REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

J. R MISC CIVIL APPLICATION NO. 250 OF 2012

IN THE MATTER OF AN APPLICATION BY DR. SOLOMON MUMMAH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST KENYATTA UNIVERSITY

AND

IN THE MATTER OF KENYATTA UNIVERSITY ACT, CAP 210C LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

IN THE MATTER BETWEE REPUBLIC………………. ………………………………………..APPLICANT

VERSUS

KENYATTA UNIVERSITY......................................RESPONDENT

EX PARTE DR. SOLOMON J MUMMAH

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 27th June 2012 filed on 29th June 2012 the *ex parte* applicants herein, **Dr. Solomon J Mummah**, seeks the following orders:

1. **An order of CERTIORRI to issue and remove to the High Court and quash the decision of the Respondent's Deputy Vice Chancellor (Administration) suspending the Applicant vide a letter dated 11th June, 2012.**
2. **An Order of MANDAMUS compelling the Respondent to consider the Ex-parte Applicant's case in accordance with the Rules of Natural Justice and the Respondent's own regulations and to reinstate the ex-parte Applicant.**
3. **Costs of this application be provided for.**

EX PARTE APPLICANT'S CASE

2. The said Motion is supported by Statutory Statement filed 18th June 2012 and Verifying Affidavit sworn the same day by the *ex parte* applicant herein, **Dr. Solomon J Mummah**.

3. According to the *ex parte* applicant, he was employed by the Respondent's Council on 23rd March 2004 and at the time of the purported dismissal was a lecturer in the Department of Psychology. On 5th January 2012, the applicant received a letter from the Vice Chancellor (Administration) (hereinafter referred to as the said Vice Chancellor) dated 27th December 2011 suspending him from the University and immediately referring his case to the Senior Board of Discipline (hereinafter referred to as the Board). Although he disagreed with the said suspension he nevertheless obliged and left the University pending his appearance before the said Board. On 2nd May 2012, he received a letter from the Respondent dated 2nd May 2012 inviting him to attend the said Board scheduled for 4th May 2012 and he was further required to defend himself on additional charges. The applicant through his legal counsel requested for a 14 days period to enable him prepare and the deletion of the additional charge as well which letter was acknowledged by the Respondent. The applicant's counsel further reminded the respondent of his request for the said 14 days before the appearance and deletion of the said additional charge. On 4th June the applicant received a letter from the Respondent inviting him to appear before the said Board on 11th June and requiring him to respond to the said illegal charge. The said letter informed him that he 'may submit a written defence (if any) to the Deputy Vice Chancellor (Administration) before the date of the meeting". On handing the said letter to his legal counsel, the latter responded that the date was unsuitable to him as he would be attending a compulsory medical review and would only be available towards the end of June 2012 and for the same reason a cause between the applicant and the Respondent at the Industrial Court being Cause No. 550 was mutually fixed for hearing on 7th July 2012. Despite inability of the applicant's counsel **Mr. Okoth Oriema**, to appear he submitted a written representation on the applicant's behalf expressed to be without prejudice to the applicant's right to appear before the Board and make oral representations. That letter and the representation was delivered to the Respondent on 8th June 2012 before the scheduled hearing as demanded by the Respondent. In the said response the *ex parte* applicant requested for all the evidence in the Respondent's possession to enable him effectively prepare for the hearing. However, on 11th June 2012, at around noon, a letter purportedly dated the same day was sneaked through the door to his house stating that he had been dismissed from the University. The said letter, according to him did not deal with the pertinent issues he had raised in his response with respect to adjournment, request for personal appearance and request for evidence. According to him the Board failed to consider the issues he had raised in his said response and concealed the evidence in their possession in support of the charge.
4. It is the applicant's case that the letter of suspension and letter of reference of the matter to the said Board was done without jurisdiction since the powers of discipline of Academic Staff is reserved to the Council vide section 13 of the ***Kenyatta University Act*** (hereinafter referred to as the Act) and Statute XIV(23) thereof under which the power is to be exercised for the reasons, on the grounds and in the manner pursuant to the procedures set out in the regulations; clause 9.4 of the Terms of Service of Academic Staff provides that the Vice Chancellor has the power to suspend a member of staff on good cause shown and 'Good cause' is defined to mean conduct which the Council approves as to constitute acts enumerated in paragraphs a-c; and that in this case the suspension was done by the Office of the Deputy Vice Chancellor (Administration) and not any other authorised body; that there was no good cause shown as per the regulations. The applicant's case is that there is no power reserved to any other office of the University to refer any disciplinary matter to the said Board as was done. He contends that suspension can only be done by the Council on good cause and not by the Deputy Chancellor (Administration) and not without good cause. The applicant's case is therefore that it was not open to the said Board to assume jurisdiction over the said charges from the said office since apart from lack of jurisdiction on the part of the said Deputy Vice Chancellor, the charge did not constitute 'good cause' as per regulations defined. These issues, though raised in the applicant's defence, he contends that they were completely ignored.
5. Part from the foregoing, it is the applicant's case that it is trite law that a person is barred from deciding a case in which he or she may be, or may fairly be suspected to be biased and imputed bias is based on the decision-maker being a party to a suit or complainant against a person whose case is set to be adjudged. Once that fact is proved, the bias is irrefutable and disqualification is automatic and there is no need for investigation into the likelihood or suspicion of bias. In this

