REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO. 320 OF 2013

IN THE MATTER OF AN APPLICATION BY PERIS WAMBOGO NYAGA FOR ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF DISCONTINUATION FROM STUDIES

BETWEEN

PERIS WAMBOGO NYAGA.....APPLICANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th September, 2013, the applicant herein, **Peris Wambogo Nyaga**, seeks the following orders:

1. **THAT this court be granted to the Applicant to apply for orders of certiorari for quash the Respondents decision to discontinue the applicant from her studies dated 22/8/2013 and the leave so granted do operate as stay.**
2. **THAT the court do grant orders of mandamus compelling the respondent to reinstate the applicant back to her studies and further compel the respondent to administer all the exams that the applicant has missed out during the period of her suspension and discontinuation from her studies.**
3. **THAT all the necessary and consequential orders and directions be given.**
4. **THAT the cost of this application be provided for.**

Ex Parte Applicant's Case

2. The Motion was supported by Statement filed on 10th September, 2013 and Verifying Affidavit sworn by the applicant the same day.
3. According to the applicant, she is a student at Kenyatta University having been admitted on 19/9/2011 for 2011-2012 academic year and on 8/1/2013, she registered for her second semester of second year where she diligently enrolled for eight (8) units and zealously attended all classes and assignments as directed by her respective lecturers and not at any single time did any question

of any impropriety on her part ever raised.

4. However on 25th March 2013, when she with other students were scheduled to sit for Continuous Assessment Test (CAT) for Customary Law in Kenya, a lecturer named **Mr. Francis Kaburu** (hereinafter 'the Lecturer') indicated that he needed to carry out a search on all of them before they sat for the said exam in order to ensure that no one had carried with them any unauthorized material in the exam room.
5. According to the applicant, when the said lecturer reached the applicant's desk, he found nothing after the search. However, when he insisted on doing a body search on the applicant, the applicant found it inappropriate and refused but insisted the lecturer should get a female personnel even if not a lecturer to do it. However, the lecturer informed the applicant that the applicant had only one choice either to accept to have him search her or she moves out of the exam room. When the applicant resisted to move out, he took away her exam papers and her switched off mobile phone which was on top of her desk and moved to the next student where upon insisting on searching another female student all the students in the exam room protested insisting that searching a female student by a male amounted to sexual harassment.
6. Thereafter, the applicant proceeded to the chairlady of Private Law Department to report the same but upon failing to get her, informed her secretary who duly informed told the applicant to wait for her. Shortly after this incident, the lecturer called the applicant alleging that she was accusing him of sexual harassment an allegation which the applicant denied.
7. According to the applicant the said lecturer apologized to her and informed her that he will administer another exam (CAT) since no materials had been found on her and that her refusal to be searched by him was sound and legitimate. However, after two weeks, on 8th September, 2013, the lecturer called the applicant together with other students who had missed his CAT to sit for it which they did and thereafter he took a way the answer sheets and went away. It was the applicant's averment that the results thereof have not been released. At the end of the CAT the applicant went and collected her examination card for the end of semester exam**.**
8. On 19th April, 2013 while the applicant was preparing for aforesaid exams, she received a letter from **Dr. S. N. Nyaga**, the Acting Registrar (Academic) informing her that she had been suspended from studying in the university pending appearance before the students disciplinary committee**.** Upon receipt of the said letter the applicant informed her advocate on record about her dissatisfaction with this decision thereby prompting the institution of Judicial Review Miscellaneous Civil Application NO. 184 of 2013. Thereafter, her advocate and the advocate for the respondent, the firm of **Mohammed Muigai** agreed that she should be subjected to the disciplinary proceedings expeditiously and the thereafter respondent's advocates in the aforesaid case, promised to get back to the applicant's advocate on the scheduled date for the disciplinary hearing.
9. It was the applicant's case that when she filed the aforesaid judicial application No.184 of 2013, the same without her involvement extensively reported in the press**.** On 31st July at around 11.00am the applicant received a call from the respondent directing her to attend the disciplinary proceedings on 1st August, 2013 and was directed me to go to the university and collect a letter to that effect**.** The applicant duly attended the disciplinary proceedings at the respondent's premises but was met with a lot of hostility by the panel hearing the matter and the first question she was asked was why she had sued the university and scandalized it by alleging that there was sexual harassment of female students by their male lecturer and caused the aforesaid case to be extensively reported by the press. Despite her attempt to explain herself, she was met with hostility and the allegation that she was being rude to the panel and was thus denied a chance to be accorded fair hearing and to explain that he side of the story.
10. According to the Respondent, the respondent university has clear policy that students should leave their luggage at a designated point (left luggage) before going to the exam room but with strict warning that no valuables including mobile phones, or money should be left there as the university cannot be held liable for their loss. Apart from that the lecturer normally brings a box where all mobile phones are to be placed while others insist that they be switched off and placed on top of the desks. To the applicant, this is normally done as most students including herself are on parallel degree programme and do not reside in the university and therefore would have no place to leave their mobile phones as they can't be left at the left luggage" point.
11. However, on this particular day, the lecturer didn't bring any box to place the mobile phones but

