REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW

CAUSE NO. 366 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN, HIGHER EDUCATION LOAND BOARD.....1ST RESPONDENT

AND

MINISTER, MINISTRY OF HIGHER EDUCATION.....2ND RESPONDENT

EX PARTE APPLICANT.....DR. STEPHEN ONYANGO ODEBERO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 8th October, 2012 the *ex parte* applicant herein **Dr. Stephen Onyango Odebero** seeks orders of mandamus compelling the 1st Respondent to release a list of all applicants who applied for advertisement for the Chief Executive Officer cum Secretary to the Higher Education Loans Board (hereinafter referred to as the Board) and a list of top three (3) candidates who qualified and were recommended for appointment by the Kenya Institute of Management (hereinafter referred to as KIM) and an order compelling the 2nd Respondent to gazette the applicant if he merits as per the initial interview by KIM and in the alternative that the 2nd Respondent be compelled not to gazette any candidate whose name is recommended out of the re-advertisement by the 1st Respondent.

Applicant's Case

2. According to the ex parte applicant, following the advertisement by the Board of the position of the Chief Executive Officer cum secretary to the Board he applied for the said position and was shortlisted and invited for an interview which interview was conducted by KIM on 2nd August, 2012. A further interview was further conducted by the Board on 23rd August, 2012.

3. From his qualifications and experience the ex parte applicant believed that he was highly qualified for

the position. Despite that the Board decided to re-advertise the said position changing the profile and reducing the minimum qualification from a Masters Degree to a Bachelors Degree and added Masters Degree as an added advantage. In the ex parte applicant's view the said re-advertisement was malicious to favour certain individuals whose interests were being covered by the Board.

4. According to the ex parte applicant this was done without informing those who had been interviewed of the outcome of the initial interview and advising them not to reapply.

5. It was therefore the applicant's view that to clear the air and in the interest of justice the 1st Respondent ought to be compelled to produce a list of all the candidates shortlisted out of the re-advertisement. He averred that under Article 35 of the Constitution, he had a right to be supplied with the said list and to be informed of the outcome of the interviews conducted on 2nd August, 2012 and 23rd August, 2012.

6. It was further contended that the 1st Respondent acted ultra vires by purporting to recruit and/or appoint a secretary to the Board which powers are bestowed and conferred on the 2nd Respondent under the ***Higher Educations Loans Board Act***, Cap 213A (hereinafter referred to as the Act).

1st Respondent's Case

7. The 1st Respondent's case was that following the advertisement of the position of the Board's Chief Executive/Secretary's position on 21st June, 2012, 38 applications were received at the closing date on 4th July, 2012 and the contracted agency, KIM, shortlisted and interviewed 12 candidates after which KIM forwarded its report to the Board with a recommendation that the Board interviews six (6) persons, including the ex parte applicant.

8. After the interviews the Board found all the candidates including the ex parte applicant unsuitable for the position and prepared a report which was delivered to the 2nd Respondent on 28th August, 2012. According to the 1st Respondent, the ex parte applicant was found unsuitable for the job as he lacked practical experience in administration and management in a senior position.

9. Pursuant thereto the 2nd Respondent directed the Board to re-advertise the position which was done with a closing date being 15th September, 2012 and the ex parte applicant once more applied for the position through his application dated 6th September, 2012.

10. It was the 1st Respondent's position the re-advertisement was done in good faith to attract qualified persons with practical experience which the ex parte applicant lacked.

Applicant's Submissions

11. On behalf of the applicant, it was submitted that the rea-advertisement of the position without giving reasons after an independent body had interviewed and shortlisted three (3) candidates to be forwarded to the 2nd Respondent for appointment was unfair, unreasonable, irrelevant, biased, an abuse of power, done in bad faith and was generally an act of procedural impropriety. It was submitted that the lowering of the minimum qualification without reasons and without advising the initial applicants not to re-apply was indicative of bias and unreasonableness on the part of the 1st Respondent.

