 4 OTHERS –VS- EGERTON UNIVERSITY COLLEGE** is binding. However, luckily this is not an issue or part of the issues

in this Motion and so the issue rests there.

29. There are a number of issues that this Motion and the response has brought up. There are the main issues and preliminary issues. I will begin with the preliminary issues and so the issue rests there.

Preliminary Issues

i. Whether the Applicant has raised new grounds in his Motion and submissions for consideration other than those raised in the statutory statement before leave was granted.
ii. Whether the applicant can apply for Judicial Remedy when other remedies are available.
iii. Whether or not the remedy of certiorari is sufficient.

30.(i) **Whether the exparte applicant has raised new grounds**.

The Respondents contended that the exparte applicant raised a new ground by holding that the proceedings leading to the suspension were not held in public and that the decision to suspend him also was not done in public. It is true that an exparte applicant upon filing an application for leave to file for Judicial Review accompanied by statements and verifying affidavit cannot be allowed at the hearing of Motion to depart from those grounds unless he/she seeks leave of court to amend and add new or delete some of the grounds in accordance to ***Order 53 rule 4 (2).*** The authorities cited by the Respondents to wit the case of **KHOBESH AGENCIES LTD. -VS- MINISTER OF FOREIGN AFFAIRS & INTERNATIONAL RELATIONS & 4 OTHERS (SUPRA)** and the case of **EXPARTE ONESMUS WAMBUA KASIVO (SUPRA)** are clear on this point and I fully agree with them. However, the exparte applicant in ground 6 of his statement that accompanied the application for leave raised the ground that the disciplinary proceedings were not held in public and that the decision was equally not made in public. He is therefore perfectly in order to rely on the ground and I am bound to consider whether the same prejudiced him or adversely affected his right to a fair hearing. I reserve the determination of the issue for now but will do so later in this judgment.

31. I am however, persuaded by the Respondents' contention that the issue of quorum of the disciplinary Committee that decided/determined that the applicant be suspended though a valid point was not raised at leave stage. However the exparte applicant was granted leave by the court on 18th December, 2013 to file supplementary affidavit which he did on 27th January, 2014 where he brought up the issue of illegality of the disciplinary committee that determined his fate. The Respondent responded vide an affidavit by Wallace Kamau sworn on 31st January, 2014. The big question then is whether the issue can be canvassed at this stage and be considered. The provisions of ***Order 53 Rule 4 (2)*** of the Civil Procedure Rules provides as follows:

> ***"The High Court may on the hearing of the motion allow the statement to be amended, and may allow further affidavits to be used if they deal with a new matter arising out of the affidavits of any other party to the application and where the applicant intends to ask to be allowed to amend his statement or use further affidavits he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits."*** (emphasis made)

32. The purpose for ***Order 53 (4) (1)*** of the **Civil Procedure Rules** was to ensure that a party has adequate notice of what grounds an applicant will be relying on in order to get a fair chance to respond to the same. This is especially so in the sense that judicial procedure under ***Order 53*** in its nature is special as it is self-regulating with its unique special procedures. The spirit of the procedures is the same as the other rules in the **Civil Procedure Rules**. It is to give notice to the opposing party on what to expect and defend himself adequately. Was the Respondent ambushed with the new ground in this motion? The answer is in the negative because as indicated above, they were made aware of the sentiments and in fact responded as I have highlighted. I also find that the requirements under ***Order 53 (4) (1)*** is not absolute but is subject to the provisions of ***subsection (2)*** which I have highlighted above. I do find that though the exparte applicant did not

amend his statement as provided, he did seek leave and was granted leave to file a supplementary affidavit which he did and raised a legitimate concern about the composition of the disciplinary committee. Having raised it in a supplementary affidavit, I do find that the objection raised by the Respondents are merely technical in nature. In that regard I do make a slight departure with utmost respect to the decision in **REPUBLIC –VS- A.G. & 2 OTHERS EXPARTE ONESMUS WAMBUA KASIVO** because I find that under ***Article 159 (2) (d)*** this Court cannot close its eyes on legitimate issues properly brought up through affidavits filed pursuant to ***Order 53 Rule 4 (2).*** The Respondents got adequate notice and chance to respond to the allegations of the illegality of the disciplinary committee and they in fact responded. This Court shall therefore consider the issue along the other issues shortly.