case, it is the applicant's case that the persons who sat in the said Board to adjudge his case were key complainants against him, whose evidence as per the letter of termination was used in deciding his case such as the Chairperson, Department of Psychology who he has accused of insurbodinating and insulting and the Dean, School of Humanities and Social Sciences who made official complaint against him to the said Deputy Chancellor. According to him these persons together with the said Deputy Chancellor sat at the Board of Discipline as members and adjudicated his case despite his raising the issues in his defence.

6. In the applicant's view the participation of these people in the said proceedings rendered the Board's decision wholly void and must be quashed as the decision cannot stand.
7. There was a further affidavit, erroneously entitled "Replying Affidavit", sworn by the *ex parte* applicant on 5th November 2012 in which he reiterated that though under section 23(f) of the Act the Council is mandated to make Statutes setting terms and Conditions of Service including the appointment, dismissal and other related matters, pursuant to the said section there exist a Statute governing the University named Terms for Academic/Senior Library and Administrative Staff under which Article 9.4 is clear on the procedure of suspension which can only be done on good cause by the Vice Chancellor. He reiterated that the suspension was carried out by the Deputy Chancellor on his own volition and not on delegated powers and which powers he did not have unless properly delegated hence his action was void *ab initio*. It is reiterated that it was only the council which could determine whether there was good cause and as the council did not exercise this statutory authority the action constituted an illegality. It is deposed that the action by the Deputy Vice Chancellor of not seeking the Council's approval of the applicant's misconduct and proceeding to dismiss him by the Deputy Chancellor who does not have the requisite powers and authority is an act of illegality that cannot be cured and renders the entire suspension illegal and subject of quashing by the Court. While disputing that there were any complaints from the students, the *ex parte* applicant deposes that the purported complaints were perpetrated as a result of personal vendetta by the Chairperson, Department of Psychology. In any case that issue was not the subject of his dismissal but is mischievously introduced yet it forms another separate cause of action at the Industrial Court. He, however, denies that he was employed by the Deputy Vice Chancellor whom he avers has no power to employ any member of Academic Staff of the University. In his evidence the letter was not delivered after office hours as alleged but was received by the Secretary to the Deputy Vice Chancellor (Administration). According to the *ex parte* applicant there is no prohibition against appearing before the disciplinary committee by counsel. To the contrary the right to fair and impartial decision by a tribunal includes the right of representation by an Advocate of one's choice. According to him, contrary to the Respondent's allegation no official of UASU was invited to the said proceedings and there was no indication in the letter inviting him to the meeting that his attendance was compulsory. He reiterates that there is no indication in the decision that his defence was considered and that he was not provided with any evidence. He also reiterates his position that there was bias in the composition of the disciplinary committee.

RESPONDENTS' CASE

8. In opposition to the application the respondents filed a replying affidavit sworn by **Prof. Paul K. Wainaina**, the Deputy Vice Chancellor in charge of Administration of the Respondent. According to him, the powers to suspend an employee are delegated expressly by the University Council under Statute VIII of the Kenyatta made by the Council pursuant to section 23 of the Act. According to him the decision to suspend the Applicant was made after several complaints were made against him by students and his Head Department and hence there were good and proper grounds for suspending him. According to him the applicant refused to discharge the duties assigned to him by the Respondent; the applicant's students raised complaints about the quality of the applicant's lectures; the applicant failed or refused to submit the marks for the units that he taught when long overdue. When asked by the Chairperson of the Department, it is deposed the applicant used rude, abrasive, disrespectful and arrogant language in answering official memos and in the deponent's view this amounted to gross misconduct and a decision was made to suspend him pending his appearance before the Board since his conduct constituted good cause for disciplinary action within the meaning of the University Rules and Regulations. According to the

deponent, it is self defeatist for the Applicant to argue that he does not have the powers to suspend an employee pending disciplinary action yet his letter of appointment was issued by his office.