12. By ignoring the recommendations made by KIM, it was submitted was an irrelevant consideration. Based on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation CA 1948** and **Republic vs. Attorney General & Another ex parte Waswa & 2 Others [2005] 1 KLR 280**, it was submitted that irrelevant consideration renders a decision unlawful and that an outright refusal to consider the relevant matter and omitting to take into account a relevant matter constitute an unlawful behaviour.

13. It was further submitted that the engagement of the ex parte applicant by the 1st Respondent in

consultancy services and subjecting him to three (3) different extraneous interviews created in the ex parte applicant a protected interest which ought not to have been taken away at the whim of the 1st Respondent. By engaging the applicant as a consultant and inviting him for interview, it was submitted that the 1st Respondent created legitimate expectation which the applicant reasonably expected that his consultancy services would continue by being appointed to the post of the Chief Executive Officer.

14. It was further submitted that since the 1st Respondent was not legally in the officer, he was not properly suited to call for any interviews and/or re-advertise the position as he did. This was because he was appointed vide gazette notice in March, 2003 and by virtue of section 4(2) of the Act, members of the Board hold office for a term of 5 years hence the 1st Respondent's term expired in March, 2008 but his extension was never gazetted as required by the law. It was submitted that the failure to gazette his appointed was unprocedural, irregular and hence he did not have the locus to call or advertise for the said position hence the Board is illegally constituted.

15. It was the applicant's position that pursuant to the provisions of Order 53 rule 3 as read with Order 51 rule 1 of the ***Civil Procedure Rules***, the application was properly made by Notice of Motion and not Chamber Summon.

16. On the issue that the order requiring the 2nd Respondent not to appoint the Chief Executive Officer or degazette any appointment being overtaken by events, it was submitted that the Court the process which led to the said appointment being fatally flawed, irregular, illegal and not inconformity with the laid down procedure, the Court ought not to rely on technicality to extend an illegality. In support of this submission the applicant cited Nairobi High Court Petition No. 255 of 2011 **John Githinji Wangondu & 7 Others vs. Coffee Board of Kenya & Another**.

1st Respondent's Submissions

17. On behalf of the 1st Respondent, it was submitted that the re-advertisement was done in good faith in order to attract qualified persons with practical experience that the ex parte applicant lacked. It was submitted that the Board was within its mandate to re-advertise the said position as all the candidates fell below the threshold of the criteria set for the CEPO of the Board. As there is a substantive holder of the office, it was submitted that the prayer for mandamus in unattainable and has been overtaken by events and reliance was placed on **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji & 9 Others Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR, Republic vs. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] eKLR and Republic vs. Secretary Teachers Commission ex parte Samson Munyoki [2012] eKLR .**

18. According to the 1st Respondent, whereas, Article 35 of the Constitution entitles a citizen to access information held by the State, the ex parte applicant herein did not exercise his right as at no point did he write to the Respondents seeking the same.

19. It was therefore submitted that the applicant has not proved that the Board acted outside its legal mandate and that the Board did follow the procedure in the recruitment process. Was not unreasonable but acted in good faith.

20. It was submitted based on **Republic vs. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology** (supra) that the order compelling the appointment of the ex parte applicant cannot be granted because the applicant has failed to demonstrate that he is owed a substantive right to be employed by the 1st Respondent.

2nd Respondent's Submissions

21. On behalf of the 2nd Respondent it was submitted that in the present application, the facts and the grounds set out in the statement of facts and the verifying affidavit do not disclose any specific relief

sought.

22. It was further submitted that the reliefs sought in the substantive motion were not the reliefs for which leave was granted hence the substantive motion is incompetent.

23. It was further contended that as the application for leave was obtained by way of Notice of Motion and by the Republic, the same was fatally defective.

24. It was submitted that since the applicant is praying for the release of results, his prayer for gazettement as the successful candidate has no basis. By submitting that the 1st Respondent had no powers to recruit or advertise the position while admitting that he applied for the same, the application was based on self-contradicting facts and issues hence incapable of judicial determination.