ordered that they be switched off and placed them on top of our desks which they duly complied with. According to the applicant her phone was off from 12.30pm to 4pm when it was given back to her during which period the lecturer ordered them switched off till she was chased from the exam room and when she signed to confirm the receipt of the same, the same was still off and therefore, there was no way she could have used it to retrieve any information for the purposes of exam cheating.

12. It was deposed by the applicant that during the hearing no incriminating evidence was produced despite her asking for the same. According to the applicant she was similarly denied an opportunity to call witnesses
13. It was therefore the applicant's case that her rights to fair trial were infringed and as a result she was condemned without being heard against rules of natural justice and that this position was confirmed when the verdict was made where she was found guilty and discontinued from her studies which decision, according to her, was unreasonable as she was not given any reasons for the decision of the committee yet the decision is weighty with far reaching implication on her career and life in general. To the applicant, this decision was specifically tailored to punish her for suing the University and probably because of the bad publicity it got from the said case as one would wonder why on 8th April, 2013 the University would allow her to re-sit the said CAT it alleges she had cheated on when the said allegations of cheating were still pending.
14. To the applicant, the university hurriedly convened a disciplinary session to ostensibly punish her and get her out of their way since she had been persistent in being heard expeditiously and also because she had exposed the university to bad publicity when her aforesaid case was reported by the press albeit without her involvement.
15. On 15th October, 2013 the applicant swore a supplementary affidavit in which she deposed that from the interview that was conducted by the committee, there was nowhere when she made any inappropriate statements or appeared disrespectful but simply explained the events as they occurred. She however reiterated that she protested against an illegal body search by a male lecturer which is clearly within her rights and all she requested him to do was to call a female personnel to do so. It was the applicant's case that the grounds under which she was discontinued namely being in possession of a mobile phone were not sufficiently warranted after she explained the circumstances under which the lecturer in question allowed them to switch them off and keep them for safe custody as the university doesn't take responsibility for any loss.
16. According to the applicant, it is not true that the said lecturer administered a second CAT to all the students but only to those who had not undertaken the first CAT and the said lecturer has deliberately avoided disclosing why he returned the phone to her instead of taking it to the dean of law school or to the chairman of the department. She denied that she ran out of the classroom as alluded to by the said lecturer but asserted that she was chased out and it is for that reason that she went to report to the relevant authority for assistance.
17. According to the applicant, the said lecturer has also warned her classmates that anyone who supports me in her case would face dire consequence and it is for this reason that despite them willing to testify none is ready to bear the consequence of victimization.
18. The applicant however averred that she has already been re-admitted back to Respondents University where she is continuing with her studies smoothly.