9. Although the applicant was first summoned to appear before the Board on 4th May 2012 through a letter dated 2nd May 2012 the said appearance was postponed at the request of the applicant and the decision to postpone the same was communicated through a letter dated 16th May 2012 and although the applicant requested for a 14 days notice there is no legal requirement for the same save that the notice must be reasonable. The applicant was invited vide a letter dated 30th May 2012 to appear for the hearing on 11th June 2012 which was 12 days notice which in his view was reasonable. According to him the letter requesting for postponement of the proceedings was delivered to the Registrar Administration on 8th June 2012 at 6.30 pm long after the Respondent's official working hours by which time no one was in the office and all was set for the hearing on 11th June 2012 on which date the applicant did not have the courtesy of even attending the proceeding as was required in his letter of invitation.
10. According to the deponent, the applicant does not have a right to be represented by his advocate at the hearing before the Board though he has a right to be represented by an official of the Universities Academic Staff Union (UASU) who were invited like any other members of the Board just before the meeting they sent texts intimating that they had other engagements and could not attend. Thereafter no communication was received from the applicant save for the letter from his advocates requesting for postponement of the disciplinary proceedings scheduled for 11th June 2012 which was delivered to the Registrar Administration on 13th June 2012 long after the conclusion of the proceedings and issuance of the dismissal letter. Since the applicant failed despite invitation to appear before the Board, the Board proceeded to consider the case in his absence since prior to the Board sitting the applicant did not communicate his intention not to appear. Since the letter inviting the applicant to appear before the Board was categorical that his attendance was compulsory, at the very least, the applicant ought to have attended the hearing as was required and his failure to attend, in the deponent's view, constituted a waiver of his right to put in an oral defence. The filing of a defence, according to the deponent, does not preclude the applicant from attending disciplinary hearings.
11. As to whether the Registrar Administration has authority to summon the Applicant to the hearing of the Board, it is deposed that the Registrar, as the secretary to the Board is the proper person to communicate the hearing date to the Applicant. According to him the Board made the decision to dismiss the Applicant on the basis of the evidence presented against him and after considering his written Statement of Defence. According to him he was not a complainant in the Disciplinary Committee proceedings and that the Chairperson of the Department of Psychology only attended as a witness as demonstrated in the minutes of the meeting. It is therefore deposed that the Board's decision to dismiss the Applicant was reached after affair process that adhered to all the rules of Natural Justice and his dismissal was only on the basis of the same grounds for which he had been earlier suspended as charge 4 was not considered as it was not part of his letter of suspension.
12. According to the deponent, the applicant having deliberately and knowingly sat on his rights and failed to appear before the Board should not now abuse the process of Court by seeking orders sought in the instant application when despite being given a chance to appeal against the Board's decision chose not to and approached the court without exhausting all the available channels. Since, in his view, the application discloses no reasons whatsoever why the orders sought in the Notice of Motion should be granted, it is only just and fair that the same be dismissed with costs.
13. The same deponent swore a further affidavit on 28th January 2013 in which he reiterated that he was not a complainant in the Disciplinary Committee proceedings and that the Chairperson of the Department of Psychology only attended as a witness. He also deposed that the copy of the minutes annexed to his replying affidavit was incomplete due to inadvertent mistake in making copies and annexed what, in his opinion was a complete record of the minutes of the disciplinary proceedings.

***EX PARTE* APPLICANT'S SUBMISSIONS**

14. It is submitted on behalf of the *ex parte* applicant that the decision to suspend the Applicant was made by the Deputy Vice Chancellor (Administration) on 27th December 2011 which decision, it

is contended was made without jurisdiction at all. The letter of suspension, it is submitted clearly originates from the desk of the Vice Chancellor and there is no evidence from the language of the letter that could infer that the said Deputy Vice Chancellor was actually acting on any delegated power or carrying out the decision of the Council of the Respondent at all. This position, it is submitted, is conceded by the Deputy Vice Chancellor in paragraph 11 of his Replying affidavit dated 28th September 2012. Section 23(f) of the Act mandates the Council to make Statutes setting the terms and conditions of service including the appointment, dismissal and other related matters while section 10(2) of the Act provides for the establishment of the office of the Deputy Vice-Chancellor who shall be under the general authority of the Vice-Chancellor and exercise such powers and perform such duties as provided under the Statutes. Pursuant to section 23(f) of the Act there exist a Statute governing the University named Terms of Service for Academic/Senior Library and Administrative Staff which exclusively deals with the procedure on staff discipline. Article 9.4 of the said Terms is clear on the procedure of suspension that discipline of Academic Staff that involves Suspension is hence reserved on the Voice Chancellor on good cause as defined by the very same statute and not the Deputy Vice Chancellor (Administration) at all. It is submitted that the Vice-Chancellor can only delegate the power to the Deputy Vice Chancellor (Administration) but the latter cannot usurp the exclusive powers reserved on the Vice Chancellor by law. The said letter of suspension, it is submitted is only copied to the Vice Chancellor 'to note on file' and there is nothing to show that the decision therein emanated from the correct body.

15. It is further submitted that the powers in Article 9.4 to refer a case to the Senior Board of Discipline are conferred upon the Vice Chancellor and are not donated to the Deputy Vice Chancellor (Administration) hence the Board cannot have jurisdiction to properly sit to determine a matter referred by a body without the requisite powers to refer the matter to it.
16. Under Article 9.4 it is submitted that the Vice Chancellor can only refer a matter to the Board where there is good cause and a conduct cannot amount to good cause for the said purpose until the Council deemed it fit, simply put, the alleged conduct must first be approved by the Council in a Council meeting to constitute Good Cause to warrant suspension of a member of Staff. In this case, it is submitted that the Council never met to deem the said conduct and hence even if the suspension was to be carried out properly by the Vice Chancellor as per the Statute provided, there was no good cause shown as defined by the Statute. Relying on **Dr. Billy George Ng'ong'a vs. Maseno University Nairobi HCCC No. 527 of 2007**, it is submitted that suspension of a member of Academic Staff and referral of his matter to the Senior Board of Discipline cannot be left in the hands of one individual at all but Council must be involved. Based on **Hypolito Cassiano De Souza vs. Chairman and Members of the Tanga Town Council [1961] EA 377**, it is submitted that if a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed and that if a clause contained any special directions in regard to the steps to be taken by the Vice Chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions.
17. It also submitted that there were charges which were introduced despite the *ex parte* applicant's protests and which were not the subject of the letter of suspension and which the Board relied upon in reaching its decision to terminate the *ex parte* applicant's services. It is submitted that whereas the *ex parte* applicant received his letter of termination at 1200 Hours, the meeting is stated to have ended at 1330 hours.
18. While reiterating the contents of his affidavits, the *ex parte* applicant submits that despite requesting for adjournment which request was received in good time, the Respondent failed to deal with his request. Similarly his request to be availed evidence was not responded to and based on the decision of **Hypolito Cassiano De Souza vs. Chairman and Members of the Tanga Town Council** (supra) it is submitted that it is difficult to conceive why any tribunal which intended fairly to listen to both sides would not give some information to an Appellant whose advocate said he was embarrassed by not knowing the precise case he had to meet. On the authority of **University of Ceylon vs. Fernando [1960] 1 All ER 631**, it is submitted the principles which should guide statutory or administrative tribunals sitting in quasi-judicial capacity include that the person accused must know the nature of accusations made; a fair opportunity must be given to those who are parties to the controversy to correct or contradict any statements prejudicial to their view; the tribunal should see that matter which has come into existence for the purposes of the *quasi-lis* is made available to both sides and, once the *quasi-lis*

has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it. Therefore it is submitted that the *ex parte* applicant had a right to be availed even without prompting the evidence that was in possession of the Board or complainant in support of the charge and failure to so do renders the decision as made in violation of natural justice and ought to be quashed.

19. Whereas the Respondent contends that it considered the written Statement of Defence, it is submitted that the minutes of the Board does not corroborate this assertion at all as there is no mention of the consideration of the said defence and further, it the letter of dismissal it is indicated that the *ex parte* applicant failed to attend the summons as a result of which the case was considered in his absence. In light of the fact that the *ex parte* applicant's pertinent issues raised in his defence were not dealt with, it is submitted that an irrefutable conclusion must be instantly made that the Board was biased and had already made a decision to dismiss the *ex parte* applicant hence they were never interested in hearing him at all.
20. In the *ex parte* applicant's view, the Respondent violated the long standing principle of *nemo debet esse judex in propria causa*. In his view the rule against bias is not only confined to some direct interest but where, short of direct interest, there is some reasonable suspicion, appearance or likelihood of bias. Although the *ex parte* applicant called for the disqualification of the Deputy Vice Chancellor to sit on the Board based on his previous conduct of ordering the arrest of the *ex parte* applicant based on the handing over of the scripts which though not subject of the charge was presented and discussed at the very same meeting and formed part of the evidence that was used to convict the *ex parte* applicant. In support of this line of submission reliance is similarly placed on the case of **Hypolito Cassiano De Souza** (supra).
21. It is also submitted that the open bias on the part of the Chairperson, Department of Psychology and Dean, School of Humanities and Social Sciences disqualified them from sitting as members of the Board. In the *ex parte* applicant's view the two sat in the committee, not as witnesses at all but representing the Department and their representation is clearly stated "Departmental Representation". Apart from this other persons attended the Committee without being members of the Senior Board of Discipline at all and these were **Mr. Ndiriti Gikaria** –Human Resource Manager and **Mr. Aaron Tanui –** Legal Officer.
22. On the issue of personal attendance of the *ex parte* applicant, it is submitted that there is no legal requirement that requires his personal attendance and further, the letter inviting him to the meeting stated that he was at liberty to file a written defence before the date of the hearing. In any case the *ex parte* applicant explained his reasons for non-attendance hence he cannot be taken to have waived his attendance.
23. With respect to the right to attend by legal counsel it is submitted that there is no prohibition against the same. Further Article 50 of the Constitution guarantees to any person to have any dispute that can be resolved by the application the law decided in a fair and impartial tribunal which in his view includes the right of representation by an Advocate of his choice. The fact that the first meeting was postponed on the basis of a request from the *ex parte* applicant's advocate without objection, according to the *ex parte* applicant shows that appearance by advocate was not forbidden. With respect to the issue of invitation of UASU officials, it is submitted that there is no such evidence.
24. In the *ex parte* applicant's view, these proceedings, being judicial review proceedings, the merits of the decision of the Respondent is immaterial in this determination.
25. In his further submissions filed on 11th March 2013, the *ex parte* applicant submits that his employment was statutorily underpinned and based on **Malloch vs. Aberdeed Corp [1971] 2 All ER 1778**, he contends that Parliament can underpin the position of public authority employees by directly restricting the field of Public Authority to dismiss thus giving the employee public rights and at least making him a potential candidate for administrative law remedies and this is what is referred to as statutory underpinning which ,means that the employee's removal is forbidden by statute unless the removal meets certain formal laid down requirements. Since the University is a creature of the Act and is governed by a Council a reading of the regulations made by the Council shows that Academic, Senior Administrative and Library Staff's terms and conditions are set out in Schedules I and II and the Terms and Conditions of Service for All Academic/Senior Library and Administrative Staff being part of the six Schedules is part and parcel of the Statutes of the University. It is submitted that it is clear that there is a clear procedure promulgated pursuant to