25. It was submitted that while the Court can compel a person to perform its duties, it cannot direct on how it should be performed.

Determinations

26. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.

27. The first issue for determination is the competency of the application. Order 53 rule 1(1) of the *Civil Procedure Rules* provides:

> ***No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***

28. Therefore a party cannot apply for judicial review unless leave to do so is sought and granted. Similarly, it is my view that a party who sets out to seek particular judicial review orders on the basis of which leave is granted cannot in the substantive motion apply for other orders for which no leave was sought and granted. Apart from that Order 53 rule 4(1) of the said 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.***

29. In the statement filed herein the substantive relief which the ex parte applicant indicated that he was intending to seek was for "an order of mandamus and certiorari to issue a notice of motion to compel the Chairman Higher Education Loans Board (HELB) to suspend and/or stay the on-going recruitment of the Chief Executive Officer cum Secretary to the Board." In its application for leave, the applicant simply sought that "leave be and is hereby granted for the ex parte applicant to file an application for an order of certiorari and mandamus." These documents read together clearly show that the leave that was being sought was for the orders specified in the Statement.

30. It is however clear that the orders that the ex parte applicant sought in the substantive motion were not those very same orders he specified in his statement. Accordingly, the orders sought by the applicant in the Motion are not the ones for which leave was sought and granted and that renders the application incompetent. Judicial Review proceedings are special proceedings and a party who applies for the same ought to bring himself or herself within the ambit of the same.

31. It was further contended that the application for leave having been brought by Notice of Motion rather than Chamber Summons was similarly incompetent. Order 53 rule 1(2) of the ***Civil Procedure Rules*** provides that "*An application for such leave as aforesaid shall be made ex parte to a judge in chambers...*" It does not state that the application is to be brought by Chamber Summons. In my view it is

one thing to require that an application be made before a Judge in chambers and another to provide that it be made by Chamber Summons or summons in chambers. The two do not necessarily mean the same thing.

32. It was further contended that as the application for leave was brought in the name of the Republic the same was fatally incompetent. The intitulement of an application for leave was dealt with by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563,** where he held that an application for leave ought to be intituled as hereunder:

> **In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition**
>
> **And**
>
> **In the Matter of Kenya Ports Authority Act**
>
> **And**
>
> **In the Matter of the National Environmental Management and Co-ordination Act 1999.**

33. This was in line with the decision in **Farmers Bus Service and Others vs. Transport Licensing Appeal Tribunal Civil Appeal No. 63 of 1959 [1959] EA 779** where the East African Court of Appeal held that the ex parte application for leave ought to have been intituled:

> **"In the matter of an application by (applicants) for leave to apply for an order of Certiorari**
>
> **and**
>
> **In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal."**

34. With respect to the substantive Motion, it was held in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** 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"**

35. 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 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".

36. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

37. I, accordingly hold that the mere fact that the application for leave was not properly intituled does not render these proceedings fatally incompetent. This Court has however held on numerous occasions that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs since it must be remembered that judicial review proceedings are special proceedings which are neither criminal nor civil. Proper intitulement of applications both for leave and the substantive Motion not helps in minimizing confusion at the appellate level, but is a reflection of the fact that judicial review proceedings are in substance commenced so as to enable parties seek and obtain orders which are not ordinarily available in the usual civil proceedings.

38. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

39. It is therefore clear that whereas the Court is empowered in an application for mandamus to compel the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform, 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. In this case therefore the Court has no powers to compel the Respondents to appoint a particular person to the position of the Chief Executive Officer of the Board cum Secretary as to do so would amount to compelling the Respondents to carry out its legal duty in a specific manner. The Court can only compel them to exercise their discretion in accordance with the law.

40. Where however that discretion has been exercised, whether rightly or wrongfully, i.e. that the duty has not been performed according to the law, then *mandamus* is an inappropriate remedy for the simple reason that an order of *mandamus* cannot quash what has already been done. In this case it is contended that another person has been appointed to the said position. Without quashing his appointment, it would serve no purpose to grant the orders of mandamus sought herein.

41. The applicant contended that since the 1st Respondent's appointment was never gazetted, he had no powers to recruit or advertise for the recruitment of the said CEO. It was however not positively averred that there in fact was no extension of the 1st Respondent's mandate.

42. 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.

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

44. In this case I have not been referred to a specific provision which requires that the appointment of the 1st respondent or the extension of his term was to take effect only on gazettement.

45. The applicant also contended that having been retained as a consultant by the 1st Respondent before and having been shortlisted for interview he had a legitimate expectation that he would be appointed to the position advertised. With respect to legitimate expectation, it is my view that the applicant's legitimate expectation was that he would be treated fairly and that his application would be fairly considered. There cannot be a legitimate expectation that an applicant for a post will be appointed to that post. If that were the position there would be no basis for conducting interviews. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007]**

KLR 240 simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. I am unable to find that the mere fact that the applicant had been retained as a consultant by the 1st Respondent amounted to a legitimate expectation that the 1st Respondent would automatically appoint him to the position of the CEO.

46. On the issue of the right to information, under Article 35 of the Constitution, this Court expressed itself in **Prof. Njuguna S. Ndung'u vs. The Ethics & Anti-Corruption Commission & Others Constitutional Petition No. 73 of 2014** as follows:

> **"...it is now trite that before an applicant seeks orders from the Court compelling the Respondent to give him access to certain information, he must show that the said information was requested for. As was held in Charles Omanga & 8 Others vs. Attorney General and Another (supra):**
>
> **'This case concerns Article 35(1). The petitioner argues that this provision is self-propelling and that a person is entitled to apply to the court directly for such information to be given. In my view, this is the wrong approach. Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, *"that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."* [Emphasis mine] How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others* Nairobi Petition No. 155A of 2011 (Unreported), the court stated that, *"[43] I am not inclined to grant ….. the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order."* In *Andrew Omtatah Okoiti v Attorney General and 2 Others* (Supra), Musinga J., stated that, *"Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant's application is rather premature."* There may well be circumstances where the Court may be required to make an order in the first instance but I think the Court should not exercise coercive power before the State organ, institution or body is given an opportunity to meet its constitutional obligation to provide the information. The right to information is not an absolute right. Each institution or person is entitled to assert any limitations consistent with Article 24 of the Constitution.'**
>
> **In the instant case, whereas a request was made to the 1st Respondent there is no evidence that a similar request was made to the Hon. The Chief Justice who was alleged in the said article to be the co-correspondent. The information sought if the article was correct could either be obtained from the 1st Respondent or the Chief Justice. Without seeking the same from the Chief Justice and as the applicant did not contend that there was any compelling reason for not seeking the same, I must hold that the instant application was prematurely made."**

47. Similarly, without evidence that the applicant sought the information in question from the Respondents before bringing this application, I am afraid to hold that the relief therefor is premature.

48. The applicant contended that he was qualified for the position and ought to have been considered for the position. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal 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."**

49. Therefore this Court is not concerned with the merits or otherwise of the 1st Respondent's decision but the process otherwise this Court would be substituting its decision for that of the 1st Respondent and as was held in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** 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.***

50. I am also cognisant of the position stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. 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. 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.**

51. In this case since the position in contention now has a substantive holder to grant the orders sought herein without quashing the appointment of the holder thereof, who is not even a party to these proceedings would not only be to act in vain but would be contrary to the rules of natural justice.

52. It follows that the Notice of Motion dated 8th October, 2012 lacks merit.

Order

53. Consequently the order which commends itself to me and which I hereby grant is the said Motion be and is hereby dismissed with costs.

Dated at Nairobi this day 30th day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ng'ang'a for Mr Amati for the Applicant

Mr Odhiambo for Miss Masaka for the 2nd Respondent

Cc Patricia