Respondent's Case

19. On behalf of the Respondent, applying affidavit sworn by **Professor J. Okumu**, the Respondent's Deputy Vice Chancellor, Academic on 8th October, 2013 was filed on 14th October, 2013.
20. According to the deponent, the Applicant was admitted as a student into the Respondent's School of Law by a letter dated July 13, 2011 prior to which she committed herself to abiding by the Respondent's Rules and Regulations. To the deponent, the Applicant went through the motions of academic life in her First Academic Year and the First Semester of her Second Academic Year until March 25, 2013 when she committed an examinations irregularity whilst taking a Continuous Assessment Test in a course known as LPL 209: Customary Law in Kenya.
21. The circumstances, according to the deponent were that on March 25, 2013, the Lecturer invigilating the said Assessment Test, **Mr. Francis Njihia Kaburu** found the Applicant with unauthorized materials (hand-written notes) and a mobile phone inside the examinations room

while the Assessment Test was being administered. Following receipt of the report regarding this incident, the Respondent decided to suspend the Applicant pending her appearance before the Student's Disciplinary Committee in accordance with the Respondent's Examinations Regulations on Penalties as stipulated in the University Calendar and on July 24, 2013, the Applicant was invited to appear before the Student's Disciplinary Committee on Thursday August 1, 2013 to answer to charges of committing and examination irregularity. The Respondent in this letter explained to the Applicant her conduct that amounted to an examinations irregularity under the Respondent's Examinations Regulations. On August 1, 2013, the Respondent's Student's Disciplinary Committee sat and deliberated over the case involving the Applicant. From the minutes of the Student's Disciplinary Committee, the deponent opined that the Applicant was afforded ample opportunity to answer the charges and defend herself and that the Applicant's statement before the Disciplinary Committee took more space and time than any other proceedings.

22. To the deponent, it is incorrect for the Applicant to allege that she was not afforded an opportunity to be heard. From the minutes it was clear that the Applicant made a detailed explanation of the circumstances which according to her, led to the charges being preferred against her and while the Applicant denied that she had carried any unauthorized materials into the examinations room, she admitted to carrying a mobile phone into the examinations room and admitted that she was aware that this was prohibited under the Respondent's Examination Regulations. To the deponent, from this oral admission, it was evident that he Applicant had contravened the Respondent's University Examination Regulations that states that possession of mobile phones, unauthorized text books, laptops, ipods or any other electronic gadgets constitutes an examination irregularity.
23. Whereas the Applicant stated that she had a health condition that required her to have her mobile phone with her so that in case the condition occurs, she can call her mother, the Applicant's stated condition has not been disclosed to the Respondent and further, the Applicant ought to have sought the permission of the Respondent or its agents to be allowed to have the mobile phone in the examination room. In any event, the Respondent has competent medical personnel that would be able to attend to unwell student when need arises.
24. In the deponent's view, it is irrelevant whether the mobile phone had been switched on, whether Applicant was using it during the assessment test or whether the information/data stored in the mobile phone was relevant to the Assessment Test since the Respondent's Examinations Regulations prohibit one being in possession of a mobile phones as long as they switched them off. It is the Applicant's case that it was the Lecturer who allowed the students to get into the examinations room with their mobile phones as long as they switched them off and the Applicant stated before the Student's Disciplinary Committee that she knew of another student who would attest to this allegation.
25. The deponent however denied the applicant's allegation that she was denied an opportunity to call this other student as her witness as false and misleading as it is clear from the Minutes that the Applicant informed the Student's Disciplinary Committee that she would be calling this other student as her witness in Court and not before the Disciplinary Committee.
26. According to him, this is the second Judicial Review Application the Applicant is bringing after she was suspended for the examinations irregularity; the first one being ***Judicial Review Miscellaneous Application No. 184 of 2013,*** which was withdrawn in open Court on June 7, 2013 before leave was granted as it had been brought prematurely. However the Applicant misrepresented to the Disciplinary Committee that as the first judicial review proceedings were still pending in Court for hearing, she would call the other student as her witnesses to testify in Court. From the foregoing, it was contended that the Applicant's appearance before the Disciplinary Committee was only intended as a dress rehearsal for filing the present proceedings hence the reason for choosing not to provide all the evidence she had to the Disciplinary Committee.
27. To the deponent, upon assessing the testimonies presented before it including the Applicant's oral admission, the Disciplinary Committee determined that she was guilty of an examination irregularity under the Respondent's Rules and Regulations as a result of which the Respondent's Disciplinary Committee decided to discontinue the Applicant's studies with immediate effect in line with the Respondent's Regulation on Penalty for Examination Irregularity (University Calendar Page 84) which states that, *'<u>Any student found guilty of an examination irregularity by</u>*

the Students Disciplinary Committee shall be discontinued' which decision was communicated to the Applicant by a letter dated August 22, 2013.