the Act for the discipline of the said staff, heavily restricted and which have the sole intention of giving specific cadre of employees to which the *ex parte* applicant belongs, public rights and making them candidates for administrative law remedies. Since the *ex parte* applicant's employment is statutorily underpinned, the procedure laid down in the said Terms must be followed by the University and the case of **R vs. Maseno University Staff Disciplinary Committee *ex parte* Mary Goretti Kariaga Nairobi High Court Misc. 963 of 2007** is cited in support of this submission. The Respondent's contention that the Regulations made pursuant to the Act are archaic and outdated, it is submitted, is based on ignorance of the law and is a tacit admission by the Respondent that they did not at all follow the procedures for the discipline of the *ex parte* applicant and hence the assertions.

26. With respect to Statute VIII Paragraph 3, it is submitted that whereas the said provision states that the Deputy Vice-Chancellor (Administration) shall be the Head of Administration Division of the University which has the following responsibilities; staff recruitment, training promotions and discipline, personnel administration, the said Deputy Vice Chancellor is not the overall head of administration and that it is the department, not the Deputy Vice-Chancellor (Administration) per se that is clothed with the overall powers of staff recruitment, training, discipline. The *ex parte* applicant reiterates that the Chairperson Department of Psychology and Dean, School of Humanities & Social Sciences attended the Board not as witnesses but as key members of the Board since there is no indication as to who represented the Department and the School in the Board. It is submitted that the Evidence adduced by the said Chairperson before the Board had no bearing to the 3 charges brought against the *ex parte* applicant though they were prejudicial to the *ex parte* applicant and no notice thereof was given to the *ex parte* applicant. In support of this contention the *ex parte* applicant cites **Fairmont Investments Limited vs. Secretary of State for the Environment & Another [1976] WLR 1255 at 1260**. This was despite the fact that the *ex parte* applicant requested for evidence which was not availed to him which is contrary to the holding in **Kanda vs. Government of Malaya [1962] PC 323 at 326**.

27. It is the *ex parte* applicant's position that a request to know before hand the evidence the *ex parte* applicant to meet and desire for representation cannot be interpreted as a desire to turn the proceedings into a court-room trial at all and secondly, the right to fair hearing in all administrative bodies is now a constitutional requirements. Therefore the decision in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009** relied upon by the Respondent, it is submitted, is nolonger relevant in light of the provisions of Article 47 and 50 of the Constitution.

RESPONDENT'S SUBMISSIONS

28. On behalf of the Respondent, it is submitted that since the dispute herein arises from an employer employee relationship such disputes are contractual and hence squarely within the realm of private law. In support of this line of submission, the Respondent relies on Staff Committee of **Maseno University & 2 Others vs. Prof. Ochong' Okello [2012] eKLR**. To succeed in judicial review in a dismissal case, it is submitted on the authority of **R vs. East Berkshire Health Authority, *Ex parte* Walsh [1984] 3 WLR 818** and **Republic vs. Judicial Service Commission & Another [2006] eKLR**, that an employee must show that he matter was public law right as opposed to private right and in this case, it is submitted that the *ex parte* applicant has failed to bring his action into the realm of judicial review and hence the motion ought to be dismissed with costs.

29. It is further submitted that looking at Statute V of Kenyatta University which sets out the powers and duties of the Vice-Chancellor, it is clear that there is no express provision conferring the power to discipline employees on the Vice-Chancellor. These powers, it is submitted, are bestowed by the Council which is the legislative organ of the University on the Deputy Vice-Chancellor (Administration) by Statute VIII section 3 while those of the Council to discipline an employee are donated to the Committee known as Seniors Board of Discipline. According to the Respondent the fact that the Deputy Vice-Chancellor has these powers is evidenced by the fact that the *ex parte* applicant's terms of engagement emanates from the office of the Deputy Vice-Chancellor Administration. According to the Respondent, the Statute governing the terms and conditions of service of the Respondent's Staff is Statute XVII and it merely authorises the Council to set the said terms and Conditions. In the Respondent's view, the said Statute is archaic

and outdated and there is no evidence that the said terms apply to his employment. In the respondent's opinion following the expansion of the University, the duty of disciplining employees was transferred to the Deputy Vice-Chancellor Administration.

30. With respect to the presence of the DVC-Administration on the Board, it is submitted that he sat as a member and there is no evidence that he was the complainant. **Dr. Wasanga**, on the other hand sat as the complainant. The issue of jurisdiction that was raised by the *ex parte* applicant, it is submitted is of no consequence and with respect to the extra charge, the minutes show that the same was not considered while and in any event the failure to mention the defence in the minutes does not mean that the same was not considered.
31. Relying on **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009**, it is submitted that practitioners are cautioned not to convert disciplinary proceedings into a court-room trial. The *ex parte* applicant having been accorded an opportunity to be heard which opportunity he declined to take, it is submitted the Board acted within the confines of natural justice by proceeding to hear and determine the matter in the absence of the applicant.
32. On allegations of impropriety it is submitted that the *ex parte* applicant having failed to attend the disciplinary hearing cannot doubt the authenticity of the minutes and that in any case there were other cases apart from the *ex parte* applicant's. The Respondent also raises serious doubts with respect to the *ex parte* applicant's conduct which it contends is not valid.

DETERMINATIONS

33. After considering the foregoing this is the view I form of the matter. The first issue for determination, in my view is whether this matter is properly before me as a judicial review court or whether it belongs to the realm of ordinary civil courts. To determine this issue one must necessarily deal with the distinction between public law and private law a distinction which is not always easy to make. In **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194, Hancox, JA** expressed himself as follows:

"The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of *certiorari* might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation."

34. On his part **Platt, JA** expressed himself as follows:

"It would, as a general rule, be contrary to public policy and as such an abuse of the process of the Court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled of an ordinary action, and by this means to evade the provisions of Order 53 for the protection of such authorities……By an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression "public law" can be used to deny a subject a right of action in a positive prescription of law by statute or by statutory rules…….If a matter of public law is directly involved then in general (subject to certain exceptions) the prerogative orders should be resorted to since the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decisions……..But if the matter is truly a private matter, then a civil suit would be appropriate……At present it is not entirely easy to decide what is a private law matter as distinct from a public law matter……..Employment by a public authority *per se* does not inject any element of public law. Nor does the fact that the employee is in a higher grade or is an officer as distinct from

the holder of an office; this only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. A reinstatement made under the Trade Disputes Act is a "private law" matter and a breach of such an order would not give rise to a "public law" remedy. A new cause of action created by a statute and consequent remedies for employees who have been "unfairly" dismissed is by no means simultaneously wrongful dismissal under common law. This new cause of action, however and statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review; they are only available to an employee on a successful application to an industrial tribunal."

35. Where therefore the dispute is purely private dispute to invoke the jurisdiction of a Court in exercise of its judicial review powers would be unacceptable.
36. However, in this case it is contended by the *ex parte* applicant that the relationship between the *ex parte* applicant and the Respondent was not purely a private law issue but was statutorily underpinned. The issue of statutory underpinning was dealt with by the Court of Appeal in **Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai. 20 of 1994,** in which the said Court expressed itself as follows:

"The word "statutory underpinning" is not a term of art. It has a recognised legal meaning. Accordingly, under the normal rules of interpretation, the Court should give it its primary meaning. To underpin, is to strength. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean, the employee's removal was forbidden by statute unless the removal met certain formal laid down requirements. Pure master and servant…mean there is no element of public employment or service in support by statute, nothing in the nature of an office or status which is capable of protection. If any of these elements exist, there is, whatever the terminology used and though in some inter partes aspects, the relationship may be essential procedural requirements to be observed and failure to observe them may result in a dismissal being declared null and void......What it means is that some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning". If this is correct, we can readily conceive of some of such public positions. For instance, under section 61 of the Constitution of Kenya, judges are appointable by the President and removable by him. But he cannot lawfully exercise the power of removal unless for specified misdoings and unless a tribunal appointed specifically for the purpose after investigating such conduct, recommends to him such removal. So it can accurately be said that the tenure of judges was protected by the Constitution. The same applies to other constitutional office holders such as the Attorney General, Auditor General and others. Even an ordinary office holder can be protected by statute. For instance, section 23(3) of the University of Nairobi Act mandate the Council of the University to keep proper books and records of account of the University as well as its expenditure. The accounts must be audited by the Auditor General and subsection 4 says in telling words; 'The employment of an auditor shall not be terminated by the council without the consent of the Minister in concurrence with the Controller-General'. So to that extent the position of an auditor is statutorily underpinned. It is difficult to see in what sense the tenure of lecturers of the University of Nairobi can properly be said to be "statutorily underpinned". The record shows that by section 19 of their terms of service, each category of academic staff can terminate his services with the University by giving notice according to their academic rank: if they should leave their appointments without giving the stipulated notices, they would have been in breach of contract. It is well established that they cannot be forced to resume their office by the equitable remedy of specific performance. So, the only remedy the University can pursue against them would be a claim for damages for breach of contract. Equitable remedies are said to be mutual. If that is so, if the University itself commits a breach of contract against them, the mutuality rule would dictate that they, for their part, can only seek damages against the University for

breach of contract. If the University can properly compel them to return to its service by equitable remedy of specific performance, then, and then only, can they claim as a remedy against the University the coercive equitable remedy of specific performance. To compel performance of a contract of personal service in this way, will turn a contract of service into a status of servitude."

37. The foregoing, in my view takes care of the *ex parte* applicant's position that his employment was statutorily underpinned. If there was any lingering doubt the same must be dispelled by the decision of **Visram JA** in **Maseno University & 2 Others vs. Prof. Ochong' Okello** (supra) in which the learned Judge held:

"The above opinion by the trial Judge is an emotive statement which opens a window for lecturers whose services are not statutory underpinned to obtain orders of judicial review having the effect similar to an order of injunction or specific performance of their contract of employment. However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties. The trial Judge appears to have been moved by the fact that the respondent is "a *senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children"*. This may well be so. Nonetheless, that fact does not make the contractual relationship between the respondent and the applicant which is governed by terms and conditions agreed by the parties a matter of public duty or matter governed by public law. Moreover, if one were to accept the reasoning of the trial Judge that the treatment of the respondent becomes a matter of public law because of the public expectation that the University would act lawfully and fairly towards the respondent, then it is not the respondent but the public who would have a right of action for orders of judicial review based on breach of their expectation. A parallel may be drawn from *Civil Appeal No.20 of 1994 Erick D. J. Makokha & others versus Lawrence Sagini & others* in which a question arose whether the breach of contract of personal service of lecturers from a public University could be remedied by equitable remedies of injunction and specific performance. In a unanimous judgment, a five judge bench of this court had this to say:

> ***"In our opinion the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal services are exceptions to the general run of the common law. In our opinion the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitudes and remedial changes they are bringing about, we cannot help feeling that the common law and the doctrine of equity which Section 3 of the Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that the transactions are entered into"***

I concur with the above proposition and find that the breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as

Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court."

38. The above decision was delivered on 10th October 2012. Accordingly it was delivered at the time when the Court was well aware of the provisions of Article 47 and 50 of the Constitution
39. Therefore the mere fact that a statute provides the procedures to be followed before an employee can be dismissed does not necessarily make the employment statutorily underpinned. What it means is that in the event that the employment is not terminated in accordance with the provisions of the statute, the termination of the employment may be wrongful in which event damages may be awarded in accordance with the law governing labour relations.
40. To quote the Court of Appeal in **Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others** (supra):

    "Section 23 of the conditions of service give the University power to remove a lecturer for good cause. This imports a duty of *audi alteram partem*, that is, they must be afforded an opportunity of answering any allegations of any misconduct justifying removal. That is also provided by the manner in which the Disciplinary proceedings of alleged errant members of the University are dealt with or should be dealt with. Although the applicants produced a great deal of case and statute law, they did not refer to even one statute which underpinned their tenure for the very sufficient reason that there is none. So the only remedy that they can obtain at law, is the one that ordinarily awardable for breach of contract of employment. They cannot properly invoke any equitable remedy to underpin their tenure any more than they can obtain one to compel any breach of their employment."

41. In **Mohamedi & Others vs. The Manager, Kunduchi Sisal Estate Dar-Es-Salaam HCCA No. 25 of 1971**, the High Court of Dar-es-Salaam held:

    "Section 20 of the Act gives the right to an employer to dismiss summarily for breaches of the Disciplinary Code. Section 21 prescribes the procedure to be followed before that right can be exercised. The contention of the appellants was that unless an employer complied with this procedure and for a breach which justifies summary dismissal under the Code any purported dismissal cannot amount to summary dismissal and therefore section 19 which ousts the jurisdiction of the court cannot apply. The short answer to this contention is that where an employer does not comply with the Act his action becomes wrongful but it is still summary dismissal for which, but for section 19 of the Act the employee can bring an action for damages. Compliance with the provisions of the Act is a complete defence to an action for wrongful dismissal but that is not the point."

42. Therefore in the event that the Respondent fails to comply with the provisions of ***Kenyatta University Act***, that would render the dismissal unlawful or wrongful. Conversely, if the provisions of the Act are complied with the dismissal would not be wrongful. The difference between the two circumstances is that in the former case the employee would be entitled to damages while in the latter he would not. Apart from the foregoing the decision of **Mead, J** in **Waibi And Another Vs. Railways and Harbours Kampala HCCC No. 432 of 1968 [1971] EA 235**, is telling. In that case the learned Judge was of the view that "a claim for wrongful termination is founded on a breach of contract of employment. By notices of appointment the services of the two plaintiffs was terminable by the defendant either on three months' notice or on payment of one month's salary in lieu of notice. The procedure laid down by regulation 55 was followed but by the wrong officers. Both plaintiffs were notified of the accusations against them and were given the opportunity to make a reply, which both plaintiffs did. It has not been proved by the plaintiffs that had the proper officer dealt with the matter they would not have been dismissed." That decision is however, not binding on me and I wish to say no more on it.
43. The *ex parte* applicant's case is that he was not afforded a fair hearing as the Respondent's Board proceeded with the proceedings despite his advocate having sought for postponement of the said proceedings and as the notice that was given was not in conformity with his Advocate's request for 14 days notice. In **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil**

Application No. Nai. 179 of 1998 the Court of Appeal held:

"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."

44. The *ex parte* applicant further contends that the DVC-Administration had no powers to suspend him and that the said suspension could only be undertaken on the satisfaction by the Council that there was good cause. Further, it is contended that one of the charges which was levelled against him was illegal since it was not among the allegations which formed the subject of his suspension. Hand in hand with this allegation is that allegation that as a result of the foregoing the *ex parte* applicant was not afforded an opportunity of properly addressing the allegations made against him due to introduction of new charges and the failure by the Respondent to furnish him with the evidence that had been put forward against him. In **Peter Okech Kadamas vs. Municipal Council of Kisumu** (supra) **Platt, JA** held that:

"Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision of failing to observe either one or other to the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."

45. Apart from that the applicant alleges that there was bias in the manner in which the disciplinary proceedings were conducted in that people who ought to have been complainant sat as members of the Disciplinary Committee. These were the DVC-Administration, The Chairperson, Department of Psychology and the Dean, School of Humanities and Social Sciences.
46. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another *Ex parte* Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400,** it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality.
47. Similarly, in In **Republic vs. Attorney General & Another *Ex parte* Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. The de-registration of the applicants in that case and the registration of main rivals within two days was held to be indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety. In addition where there is certainly evidence of bad faith on the part of the decision maker the Court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument.
48. The same issue was dealt with by the Court of Appeal **Peter Okech Kadamas vs. Municipal Council of Kisumu** (supra) in which **Nyarangi, JA** expressed himself as follows:

"The rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgement to decide in that particular case, either his own case, or in any other case where he brings forward the accusation or complaint on which the order is made."

49. This position in my view is reinforced by the provisions of Article 50(1) of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. A hearing cannot be said to be fair where a complainant also sits as a judge in the same proceedings.
50. The other issue raised by the *ex parte* applicant is that he ought to have been permitted legal representation. However 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".

51. 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."

52. 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 scale 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 indecision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

53. 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."

54. 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.”

55. The Respondent’s position, on the other hand is that the powers to suspend an employee are delegated expressly by the University Council under Statute VIII of the Kenyatta made by the Council pursuant to section 23 of the Act. The DVC-Administration was not a complainant while the said Chairperson and the said Dean were not committee members but were just witnesses.
56. From the foregoing, it is my view and I so hold that the issues raised by the *ex parte* applicant if found by the Court after hearing of the parties to be true, would found a cause of action for wrongful dismissal. In the light of the finding made by the Court of Appeal in **Maseno University & 2 Others vs. Prof. Ochong’ Okello** (supra) I am unable to elevate the *ex parte* applicant’s cause to the level of a public law dispute which would justify the remedy provided for under sections 8 and 9 of the ***Law Reform Act***. **Platt, JA** in **Peter Okech Kadamas vs. Municipal Council of Kisumu** (supra) was of the following view:

“Employment by a public authority *per se* does not inject any element of public law. Nor does the fact that the employee is in a higher grade or is an officer as distinct from the holder of an office; this only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. A reinstatement made under the Trade Disputes Act is a “private law” matter and a breach of such an order would not give rise to a “public law” remedy. A new cause of action created by a statute and consequent remedies for employees who have been “unfairly” dismissed is by no means simultaneously wrongful dismissal under common law. This new cause of action, however and statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review; they are only available to an employee on a successful application to an industrial tribunal.”

57. It therefore follows that judicial review procedure was neither the most efficacious method for the applicant to ventilate his grievances nor are the remedies under judicial review available to the *ex parte* applicant in the circumstances of this case. Therefore in order not to prejudice any action which may be commenced by the *ex parte* applicant whether in the ordinary civil court or in the Industrial Court I decline to make any specific findings on the issues which may form the subject of the said proceedings were they to be instituted.

ORDER

58. Having said that it must now be clear that the Notice of Motion dated 27th June 2012 is unmerited and the same fails with costs to the Respondent.

Dated at Nairobi this day 25th of April 2013

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Ogembo for the ex parte applicant

Mr Nyaosi for the Respondent