



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NUMBER 232 OF 2012

IN THE MATTER OF AN APPLICATION BY DR. WILFRIDA ITOLONDO, DR. MUMAH SOLOMON, DR. ELENA KORIR, MARTHA MIYANDAZI AND FRED OBARE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION AGAINST THE PRESIDENT, THE COUNCIL, KENYATTA UNIVERSITY, THE ATTORNEY GENERAL

AND

IN THE MATTER OF THE KENYATTA UNIVERSITY ACT, 1985

AND

IN THE MATTER OF THE KENYATTA UNIVERSITY STATUTES

AND

IN THE MATTER OF ARTICLES 232, 73, 75 AND 10 OF THE CONSTITUTION OF KENYA

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

THE PRESIDENT.....1ST RESPONDENTS

THE ATTORNEY GENERAL.....2ND RESPONDENTS

THE COUNCIL, KENYATTA UNIVERSITY.....3RD RESPONDENTS

THE CHANCELLOR, KENYATTA UNIVERSITY.....4TH RESPONDENTS

THE MINISTER FOR HIGHER EDUCATION

SCIENCE AND TECHNOLOGY.....5TH RESPONDENTS

PROF. OLIVE MWIHAKI MUGENDA.....1ST INTERESTED PARTY

ETHICS & ANTI-CORRUPTION

COMMISSION.....2ND INTERESTED PARTY

NATIONAL COHESION & INTEGRATION

COMMISSION.....3RD INTERESTED PARTY

1. DR. WILFRIDA ITOLONDO
2. DR. MUMAH SOLOMON
3. DR. ELENA KORIR
4. MARTHA MIYANDAZI
5. FRED OBARE.....APPLICANTS

JUDGMENT

1. By a Notice of Motion dated the 24th of July, 2012 the Applicants herein seek the following orders:
 - a. **An Order of Mandamus compelling the Respondent to institute the process for appointment and to appoint the Vice Chancellor of Kenyatta University**
 - b. **An Order of Prohibition to prohibiting Prof. Olive Mwihaki Mugenda from acting or purporting to act as the Vice Chancellor of Kenyatta University unless appointed/reappointed as required by law.**
 - c. **Costs**

Applicants' Case

2. The Application is based on the Statutory Statement filed with the Chambers Summons for leave on the 31st of May, 2012 and a verifying affidavit sworn on the 30th May, 2012 by Wilfrida Itolondo.
3. It is not contested that the 1st Interested Party was appointed the Vice Chancellor of Kenyatta University effective the 1st of April, 2006 to serve for a five (5) year term up to and including the 31st of March, 2011. However it is the Applicants' contention that the office of the Vice Chancellor of Kenyatta University has been vacant in law since the 31st of March, 2011 because the process for appointment of a new Vice Chancellor or the process leading to the re-appointment of the 1st Interested Party has not been instituted and undertaken contrary to the Constitution of Kenya 2010, **Kenyatta University Act**(hereinafter referred to as the Act) and the Kenyatta University Statutes.
4. According to the Applicants, during the period that she has been illegally purporting to be the Vice Chancellor following the expiration of her term in March, 2011, the 1st Interested Party has entrenched high level financial mismanagement, corruption, embezzlement of funds, abuse of office and bad governance as well as tribalism, nepotism, cronyism contrary to the Constitution and other relevant laws. The Applicants contend that the continued stay in office of the 1st Interested Party puts the University under undue debt burden, engenders unnecessary disharmony to the University and exposes the University to a real risk of collapse. As a result the Applicants aver that it is now necessary that the process for the appointment of the Vice Chancellor of Kenyatta University be instituted and a Vice Chancellor be appointed to restore the good governance currently lacking at the University.

The 1st, 2nd and 5th Respondents' Response

5. The 1st, 2nd and 5th Respondents filed Grounds of Opposition dated the 26th of June, 2012 where they opposed the Notice of Motion on the grounds that judicial review remedies cannot issue as against the 1st Respondent. They aver that the Applicants have failed to demonstrate the existence of a justiciable cause as against them and as such the orders sought for cannot issue. Another ground upon which they oppose the Motion is that the Applicants have not demonstrated sufficient interest in this matter to warrant the issuance of the orders sought. They contend that the order of prohibition cannot lie as against them where the action sought to be prohibited has been effected. In their view the Applicants have failed to prove that they failed to carry out their statutory duties. They conclude by stating that the Motion is a clear abuse of court process as the suit is spent and the Applicants are guilty of material non-disclosure.

The 3rd Respondents' Response

6. The 3rd Respondent filed a Replying Affidavit sworn by a **Benson I Wairegi** on the 22nd of June, 2013 in his capacity as the Chairman of the 3rd Respondent. In his affidavit, the deponent deposed that for the Applicants to apply for the orders of mandamus and prohibition there must be prima facie evidence that there is no Vice Chancellor of the Kenyatta University currently in office and that the 1st Interested Party is unlawfully acting or purporting to act as the Vice Chancellor until she is appointed or re-appointed as required by law.
7. According to the deponent the Permanent Secretary in the Ministry of Higher Education Science and Technology in his letter dated the 26th November, 2010 addressed to Chairpersons of University Councils and University College Councils, seeking to clarify the position regarding the re-appointment of Chief Executive Officers of State Corporations, spelt out that Vice Chancellors of Public Universities and Principals of University Colleges were also categorized as Chief Executives of their respective corporations.
8. It was further deposed that by a Circular Reference Number OP/CAB.9/1A dated the 23rd of November, 2010 the procedure for the re-appointment of service Chief Executive Officers in State Corporations was outlined as follows;
 - a. *The CEO wishing to be reappointed will indicate interest by writing to the Board at least six months before expiry of his/her term.*
 - b. *The Board will evaluate the performance of the CEO and make a report to the appointing authority with a recommendation on either renewal or termination of the contract upon expiry*
 - c. *In the event that the Board does not recommend renewal of the contract, the CEO will be required to proceed on terminal leave to pave way for the recruitment and appointment of a new CEO. This is important to ensure a smooth transition.*
 - d. *The Board will recruit an acting CEO, in consultation with the parent Ministry and the State Corporations Advisory Committee (SCAC) as provided for by Section 27(1) (c) of Cap 446, in a caretaker position when the process of recruiting a new CEO is ongoing.*
9. According to the deponent the Applicants' case rests on the premise that the above process has not been done since the Applicants contend that there is no Vice Chancellor of Kenyatta University and the 1st Interested Party has not been lawfully appointed or re-appointed as Vice Chancellor.
10. According to the deponent he received a letter from the 1st Interested Party dated the 11th of October 2010 in which she requested for a renewal of her contract. He deposes further that a meeting was held on the 30th of November 2010 by the Special Appointments Committee in which the request by the 1st Interested Party was considered. That the Special Appointments Committee unanimously agreed that the 1st Interested Party had shown commitment and exemplary performance during her first term and as such they resolved to renew her contract effective 21st of March, 2011 and the resolution was communicated to the Minister for Higher Education Science and Technology and the Chancellor of Kenyatta University.
10. According to the deponent, the 1st Interested Party, received communication from the Chancellor of the University vide a letter dated the 23rd of December 2010 informing her that her contract had

been renewed for a further five years effective 20th March, 2011. It is therefore the deponent's position that the 1st Interested Party was duly re-appointed as the Vice Chancellor of Kenyatta University in accordance with the law and for a further period of five years effective 20th March, 2011.

11. It was his deposition that the Applicants have never approached him or the University for any clarification as to whether the 1st Interested Party was duly re-appointed as the Vice Chancellor prior to the institution of this Motion. Assuch, the Applicants intend to use these judicial review proceedings and the honourable processes of the court in bad faith and merely to embarrass the 1st Interested Party as most of the allusions made by the Applicants are beyond the scope of the judicial review jurisdiction.
12. According to the deponent, four of the Applicants have been suspended or dismissed from employment with Kenyatta University and have pending cases in the Industrial Court and one of them who is still serving at the University has persistent issues with her students. As such the deponent holds the belief that the Applicants are actuated by malice in instituting these proceedings.

The 4th Respondent's Response

13. The 4th Respondent filed a replying affidavit sworn on the 15th of September, 2012. According to the deponent, the Chairman of the 3rd Respondent wrote to him on the 1st of December, 2010 stating that by a meeting held on the 30th November, 2010 the Kenyatta University Council had considered the 1st Interested Party's request for a renewal of her contract and it was unanimously agreed and recommended that because of the exemplary performance of the 1st Interested Party during her first term, her contract be renewed for a further five year period effective 21st March, 2011.
14. According to the deponent, he communicated the recommendations of the Council on the re-appointment of the 1st Interested Party vide a letter dated the 10th December 2010 to the then President of the Republic of Kenya and following consultations the 1st Interested Party was duly re-appointed as the Vice Chancellor of Kenyatta University by the President. He deposed further that by a letter dated the 23rd December, 2010 he informed the 1st Interested Party that her appointment had been renewed for a further five years.
15. It is the deponent's position that the process of appointment and/or re-appointment of the Vice Chancellor are consultative processes between the Kenyatta University Council, the Chancellor and the President of the Republic of Kenya. The deponent affirms that the due process as set out in the Act was adhered to, to the letter and the appointment made by the President in accordance with the law after due consultations with the relevant and necessary offices and bodies.

The 2nd Interested Party's Response

16. The 2nd Interested Party filed Grounds of Opposition dated the 4th of July, 2012 in which they affirm that the Applicants' motion is a clear abuse of court process and avow that the Applicants have never lodged any complaint as envisaged under the provisions of Section 13 (c) of the ***Ethics and Anti-Corruption Commission Act*** 2011 and Article 252 (1) (a) of the Constitution and as such the same should be dismissed with costs.

1st Interested Party's Response

17. The 1st Interested Party filed a Replying Affidavit sworn on the 26th of June 2012 and a further affidavit sworn on the 13th of September 2012. It is the deponent's position that the Applicants herein are guilty of material non-disclosure and misrepresentations and are therefore undeserving of the orders sought. The 1st Interested Party deposes that as at the 30th of May, 2012 four (4) of the Applicants were not serving in the capacities that they claimed with the 2nd Applicant having

- been suspended from the University on the 27th December 2011; the 3rd Applicant has a pending court case between herself and the University surrounding her PHD thesis; the 4th Applicant was dismissed from employment of the University on the 14th March, 2012 and the 5th Applicant was suspended from the University on 21st January, 2009 for making false mileage claims. It is the belief of the deponent that the Applicants therefore lack sufficient interest because they no longer serve at the University in the capacities they claim to.
18. In response to the allegations of mismanagement, embezzlement of funds and queries purportedly raised by the Auditor General whilst auditing the accounts of the University, the 1st Respondent deposes that the University responded to all these queries satisfactorily and was even issued with a final certificate clearing the University of any wrong doing as such the said allegations are false and far-fetched and not the concern of this court in its judicial review jurisdiction.
19. It is the deponent's position that the dispute between the Applicants and the University is a pure employment dispute and adds that some of these disputes are the subject of court proceedings in the Industrial Court and as such these judicial review proceedings have been filed to purely wage vendetta against her and the University for decisions that were reached against some of the Applicants by a Senior Board of Discipline. According to her legal advice, it is the deponent's belief that this amounts to an abuse of court process.
20. As per her legal advice, it is the deponent's stand that the judicial review orders proceedings herein are misconceived in so far as they substantively dwell on the propriety of the running and management of the University and that the orders of mandamus and prohibition sought would only be concerned with the process of her re-appointment as the Vice Chancellor of the University and not with the merits of the management of the University. It is her belief that if this court were to delve into the issue of management of the University then the court would be reduced to the ignominy of having to micro-manage the University.
21. Regarding the documentation leading up to her re-appointment, it is the deponent's testimony that prior to her first term coming to an end on the 31st of March, 2011, the President through the Permanent Secretary in the Ministry of the President issued a circular dated the 23rd November, 2010 which detailed the procedure on the re-appointment of Chief Executive Officers of State Corporations. It is the deponent's position that by the circular dated the 26th of November 2010 the Permanent Secretary in the Ministry of Higher Education Science and Technology clarified that the circular of the 23rd November, 2010 covered Vice Chancellors as well.
22. It is the deponent's position that the procedure for the re-appointment of the Vice Chancellor was stipulated as follows:
- a. *The Vice-Chancellor wishing to be re-appointed would indicate interest in writing to the Board (in this case the University Council) at least 6 months before the expiry of their term*
 - b. *The University Council would evaluate the performance of the Vice Chancellor and make a report to the appointing authority with a recommendation on either renewal or termination of the contract upon expiry*
 - c. *In the event that the University Council does not recommend renewal of the contract, the Vice Chancellor would be required to proceed on terminal leave to pave way for the recruitment and appointment of a new Vice Chancellor. This is important to ensure a smooth transition.*
23. In view of the foregoing, the deponent's election was that if one was not sent on terminal leave then there would be no doubt that the University Council had recommended the renewal of such a Vice-Chancellor's contract.
24. The deponent adds that the circular dated the 23rd November, 2010 stated that: "*For avoidance of doubt the position of [Vice Chancellor] shall be declared vacant only when the [University Council] has no intention to renew the appointment of the incumbent for a further term.*"
25. In regard to the aforementioned statement the deponent adopts the opinion that in the event the University Council did not signify its intention to terminate the Vice Chancellor's contract, the incumbent Vice Chancellor would continue in office and the position would not be declared

- vacant.
26. With regard to the process she employed leading up to her re-appointment as the Vice Chancellor of the University, it is the deponent's position that she duly applied for re-appointment as Vice Chancellor within the stipulated six (6) month period and adds that on the 30th of November, 2010 the University Council considered her application, invited her to make a presentation regarding the management of the University and subsequently recommended her re-appointment based on her exemplary performance during her first term. It was the deponent's position that she received a letter from the Permanent Secretary in the Office of the President, Secretary to the Cabinet and Head of Public Service dated the 16th of December 2010 confirming that she had been re-appointed as the Vice Chancellor of the University for a further period of five years effective 21st March, 2011. The deponent affirmed that she received a letter from the Chancellor of the University dated the 23rd of December 2010 informing her of her re-appointment as Vice Chancellor for a further five years effective 20th March, 2011.
27. According to the deponent there is no requirement in law that notification of her re-appointment should be done in any particular way and that the letters aforementioned sufficed. It was her position that her re-appointment was done in accordance with the relevant laws and she is in office legally until the 19th of March, 2016 when her second term expires and any allegation that the University does not have a Vice Chancellor is hence baseless and an attempt to mislead the court.
28. According to her the request to the court to compel the Respondents to institute the process of re-appointing the Vice Chancellor of the University is contradictory as she believes the Respondents have not denied that she is in office and that any attempt to appoint a Vice Chancellor must first be preceded by an application quashing her re-appointment which application in law would be time barred as the same ought to have been filed within an 18 months window period of the alleged improper action.
29. According to the deponent's legal advice an order of mandamus as sought by the Applicants is completely misplaced and misdirected as it aims at compelling the Respondents to carry out an appointment which has already been done and also judicial review orders cannot issue as against the President who in any event has performed his statutory duty as per Section 10 of the Act after consultations with the Council and the 4th Respondent.

Applicants' Submissions

30. It is the Applicants' submissions that the Respondents and the 1st Interested Party purportedly used the Special Appointments Committee synonymously with the Full Council. They aver that the Special Appointments Committee was not constituted or mandated by the Full Council and the minutes of their meeting were also not ratified by the Full Council as the Respondents have failed to produce to this court any documents/evidence showing the involvement of the full council. They rely on the holding in **Centre of Human Rights and Democracy vs. Moi Teaching Referral Hospital Board and 2 Others Petition No. 8 of 2011** where it was observed that the people of Kenya will not watch the Executive's lurking hand behind in the appointment of the Parastatal board and the people shall not fail to act to have any unprocedural actions declared unconstitutional.
31. It was also the Applicants' submissions that the affidavit as sworn by the 3rd Respondent has tainted the image of the 1st Applicant as it paints her as the lecturer who has had persistent issues with her students. The 1st Applicant requests in her submissions that the courts should not allow such intimidating actions against individuals especially those trying to fight impunity and injustices.
32. The Applicants submit that the 1st Interested party makes reference to a section in the affidavit of the 1st Interested Party wherein she claimed that: "*the statute governing the renewal of contracts for the Vice Chancellor allows for a second term if the University Council feels the incumbent Vice Chancellor has performed his/her duties as expected.*" It was the submission of the Applicants that the 1st Interested Party did not cite the particular section of the statute where the above caption is found. They add that by the time the letter of 10th October 2010 was written there was a new Constitution in place and as such the appointment of the 1st Interested Party should

- have complied with Article 73 (2)(a) of the Constitution.
33. It was the submission of the Applicants that the letter addressed to the Chairman of the University Council was addressed to an individual, **Mr. Benson Wairegi**, such that in the event the said **Mr. Wairegi** was absent then no one else would have been able to act in his place. According to the Applicants this gave the impression that the Chairman of the Council is synonymous with the Council. The Applicants add that **Mr. Wairegi** was making unilateral decisions in so far as the purported re-appointment of the 1st Interested Party is concerned and that his roles as the Chairman of the Council are not stipulated.
 34. The Applicants further submit on the difference in the date of the letter that the 1st Interested Party wrote expressing her interest to renew her contract as the Vice Chancellor and the date of the circular outlining the process for re-appointment. In their view the former came before the latter and as such the 1st Interested party may have pre-meditated the circular.
 35. The Applicants submit that the then Permanent Secretary in the Office of the President infringed Articles 2(1) and 3(1) of the Constitution because according to the Applicants, the 23rd November, 2004 Guidelines which were referred to in the circular dated 23rd November, 2010 and which outline competitive sourcing of chief executives there ought to have been a preparation of a job description and job requirements, job and person specifications, transparent shortlisting and interview processes based on a verifiable Recruitment Procedure approved by the Board and finally three candidates should have been considered for the final decision by the appointing authority based on interview scores and panel recommendations. The Applicants submit that the above guidelines are enshrined in Article 72(3)(a) of the Constitution and as such the recruitment process ought to have adhered to the letter and spirit of the Constitution. The Applicants also submit in regard to the circular dated the 26th November, 2010 and take issue with the position taken by the 1st Interested party that this circular was on the procedure of re-appointment of Chief Executives of State Corporations yet the same was addressed to Chairpersons of University Councils and of University College Councils.
 36. It was the Applicants' submission that an important component such as integrity was ignored by the committee and cited the decision of the **Supreme Court of Appeal of South Africa Case Number 263/11 Democratic Alliance and the President of the Republic of South Africa and 3 others**. According to them, the Special Appointments Committee should have been independent people devoid of any interest in Kenyatta University.
 37. It was the submissions of the Applicants that the letter written by the 4th Respondent to the President dated the 10th of December 2010 and the letter from the office of the President dated the 16th of December, 2010 were both not filed along with the first affidavit of the 1st Interested Party and instead were annexed to the affidavit of the 4th Respondent which was sworn on the 15th of September, 2012. It is their further submission that these letters should have been easily available within the University. The Applicants add that the President as the appointing authority of state and public officers could not have asked the Permanent Secretary in his office to inform the 1st Interested Party about her purported re-appointment; this in their view is the reason why the purported re-appointment was not followed by a gazette notice.
 38. It is the submission of the Applicants that the appointment procedure for the position of Vice Chancellor of the University is very clear and that the appointment of the Vice Chancellor must be direct to the appointee and not through another officer and in the event the President was unable to re-appoint the 1st Interested Party after the expiration of her first term, then the 1st Interested Party could have been appointed in an acting capacity pending the confirmation of the President. They contend that considering the re-appointment was done prior to the expiration of her first time there was no need for re-appointing the 1st Interested Party in an acting position and as such her re-appointment should be treated as null and void.
 39. It is the submissions of the Applicants that the Gazette Notice published on the 2nd November 2012 confirming the purported re-appointment of the 1st Interested Party was backdated almost two years back and done after the Applicants had filed this application in court and that the timing of the filing of the affidavit that contained the Gazette Notice was done in bad faith.
 40. It is the Applicants' submissions that had the right procedure been followed in the purported re-appointment of the 1st Interested Party she still would not have met the requirements of Chapter

- Six of the Constitution of Kenya and more specifically Article 72(3) because of the litany of issues and the accompanying evidence that was raised regarding the integrity of the 1st Interested Party.
41. In her oral address to the Court, **Dr Itondolo**, the 1st applicant herein who spoke on behalf of the applicants urged the Court to strike out the replying affidavits on the ground that the same was filed out of time and relied on **Petition No. 5 of 2013, Raila Odinga versus Independent Electoral and Boundaries Commission & Others**. According to her when the 1st Interested Party was appointed the Constitution had already been promulgated and there was no letter signed by the President, the appointing authority hence the interested party is occupying the office illegally and her continued occupation is illegality and the court ought to declare it as such. In her position based on **Naftali Muigai vs. Cabinet Secretary for Education, Science and Technology HCCC No. 280 of 2013** that the Attorney General was applying double standards in this matter.

1st Interested Party's Submissions

42. Citing Section 10 of the Act, the 1st Interested Party submitted that the aforementioned Act does not provide for the mode of communication of the decision to appoint or re-appoint either to the appointee or to the general public.
43. The 1st Interested Party made reference to **Nairobi CACA Number 266 of 1996 Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge and 9 Others** where the Court of Appeal explored the nature and purpose of the remedies of judicial review orders of mandamus, prohibition and certiorari and contended that an order for prohibition is directed to an inferior tribunal or body which forbids the said body or tribunal from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. To the 1st interested party an order of prohibition does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. In regard to the order of mandamus, the 1st Interested Party's submitted from paragraphs 89 and 90 of ***Halsbury's Laws of England 4th Edition***, Volume 1 where it is summarized thus:

“...an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to compel the legal duty to be performed.”

44. Referring to the **Kenya National Examinations Council** case (supra) the 1st Interested Party submitted that **“if the complaint is that the duty has been wrongly performed i.e that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because like an order for prohibition, an order of mandamus cannot quash what has already been done,”** and that further the appropriate remedy against a decision which has already been made, albeit wrongly, is certiorari.
45. It was the submission of the 1st Interested Party that the Applicants have not questioned the decision to re-appoint her as the Vice Chancellor of the University instead they have claimed that the 1st Interested Party was never re-appointed and is in office illegally; she added that the Applicants have now mutated and they are now challenging the recruitment of public officers in the context of Articles 10, 73, 75 and 232 of the Constitution. To the 1st Interested Party by seeking an order of prohibition to restrain the 1st Interested Party from holding office the Applicants conceded that the 1st Interested Party is indeed the current Vice Chancellor of the University; and by seeking an order for mandamus the Applicants pray that the Respondents be compelled to institute the process for appointment and appoint a Vice Chancellor for the University. It is the view of the 1st Interested Party that these orders are mutually exclusive.
46. The 1st Interested Party submitted that it is trite law that parties are bound by their pleadings and relied on **Nakuru CACA 141 of 2004 Chumo Arap Songok vs. David Kibiego Rotich, Nairobi CACA 269 of 2001 Baber Alibhai Mawji vs. Greenfield Investments & Another consolidated with Nairobi Civil Appeal 155 of 2004 Greenfield Investments vs. Baber Alibhai Mawji**. It

was the 1st Interested Party's submission that as the Applicants based their entire case on the allegation that the process of appointment of the Vice Chancellor has not been undertaken, they cannot now be allowed, in their submissions to argue that the re-appointment may have failed to comply with certain laws.

47. On concealment of material facts, the 1st Interested Party submitted that the Applicants misled the court to believe that they were members of staff at the time of instituting these proceedings. The 1st Interested Party relied on the holding in **Nairobi High Court Miscellaneous Number 80 of 2008 Republic vs. City Council of Nairobi and 2 Others** where the High Court stated that failure by a party to make a frank and full disclosure disentitles parties to the exercise of the court's discretion and as such these parties should be accorded any audience by the court.
48. The 1st Interested Party submitted that the Applicants do not have locus to institute these proceedings and relied on the holding in **Koigi Wamwere vs. The Attorney General (2004) 1 KLR 166 & Nairobi High Court Miscellaneous Number 93 of 2007, Republic vs. The Commissioner for Co-operative Development Ex Parte Thika Coffee Mills (2012)** where the courts reiterated that an Applicant in judicial review proceedings must demonstrate sufficient interest in the subject matter of the judicial review proceedings. It was the 1st Interested Party's position that the Applicants have not demonstrated sufficient interest in this matter but have instead waged vendetta battles against the 1st Interested Party and the University which the 1st Interested Party believes are predicated mainly on the dismissal and/or suspension of the Applicants from the services of the University.
49. It was the submission of the 1st Interested Party that an order for mandamus cannot be issued against the President. The 1st Interested Party relies on a commentary from **De Smith's Judicial Review**, 6th Edition page 129 where the learned authors state that:

"In some instances, the court may lack jurisdiction because the prerogative power in question has been exercised directly by the sovereign rather than her Ministers and as a matter of general constitutional principle, the sovereign cannot be subject to legal process."

50. The 1st Interested Party further added from page 886-887 of the same book that:

"The prerogative orders (mandatory, prohibiting and quashing orders) and injunctions cannot be granted against the crown directly. Declaratory relief is however available. The justification given for this restriction is both because there would be an incongruity in the Queen commanding herself to do an act, and also because disobedience to a writ of mandamus is to be enforced by attachment."

51. The 1st Interested Party urged this court to draw a parallel between the Queen of England and the President of the Republic of Kenya and to consider the constitutional safeguards of immunity of the President.
52. The 1st Interested Party concluded by stating that it is trite law that judicial review is concerned not with the merits of a particular decision but the procedure leading to the decision and further submitted that the issue before this court is whether the 1st Interested Party was reappointed by the President to continue acting as the Vice Chancellor, which issue is a matter that can be well settled by the 1st, 3rd and 4th Respondents and not this court.
53. According to **Mr. Rigeru**, learned counsel for the 1st interested party, the replying affidavits were filed with the leave of the Court and the applicants were similarly granted leave to respond hence there was no prejudice. According to him, when an ex parte applicant gets leave, leave is granted a particular case which in this case was for orders of mandamus and prohibition hence they cannot mutate their case and advance a different case. By raising constitutional issues, it was submitted that the applicants are not within the leave granted since they are bound by their pleadings. In his view the process of reappointment was one within the law and there is a gazette notice appointing the 1st interested party though this was in abundant caution since there is no such requirement which in any case is a mere notification.

The 3rd and 4th Respondent's Submissions

54. It was the 3rd and 4th Respondent's submission that the Applicants have not placed any evidence on record to rebut the factual details leading up to the reappointment of the 1st Interested Party and as such the same is uncontested and hence true. They added that the Applicants' argument that the position for Vice Chancellor was not advertised was not the position that the Applicants had taken from the outset but also contended that advertising the vacant position was not a requirement under the Act or the presidential circular on reappointment.
55. It is the submission of the 3rd and 4th Respondents that the Applicants failed to demonstrate how the constitutional provisions as envisaged in Articles 73, 75 and 232 of the Constitution were violated; and if at all the said Articles were violated then these should form the subject of a constitutional petition and is totally irrelevant to these judicial review proceedings.
56. It was the submission of the 3rd and 4th Respondents that these judicial review proceedings constitute an abuse of the process of this court as was held in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Ltd (2004) eKLR** where abuse of court process was defined as using court process for a purpose or in a way significantly different from its ordinary and proper use. They added that the Applicants are using these proceedings for the ulterior purposes of ventilating their personal grievances against the 1st Interested Party. It was their submission that all the Applicants except one are involved in disciplinary proceedings or litigation against the 1st Interested Party and the University and neither of them has sought to rebut the same in evidence. To the 3rd and 4th Respondents, the Applicants have deliberately committed perjury by stating under oath, in the affidavit of **Wilfrida Itolondo**, that among the instances of entrenching high level financial mismanagement, embezzlement of funds, corruption, abuse of office and bad governance in the University by the 1st Interested Party, is the taking out of medical cover for staff with British American Company here the Chairman of the 3rd Respondent is a director. It was the position of the 3rd and 4th Respondents that Jubilee Insurance Company Ltd provided the medical cover for staff as each member of staff was issued with medical cards.
57. In his oral address to the Court, **Mr Wetangula**, learned counsel for the 3rd and 4th Respondents reiterated the aforesaid submissions and stated that in the absence of an order of certiorari the orders sought herein are not efficacious and that the mischief that the applicants were avoiding was that the remedy of certiorari was out of time. According to him there was no requirement for a gazette notice for the appointment of the Vice Chancellor.

Determination

58. I have considered the application and the response thereto as well as the submissions made by or on behalf of the parties herein.
59. The first issue I wish to deal with is whether the replying affidavits were filed out of time and whether the same ought to be expunged from the record.
60. In my view whether or not a document ought to be expunged from the record must depend on the circumstances of a particular case and it is not the rule of thumb that any document filed irregularly must of necessity be expunged. In **Raila Odinga Case**, the Supreme Court took into account the effect of allowing the irregularly filed documents on record in light of the Constitutional timelines for the hearing and determination of Presidential Election Petitions as well as the prejudice that was likely to be occasioned to the Respondents by allowing the said documents to be on record.
61. In this case on 7th November, 2013, I granted leave to the applicants to file and serve a further affidavit limited to the gazette notice and a letter by **Mr Muthaura**. This leave was granted after the replying affidavits by the interested party had already been filed. In **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998** the Court of Appeal held:

“Rule 16(2) of the Civil Procedure Rules does not say that documents filed out of time must be ignored as the subsection does not talk of any time frame and a document filed out of time (like a

written statement of defence which under Order 9 rule 1, is acceptable although filed late but before judgement is entered), is acceptable and valid if filed before the application is called for orders.... Order 50 rule 16(2) does not say that the applicant may proceed *ex parte*, but empowers the Court to make orders *ex parte* on being satisfied that the Respondent has no good reason or reasons for not filing its papers at all and therefore it is not true that documents filed out of time in response to an application are necessarily invalid and should not be looked at. A court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so.”

62. The applicants have not alleged that they were prejudiced in any way by the said late filing of the affidavits assuming the same was correct. Accordingly, I do not wish to take the drastic step of expunging the said affidavits from the record.

63. The next issue is whether judicial review orders can issue to question the conduct of the 1st Respondent herein. In dealing with this issue the Respondents have relied on the English authorities. One must however remember that unlike in United Kingdom where there is no written Constitution, in Kenya we have a written Constitution and under Articles 2(1) and (2) thereof all persons and all State organs at both levels of government are bound by the Constitution which is the supreme law of the Republic and no person may claim or exercise State authority except as authorised under the Constitution. Accordingly, In Kenya we have the supremacy of the Constitution as opposed to the Supremacy of Parliament. Therefore where it is alleged that the President’s action has contravened the Constitution, I do not see why the same cannot be questioned before this Court unless the action falls within the realm of a purely political question.

64. I share in the view expressed in **Republic vs. Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua Miscellaneous Civil Application Number 1298 of 2004** that:

“As a matter of constitutional practice it is of course well known that the President is not above the reach of the courts and cannot be put in a situation where he is above the constitution. We must add that the courts have no power to review the exercise of powers by the President provided that the President is acting within the scope of his powers and within the confines of the constitution. And that he is within the legal nature of the exercise of his powers and responsibilities. No doubt the courts have powers to restrict and review decisions made by a sitting President which is in contravention of the Constitution and which is against public interest and policy. We hold that there was nothing wrong in the applicant suing the respondents since their decision which was made or which would be made is likely to affect his rights and interests.”

65. The arguments by the Applicants that the President is immune to civil and criminal proceedings as provided for under Article 143 of the Constitution is in my view untenable in the current constitutional dispensation because the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the power of the High Court to grant judicial review remedies is *sui generis*. I therefore find that the Applicants did not err in suing the President as an institution and indeed judicial review proceedings can be instituted against the President in so far as he makes decisions that are ultra vires the law.

66. With respect to the issue of locus standi, long before the promulgation of the current Constitution, it was held on 11th March, 1970, by **Chanan Singh & Simpson, JJ** in **Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board Nairobi HCMC No. 89 of 1969** that:

“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the

individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public. Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public. Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public.”

67. The same issue of standing was recently dealt with by Nyamu, J (as he then was) in Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others.....Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions

ought to be given a hearing by a court of law.....The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”.....Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest.....In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

68. Under the current constitutional dispensation Article 3(1) provides that every person has an obligation to respect, uphold and defend the Constitution. Accordingly where a person is of the bona fide view that a provision of the Constitution has been violated or is threatened, the person is not only entitled to but is enjoined to bring an action to protect the Constitution. I therefore do not accede to the argument that the applicants have no sufficient interest or locus in this matter.

69. It was further contended that the applicants are guilty of non-disclosure. On this point it is alleged that the applicants did not disclose to the court that some of them were no longer employed by the University while others had disciplinary cases pending therewith. In my view, it is not every non-disclosure that would be fatal to the grant of the orders sought by the applicant. The non-disclosure must be in respect of material facts. The law is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. However, what is material and what is not must depend on the particular circumstances of the case. The issue was deliberated upon at length in Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where the Court of Appeal stated:

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is

under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.

It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...

In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include;

(i) The duty of the applicant is to make full and fair disclosure of the material facts.

(ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers.

(iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including

(a) the nature of the case which the applicant is making when he makes the application,

(b) the order for which the application is made and the probable effect of the order on the defendant, and

(c) the degree of legitimate urgency and the time available for the making of the inquiries.

(v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...

In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal.

There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made?

The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted”.

70. In this case, in light of the Constitutional provisions discussed hereinabove I am not convinced that the so called non-disclosure is material to the determination of the issues in dispute herein.

71. The next issue for determination is whether the orders sought herein are efficacious.

72. The parameters of judicial review were set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....

Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....

The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform.

Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands

of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

An order of *mandamus* compels 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 but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

73. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

“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 maker 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 decision.”

74. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected 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. Unless that 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. See *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60*.

75. In the instant application the applicants are content with seeking only two substantive orders of Mandamus compelling the Respondent to institute the process for appointment and to appoint the Vice Chancellor of Kenyatta University and that of Prohibition prohibiting **Prof. Olive Mwhiki Mugenda** from acting or purporting to act as the Vice Chancellor of Kenyatta University unless appointed/reappointed as required by law.

76. In her oral submissions, the 1st applicant submitted that when the 1st Interested Party was appointed the Constitution had already been promulgated and there was no letter signed by the President, the appointing authority hence the interested party is occupying the office illegally and her continued occupation is an illegality and the court ought to declare it as such. In effect the applicants recognize that the 1st interested party was appointed whether regularly, illegally or otherwise. It is that appointment that the applicants in their submissions would wish this court to declare illegal so that the process of appointment or reappointment of the Vice Chancellor for Kenyatta University may start afresh.

77. This submission poses two problems. First and foremost that is not the prayer sought in this application. Under Order 53 rule 4(1) of the Civil Procedure Rules provides:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

78. Clearly therefore a relief not set out in the statement cannot be granted in purely judicial review proceedings. This, in my view is due to the fact that the Court can only competently grant reliefs for which leave was sought and granted.
79. The second problem is that without quashing the appointment of the 1st interested party, the orders of mandamus and prohibition would be in vain. As was held by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) neither mandamus nor prohibition can quash a decision already made. Therefore in the absence of a prayer for certiorari, to grant the orders sought herein would be futile. The effect of granting the orders sought herein would be that in effect there would be a risk of having two Vice Chancellors at the University. It is now trite that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
80. This determination is sufficient to dispose of this application.
81. However, it was contended that during the period that she has been illegally purporting to be the Vice Chancellor following the expiration of her term in March, 2011, the 1st Interested Party has entrenched high level financial mismanagement, corruption, embezzlement of funds, abuse of office and bad governance as well as tribalism, nepotism, cronyism contrary to the Constitution and other relevant laws hence her continued stay in office puts the University under undue debt burden, engenders unnecessary disharmony to the University and exposes the University to a real risk of collapse. In other words the applicants are questioning the integrity of the 1st interested party.
82. As already stated hereinabove this Court in the exercise of its judicial review jurisdiction is not concerned with the merits of the decision in question but only concerned with the process with which the decision was arrived at. The Respondents' position is that in renewing the 1st interested party's term one of the factors which was taken into account was the 1st interested party's commitment and exemplary performance during her first term. Whether or not that view was in fact correct is not for this court to examine.
83. The Respondents' position was that the relevant provisions and regulations leading to the appointment of the 1st Respondent were adhered to. As was held in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC.:**

“so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair.”

84. Similarly In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 it was held:

“When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.”

85. The issue of gazettelement of the 1st interested party was also raised. In Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT), it was held that the requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.

86. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that an appointment thereunder is effective on gazettelement, the gazettelement is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment.

87. In this case I have not been referred to a specific provision which requires that the appointment of the Vice Chancellor of Kenyatta University was to take effect only on gazettelement.

88. Having considered the foregoing, I come to the inescapable conclusion that the Notice of Motion dated the 24th of July, 2012 is unmerited.

Order

89. Consequently, this application is dismissed with costs to the Respondents and interested parties.

Dated at Nairobi this day 21st of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Applicants in person

Ms Chimau for 1st and 2nd Respondents

***Mr Mwangi for Mr Wetangula for 3rd and 4th Respondents
and Ms Shamalla for 2nd Interested Party***

Ms Ngondi for Mr Regeru for 1st Interested Party