28. To the deponent, it is incorrect to state that the Applicant was discontinued from her studies because she had sued the Respondent or because her story had been reported in the press as this did not inform the decision of the Respondent's Disciplinary Committee.
29. It was therefore deposed that in light of the above, the Applicant has not demonstrated any unreasonableness, bias, hostility, extraneous or irrelevant considerations by the Respondent's Student's Disciplinary Committee as alleged in her application to warrant its decision being quashed or to warrant the Applicant's reinstatement to the Respondent University.
30. Despite being informed in the letter dated August 22, 2013 communicating the decision to discontinue her studies that she had a right of appeal against the decision of the Disciplinary Committee, the Applicant however refused and/or ignored to follow due procedure in this regard as advised. It was however contended that the Respondent abided by its Rules and Regulations and the principles of natural justice in investigating the incident of an examinations irregularity by the Applicant, informing the Applicant of the charges against her, granting her ample opportunity to be heard on the same and meting out the prescribed/appropriate penalty under the Rules having found her guilty of the offences by her own admission. In the deponent's view, the Applicant wishes to have this Court replace the decision of the Disciplinary Committee which was properly constituted and upon considering the evidence with the Court's decision yet this Court should not be moved to act as such. To the deponent, the Respondent should be allowed to discipline its students as and when the circumstances call for the same without intimidation by the students abusing the Court process as this would set a dangerous precedent leading to the emasculation of the Universalities in dealing with errant students hence it is only fair and just that his Honourable Court dismiss the entire Application with costs to the Applicant as the same is baseless and a waste of judicial time.

Applicant's Submissions

31. On behalf of the applicant it was submitted that the respondent failed to accord the applicant a fair chance to be heard by not allowing the applicant to explain herself out and canvass her case. Further the Respondent refused to allow to applicant an opportunity to call witnesses. It was further submitted that fair hearing ought to have encompassed the disclosure of the material to be used against the applicant by the Respondent to enable the applicant appreciate the extent of the allegations against her.
32. To the applicant the failure to disclose the nature of material allegedly found on the applicant coupled with the return of the cell phone to the applicant and the administration of another CAT showed that the decision was unfair. Although at common law there was no obligation to give reasons for the decision, it was submitted that it is an indispensable part of a sound system of administration of justice hat this requirement be adhered to. From the conduct of the disciplinary proceedings, it was submitted that the same was biased. It was therefore submitted that the decision was unreasonable and in bad faith.

Respondent's Submissions

33. On behalf of the Respondent, it was submitted while reiterating the contents of the replying affidavit that it is trite law that in order to succeed in an application for judicial review, the burden of proof is on the applicant to demonstrate that the hearing conducted by the Disciplinary Committee was in violation of the principles of natural justice. It was submitted that though the applicant was informed of the charges facing he, she did not allege that she did not understand the same.
34. It was submitted that the reason for the failure to produce the material was due to the fact that the applicant ran out of the examinations room with the handwritten notes and her mobile phone was later returned to her. Since the applicant admitted that she carried her mobile phone into the examinations room, this admission formed the basis of decision to discontinue her studies and her attempted justification of was not accepted by the Disciplinary Committee. Citing **Patrick Mbau Karanja vs. Kenyatta University Petition No. 181 of 2012**, it was submitted that administrative

disciplinary process such as the Students Disciplinary Committee is not expected to conduct its proceedings like a Court would and that it is sufficient that he has heard and a decision made, taking into account all the matters placed before the committee fo determination. Further reliance was placed on **Republic vs. Kenyatta University HCMisc. Appl. No. 54 of 2009**.

35. It was submitted that the allegation that the applicant was denied an opportunity to call a witness is similarly baseless since the minutes indicate that the applicant said she was going to call the witness in court and hat even in these proceedings there is no evidence adduced in support of the applicant's claim by any student.
36. It was further submitted that an order of mandamus cannot issue in the manner in which it was sought since it sought a direction on the manner in which the Respondent ought to discharge its mandate and to grant the order would amount to the Court usurping the mandate of the Respondent to manage its students hence the application ought to be dismissed with costs.