33. On the question of availability of other remedies, I do find that an applicant cannot be prevented from seeking justice through Judicial Review because of availability of other remedies. In any event, the remedies alluded to by the Respondents are not statutory in nature but regulatory in nature. The exparte applicant has poked holes on the said regulations saying that some parts of those regulations are unfair and unconstitutional. So where the available remedies are not sufficient to address the concerns of a party fairly, that party is at liberty to seek for judicial review.

34. The Respondents contended that the remedy of *certiorari* was not sufficient to address the concerns of the exparte applicant but this is really a question of interpretation which I hope this judgment will address and determine correctly in the end.

35. **Main Issues**

i. Whether denial of legal representation affected the applicant's right

to a fair trial.

ii. Whether the exparte applicant was subjected to unfair trial by being confronted by new charges different from those he was called upon to answer.

iii. Whether the merits of the decision to suspend the applicant can be

challenged through Judicial Review.

iv. Whether the exparte applicant was subjected to due and fair process.

36. **Whether the merits of the decisions to suspend the exparte applicant can be challenged through a judicial review.**

The Respondents have submitted that the decision to suspend the exparte applicant was arrived at after the disciplinary committee went through the evidence tendered though no witnesses were called. They further contended that the rules of evidence do not apply to the disciplinary process as they have their own rules and regulations during the hearing of disciplinary cases. The applicant however, maintains that the decision was unfair as he was victimized because of championing the interests of fellow students who elected him to champion their rights. This Court finds that a party cannot challenge a decision of a tribunal or quasi-judicial body on the merits. I agree with the Respondent that the proper avenue in such circumstances is to appeal against the decision where avenues for appeal exist but where no avenues exist then an aggrieved party can properly invoke this Court's prerogative powers to review the process for want of avenues to appeal. In the case of **MUNICIPAL COUNCIL OF MOMBASA –VS- REPUBLIC & ANOR [2002] eKLR** the Court of Appeal made the following observations:

> "***Judicial review is concerned with the decision-making process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision did the decision-maker take into account***

relevant matters or did he take into account irrelevant factors? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a court of appeal over the decider, acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision, and that, as we have said, is not the province of Judicial Review."

The above clearly shows that it was wrong for the exparte applicant to challenge the merits of the decision to suspend him through this judicial review.

37. **Whether denial of legal representation denied the exparte applicant the right to a fair trial.**

The exparte applicant was denied legal representation and the Respondents' counsel had no qualms about this contention. He argued that the exparte applicant did not require legal representation as he was not an accused person and the rules of the college expressly denied legal representation. The exparte applicant on the other hand maintained that it was his constitutional right and cited the provisions of ***Article 47, 50 (1) (2) (a) (b) (c)*** and ***(g)*** of the Constitution. The question that this Court needs to address is whether the disciplinary process was open and fair. A process is deemed open and fair if in the eyes of an ordinary person the process is deemed fair. The Respondents did not explain the rationality or the constitutionality of the rule barring legal representation to those facing disciplinary hearing. ***Article 47 (1)*** of the Constitution provides as follows:

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

38. I do not find it fair for a university considering the weight of the decision they are allowed to make, to make rules that are not only unconstitutional but unfair whichever way one looks at it. In a situation where a decision that has the potential to substantially affect the rights of a person surely legal representation is a must. In any event under ***Article 50 (1)*** a right to a fair hearing includes right to legal representation. That right to legal representation does not apply only in courts of law as respondents contended. This Court finds that the right to legal representation is a basic right that must not only be respected by courts of law but other independent tribunal or bodies exercising quasi judicial authority. One of the attributes that underlie an open and democratic society such as ours is respect for fundamental rights and freedoms. These rights include right to legal representation going by the letter and the spirit of the Constitution under ***Article 47*** and ***50***. The Constitution is binding to all including the Respondents herein. It is true that any law, regulation or rule that is inconsistent with the Constitution is void and invalid to the extent of the inconsistency. I do find that Regulation VII under NOTICE OF MEETING clause (ii) of the 1st Respondent is void and invalid. The exparte applicant was subjected to unfair trial by being denied the right to be represented by an advocate of his choice at the disciplinary hearing. It is vital to note that no one can hide under the guise of "house rules" or "own regulations" to deny a party a fair hearing or any of his constitutional rights. A fair hearing should be fair and open for all to see even to outsiders. You cannot cloud rules in secrecy and claim that a party has been subjected to a fair process.

39. **Whether the exparte applicant was subjected to unfair trial by being confronted by new additional charges different from those he was called upon to answer**.

On this point I have considered the contents of annexture "1kk2" in the exparte applicant's verifying affidavit and contrasted it with the contents of annexture "1KK3" in the same affidavit and noted some disparity. While the suspension letter dated 25th October, 2013 contained three charges the suspension letter dated 18th November, 2013 listed 8 charges upon which the exparte applicant was convicted. It is apparent also from the minutes of the meeting vide Min 7/11/2013 exhibited by the Respondents annexture wk6 in the replying affidavit sworn on 9th January, 2014, that charges read out to the exparte applicant when he appeared at disciplinary hearing, were materially different and it is easy to understand why counsel for the applicant described it as trial "by ambush". Whatever the description it is a rule of universal application that a party must be

accorded a fair opportunity to defend himself. This is founded on the plain principle of natural justice. I find that the letter of suspension was too general and ambiguous unlike the specific charges that the 2nd Respondent read out to the applicant when he turned up for the disciplinary hearing. The same was unfair as the exparte applicant was ambushed and could not have gotten an opportunity to fully defend himself. I am not persuaded by the Respondents' contention that the exparte applicant should have sought the particulars before attending the trial. It was incumbent upon the Respondent to show with sufficient detail the charges they had preferred against the applicant to enable him defend himself sufficiently. By introducing additional charges at the 11th hour, I find that Respondents subjected the applicant to unfair trial.

40. **Whether the exparte applicant was subjected to due and fair process.**

The exparte applicant raised the issue of quorum hitch and the fact that the disciplinary hearing was not held in public. To begin with the question of quorum, as illustrated by the authority in the above quoted case of Mombasa Municipal Council it is important to establish from decision made whether the body that made the decision was:

i. Mandated to make the decision
ii. That it was duly constituted as per the law.

I have considered the composition of the body that made the impugned decision in this motion. The members of the disciplinary present were six as per the minutes of the meeting. The regulations of the college indicate that the membership of the disciplinary committee should be 9 members. I do find that the composition of the membership at the meeting lacked 3 crucial members to wit the Dean of Students and two student representatives. The Respondents contend that the Dean of Students was present but that the minutes inadvertently left him out. I am however, not convinced because if that was the case nothing could have been easier than filing an affidavit by the said Dean of Students or the secretary that recorded the minutes to demonstrate that the Dean of Students was present. In the absence of an affidavit the only assumption that can be made is that the said Dean was absent and 2 other members to form the requisite quorum to deliberate upon the disciplinary case against the Respondent. In view of lack of quorum, I am persuaded by the submissions by the applicant that the body that made the decision to suspend the applicant was irregular and any decision emanating therefrom is a nullity.

41. This Court finds that though the exparte applicant has no basis to complain that the disciplinary meeting was held in camera, as no prejudice was suffered, he has basis to question the irregular manner in which the decision to suspend him was arrived at. The decision to suspend him for 3 years adversely affected his rights as it meant that he was going to take longer time to graduate if at all. It was important for the Respondents to ensure that the applicant was subjected to due process that was open and fair. As illustrated above he was not and in such circumstances I find that a remedy of certiorari is available for him to have the decision to suspend him for 3 years quashed.

From the foregoing, this Court finds merit in the Notice of Motion dated 10th December, 2013. The decision dated 18th November, 2013 made by the Respondents to suspend the exparte applicant for 3 years is removed into this Court and is hereby quashed forthwith. The exparte applicant should be treated like any other regular student by the 1st Respondent. I do not find any basis that the applicant does require an additional remedy of mandamus as he was not expelled to require an order for re-admission. He was simply suspended and upon lifting suspension as it has been done here, he remains a student like any other. The Respondents are also condemned to pay costs of this application. It is so ordered.

Dated and delivered at Kerugoya this 23rd day of July, 2015.

R. K. LIMO

JUDGE

23.7.2015

Before Hon. Justice R. Limo

Court Assistant Mbogo

Magee for applicant present

Njomo for Respondent present

COURT: Judgment dated, signed and delivered in the open court in the presence of Magee for applicant and Njomo for Respondent.

R. K. LIMO

JUDGE

23.7.2015