Determinations

37. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

"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."

38. 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.***
39. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of

the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

40. That the Respondent has powers and jurisdiction to discipline students is not in dispute. Their power to mete out the punishments they meted to the *ex parte* applicants cannot therefore be contested. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

41. It is therefore clear that, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary.
42. In this case, it is contended by the applicant hat she was not afforded a fair opportunity of presenting her case in that when she appeared before the Disciplinary Committee she was met with hostility and was never afforded an opportunity of presenting her case. She was further never allowed to call her witnesses. However in her further affidavit, the applicant deposed that the lecturer warned her classmates that anyone who supported her in her case would face dire consequences hence none was willing to testify.
43. From the foregoing it is clear that the failure by the applicant to secure the witnesses was as a result of the alleged fear of victimisation by the would be witnesses. In the premises I find that the allegation that the applicant was deprived of an opportunity to call witnesses unfounded. Apart from that in these proceedings, apart from the applicant no other person has sworn an affidavit to support the applicant's case and the applicant has not attempted to explain why this is so.
44. With respect to the allegation that the applicant was not afforded an opportunity of presenting her case, the proceedings exhibited show that the applicant did present her case. In the said proceedings the applicant admitted as she has admitted in these proceedings that she was in possession of the cell phone in the examinations room. From the Respondent's Regulations exhibited, it is clear that one of the ingredients of examination irregularity is the possession of mobile phones and the penalty provided thereunder is discontinuation. The Regulations do not provide that the mobile phone be in use at the time or not. Whether or not such a regulation is reasonable is not the subject of these proceedings since the applicant is not challenging the reasonableness of the said regulations. Whether in the prevailing circumstances, her actions were excusable, is in my view a matter which went to the merits of the decision and this court is not concerned with the merits but only with the process of the decision making.
45. That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every

step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

46. The applicant further contended that the case that she was to face ought to have been disclosed to her to enable her prepare for the case. Again from the records there is no evidence that the applicant did seek that she be supplied with the materials which was to be used against her.

47. Further as is stated by Michael Fordham in ***Judicial Review Handbook***; 4th Edn. at page 1007:

"Procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

48. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

49. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

50. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

51. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing

requirements in court room situation etc."

52. Taking into account the foregoing and circumstances of this case I am not convinced that the Respondent's action was tainted with illegality, irrationality or procedural impropriety to entitle the court to issue the said orders.
53. Apart from the foregoing, the applicant in the supplementary affidavit deposed that she has already been readmitted back to the Respondent's University where she is continuing with her studies. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held 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 nolonger 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 **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
54. Being discretionary in nature, the Court will not grant the orders for the sake of doing so where it is clear that no useful purpose will be served by so doing.
55. With respect to the order of mandamus sought, the law is that the Court in granting such order does not do so where what is being sought is to compel the Respondent to exercise discretion or 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. See **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR.**

56. In this case apart from seeking an order that the applicant be re-admitted or reinstated back to her studies, an event which has already taken place, the applicant also sought an order that the respondent be compelled to administer all the exams that the applicant missed out during the period of the suspension and discontinuation from her studies. Once the Court grants an order of certiorari, unless the Respondent is legally obliged to take further steps the Court will leave it to the Respondent to decide on what steps to take and will not compel the Respondent to take particular steps which the respondent is not legally obliged to take. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

"The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court's consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law….. Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari,* prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant

to such an order would themselves be highly questionable."

57. Before concluding this judgement, it is clear that this application was not properly intituled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
58. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

59. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

"REPUBLIC……..……..……..……..APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA……..…RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

60. In the result I find that this application is both incompetent and unmerited.

Order

61. Consequently the order which commends itself to me and which I hereby grant is that the Notice of Motion dated 25th September, 2013 be and is hereby dismissed. In the circumstances of this case I make o order as to costs taking into account the relationship between the parties to these proceedings.

Dated at Nairobi this day 19th of March 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties