REPUBLIC ……..……APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION ……....……..RESPONDENT

SAMUEL ONYANGO OBARA….…….....1ST INTERESTED PARTY

CAROLINE ONDARI …...……...….2ND INTERESTED PARTY

JUDGEMENT
INTRODUCTION

1.By a Notice of Motion dated 22nd September 2009, filed in Court on 23rd September 2009, the ex parte applicant herein, **Robert Ombiu Nyamechu**, seeks the following orders:

1. AN ORDER OF CERTIORARI to remove into the High Court for the purpose of its being Quashed the order made by the Teachers Service Commission by a letter dated 26th February 2009 and 8th May, 2009 respectively in the Teachers Service Commission case NO. 913/05 2007/08/24 DISMISSING Robert Ombui Nyamechu from Employment and dismissing the said applicant appeal.

2. THE ORDER OF PROHIBITION to prohibit the Teachers Service Commission from removing Robert Ombui Nyamechu's name from its Register of Teachers.

3. THE COSTS of this application be provided for.

APPLICANTS' CASE

2. The said Motion is supported by the Statement filed on 21st August 2003 and the verifying affidavit sworn by **Robert Ombui Nyamechu**, the applicant on 20th August 2009. The said verifying affidavit is made up of four paragraphs and states as follows:

1 That I am an adult male of sound mind residing in Kiserian and the applicant herein therefore competent to swear this affidavit on my own behalf.

2 That the averments contained in my statutory statement filed herewith are true and correct and conform to my instructions to MS K. Onsembe & Co Advocates.

3 That there is no other application for Judicial review pending and that there have been no precious proceedings for judicial review in any court between myself and the parties herein over the same subject matter.

4 That I swear this affidavit to verify the truth and correctness of my statutory statement.

5 The applicant also swore an affidavit entitled “Affidavit of support” on 20th August 2009. According to the said affidavit, the applicant was employed by the Teachers Service Commission on 2nd May 1995 under TSC NO. 310163 and he rose the ranks to become a senior graduate Teacher and Deputy principle at Riyabu ELCK Secondary School since January 1997 to the date of dismissal. However by a letter dated 7th April,2008, the District Education Officer Gucha informed the applicant that he had been directed by the Respondent to inform the applicant[that the applicant’s name could be removed from the register of Teachers and asked the applicant to make statement before the said action could be taken. The applicant responded to the said letter vide his letter dated 20.4.2008 and by a letter date 15th October, 2008 the Respondent purported to amend letter of interdiction dated 7th April, 2008. After responding to the said letter vide his letter dated 26th November, 2008 the respondent thereafter informed the applicant by a letter dated 30th January 2009 that there would be a hearing of the applicant’s case on 26th February 2009 at the District Education officers office Gucha. The said letter, according to the applicant, was received on 24th February 2009 and he attended the said hearing of case on 26th February, 2009. However instead of having or conducting a hearing in the applicant’s presence so that the applicant could personally hear the testimony of his accusers the respondent locked the applicant out of the proceedings and called him in after his accusers had allegedly given their part of the story.

6 According to the applicant, when he was called to the office as aforesaid the Respondents agents being the area DEO and two employees from the Respondents headquarters asked him whether he had anything to add to his letters which he had written to the respondent and on insisting that he needed to personally hear the testimony of his purported accusers their witnesses and any other evidence and be given a chance to cross-examine them, the District Education Officer who was chairing the meeting together with the said Respondent started abusing him by calling me names and saying that the applicant had spoiled so many girls and that he was only likely that I had only one case. The said panel, according to him, also refused to take his oral evidence saying that what they had was enough and refused to hear the applicant’s witnesses whom he could have called.

7 According to the applicant he was harassed and openly humiliated and intimidated by the said panel of the Respondent and never given adequate time to prepare and or present his defence and an opportunity or at tall. Although he insisted on a DNA test to be done so that the panel could ascertain the accuser’s allegations, the said panel totally refused to heed his plea. In his view, the nature of allegations labelled against him and the outcome and or substance of the alleged proceedings are contradictory in that I was informed of my name from the register and an interview whereas the outcome was interdiction and dismissal, inter ala (sic). According to him, his fundamental rights were further grossly violated by the Respondent not informing him of the Rules Regulating the practice and procedure of the commission in such proceedings and his case was predetermined as the said panel handed down the letter for dismissal on the same date before he could tender his defence which letter had been written before the said panel sat to hear his case. On refusal to accept the said letter, the same was posted to him bearing the same date and content dated 26th February, 2009.

8 On receipt of the said letter, the applicant deposes that he appealed to the Teachers Service Appeals Tribunal established under section 11 of the ***Teachers service commission Act*** Cap 211 laws of Kenya through the secretary Teachers Service Commission vide a letter dated 20th March, 2009. Instead of the commission secretary forwarding his said appeal to the aforesaid tribunal the respondent decided to hear his appeal and dismissed the same vide a letter dated 8th May, 2009 and the respondent consequently locked him out from accessing the Teachers service appeals tribunal and was never heard by the said Tribunal thereby grossly violating his fundamental rights.

9 In the applicant’s view, the Respondent had neither the mandate nor legal basis to hear his appeal which the respondent purported to alter and called it a review but still never afforded him a chance to be heard on a review. As a result of the Respondent usurping the Tribunals Authority, the applicant contends that the Respondent denied him a chance and or opportunity to produce to the tribunal the documents which had rejected. He further deposes that the acts of the respondent barred and or blocked him from utilizing his chance to call his witnesses at the hearing of his appeal and making an application for the

aforesaid DNA test. According to the applicant, if his case had been handled fairly and impartially the responded could have not dismissed him since even based on his written representation he could not have been found guilty. The applicant contends further that subsequently the second interested party conceded that she was cheated and wrote the same to clarify her position but the respondent refused to consider that as it had predetermined the applicant's case on grounds of witch hunting by the 1st interested party whom the applicant had developed bad blood with and the respondent floated the Board of Governors advise since it was bent to punish me any way.

2ND INTERESTED PARTY'S CASE

10. In opposition to the application, the 2nd interested party, **Caroline Ondari**, swore a replying affidavit on 22nd December 2009 in which she deposed that t is indeed true that the said **Robert Ombiu Nyamechu** was her teacher and the Deputy Principal in the period under reference. According to her, she was shocked the first time she was informed of the said allegations against the applicant as the whole story was not true. She deposes that she had earlier been approached by the 1st interested party who tried to persuade her to allege that the applicant was the biological father of my child which I vehemently denied. After sometime, she was called by the school principal and subsequently by the Board of Governors who interrogated her on this issue and she told them the truth that the applicant was not the biological father to her child and that she did not and had never had any love and or sexual relationship with the applicant. She was, however, prevailed upon by her mother and brother after they had been bribed by the 1st interested party to prevail upon her and forced her to accept that the applicant had an affair with her. She deposes that her said brother, **Godwin Onyambu Ondari**, later owned up and wrote a letter dated 11th February 2008 to the applicant explaining to him what had transpired and in a bid to win her support the 1st Interested party promised to take her to the United States of America since he had been there before. Later came to learn that the said 1st interested party had been deported from the United States of America and regretted her action against the applicant which the applicant forgave. She admits having written the letters dated 31st March, 2008, 10th June, 2008, 11th November, 2008 and 20th November 2008 all attached to the applicants application explaining her actual position on this matter but the pressure she subsequently had from the DEO, the Principal of the school, the 1st Interested party among others to press evidence against the applicant was too much.

11. The deponent avers that she told the panel the truth but it appears that they were decided to fix the applicant and harassed and abused the applicant in front of her, her mother, brother and all those who were in attendance and was never given a chance to explain his side or cross examine any of them. Despite her attempt to plead that the applicant was innocent she was told by the presiding officers that she was wasting their time and was forced to sign some letters and the forms without being allowed to read them or given copies of the same. The said issue, she states, is too disturbing to her and has caused a lot of stress to her and has in effect defamed her and made her become a laughing stock in the village and wishes it comes to an end as the applicant is not the father of her child.

RESPONDENT'S CASE

12. On the part of the respondent, the application was opposed by way of a replying affidavit sworn by **Charles Chedotum**, the Deputy Secretary in charge of Discipline of the Teachers Service Commission, the 1st respondent (hereinafter referred to as the Commission). According to him, the commission is created under section 3 of the ***Teachers Service Commission Act***, Cap 212 of the Laws of Kenya with its principal objectives and/or functions being to recruit, employ, assign teachers so employed for service to Public Schools, promote or transfer any such teacher/s. The Commission is also mandated to terminate the employment of any such teacher. Under the Act, the commission is further empowered under the said Act to *inter alia*, compile and publish a Code of Regulations to apply to all teachers in its service, deny registration of an unsuitable person as a teacher and dismiss and/or remove from the Register of Teachers any unsuitable and/or un-fit person as a teacher. According to him, the Commission is thus vested with the inherent power to institute disciplinary proceedings /processes against errant teachers in its service and such disciplinary process may be initiated directly or through an authorized agent.

13. On or about 18th may 1990, it is deposed that the applicant was employed by the commission as an untrained teacher and was allocated TSC/Employment No. 310163 and thereupon posted to Nyabimwa SDA primary School in Kisii. Following his qualification from Maseno University, the Commission offered him employment as a Graduate teacher on permanent terms and he was subsequently posted to Riyabu secondary school to teach History and CRE. The applicant's contract of employment with the respondent, according to him, was governed by inter-alia, provisions of the ***Education Act***, Cap. 211 of the Laws of Kenya, the ***Teachers Service Commission Act Cap 212*** of the Laws of Kenya together with the Code of Regulations for Teachers compiled and published by the Commission (hereinafter referred to as "the Code). Sometime in 2007 the Principal, Riyabu ELCK Secondary School received information to the effect that the applicant (while serving as a teacher in public service) had engaged in acts which are/were inconsistent with the Code and some of the allegations against him were that he (the Applicant) had sired a child with the 2nd interested party who was at the material time his student/pupil and engaged in intimate relations with several school girls who were his students. The Principal, Riyabu Secondary School and/or the Board of Governors of the school addressed the Applicant letters requiring him to respond to the allegations and the applicant duly responded. The Ministry of Education through the District Education Officer, Gucha who doubles as an Agent of the Commission by virtue of his Office constituted a panel to interrogate these allegations and the said District Education Officer prepared a Report in which he recommended disciplinary action against the teacher and a decision was therefore reached to interdict the Applicant. According to the deponent, the Commission received information that initial attempts by the Board of Governors of the school to investigate this matter were frustrated by persons and forces determined to exonerate the teacher from blame, hence, conclusions of the said Board were merely an attempt to cover up the case. However, the commission through independent sources, established *inter alia* that there was interference in the investigations of this case even at the BOG meeting, several people including members of the said BOG wanted to exonerate the applicant from any blame, many witnesses, including close relatives to the girl; the victim of the Applicant's acts were bribed and/or compromised with a view to buy their silence and thus frustrate the investigation, the head Teacher had earlier feared to pronounce the truth on this matter for fear of agitating the community and the case had caused a lot of animosity, tension and suspicion among teachers and the community.

14. As a result of the foregoing, the Commission sent a team from its headquarters to carry out an independent inquiry in the matter which team interrogated several people who included **Caroline Ondari**, the alleged victim and 2nd Interested party and on 7th October, 2008 a full meeting of the Board of Governors was convened with a view to evaluate the evidence and/or statements against the applicant at which meeting the Board resolved that disciplinary action be initiated against him. Consequently, the commission addressed the applicant an amended letter of interdiction dated 15th October, 2008 in which he was required to "show cause" why disciplinary action (including removal from the Register of teachers and/or dismissal from service) should not be initiated against him which letter the applicant duly responded to denying the allegations but clearly confirming that he was aware of the allegations. This response was subsequently forwarded to the disciplinary panel of the commission which convened on 26th February, 2009 at the District Education Office, Gucha, interviewed and/or interrogated witnesses including the applicant **Caroline Ondari**, the alleged victim and 2nd interested party herein and after evaluating both the oral and written statements of these witnesses and indeed all evidence presented at the hearing, the panel directed that the applicant be dismissed from service. The applicant was duly informed of his dismissal through the commission's letter of 26th February, 2009 addressed to him. However, vide letters dated 1st April, 2009 and 20th June, 2009 the applicant and **Hon. Charles Onyancha** (the applicant's Member of Parliament) respectively asked for a Review of this decision which request was duly considered and denied.

15. It is therefore the deponent's position that the acts and/or allegations of sexual relations with school girls, expressed variously against the applicant constitute acts of gross immoral behaviour and hence offend the express provisions of the Code and that the dismissal of the applicant from teaching service was lawfully effected pursuant to the spirit and provisions of the Law, specifically the aforesaid ***Teacher's Service Commission Act***, Cap 212 of the Laws of Kenya and the attendant Code and that due process of the law were followed. It is the Respondent's contention that at the earliest opportunity, its agent (the District Education Officer, Gucha district and Board of Governors, Riyabu ELCK Secondary

School) invited the applicant to defend himself; the applicant wrote responses which were duly considered at every stage of the disciplinary process; the appellant appeared in person before the disciplinary panel, heard the evidence presented against him and had the opportunity to cross examine the Respondent's witnesses; the applicant testified and was accorded a fair opportunity to counter the reasons for dismissal; the applicant's evidence was duly considered prior to the decision; and that he was adequately informed of the issues pertaining to his case

16. It is deposed that the applicant's dismissal from teaching service was not actuated by bad faith and/or malice as alleged and that every finding by the commission was against the acts of the applicant was independently evaluated and based on legal advice received from **Mr Allan Sitima**, Counsel on record for the Commission the procedure prescribed under law was meticulously applied to this case. Based on the same advice the deponent contends that if the applicant is dissatisfied with the decision, he may initiate a suit for recovery of damages, if any; the applicant's application does not satisfy the criteria in law for grant of the Orders under Order 53 of the civil Procedure rules; and that the applicant has no accrued rights and/or crystallized interest known to law to fetter the hands of the Commission from exercising the powers under the Teacher's Service Commission Act Cap 212 of the Laws of Kenya and the Code of Regulations for teachers.

17. The deponent further believes that the applicant in these proceedings has withheld material facts from the court and is therefore not entitled to the relief sought hence the application ought to be dismissed with costs.

REJOINDER BY THE EX PARTE APPLICANT

18. In a further affidavit sworn on 18th November 2010, the ex parte applicant took issue with the Respondent's replying affidavit and contended that its contents does not hold any water as to date the Respondent has been unable to prove its allegations. According to him, all the allegations about the 2nd interested party, her mother and brother have been denied by the alleged persons personally and he annexed the 2nd Interested party mother and brother's affidavit denying the same. According to him, the 1st interested party's complaint came about on grounds that he was strict on them as the Deputy Head Teacher, and was considered a foreigner because I did not come from within their village and was envious as he was among the pioneers of the school and the first TSC Teacher to be posted there in the year 1995, when the school had only two teachers. He reiterates that he had strained relationship with some members of the teaching staff who felt that he was very strict on them especially as appertains to the supervision of the curriculum. Owing to witch-hunting the respondent had to do more than one letter of interdiction and the grounds for each one of them is totally different from each other nor does it tally with the purported evidence and or alleged allegations of either the 1st or 2nd interested party. He deposed that the 2nd interested party has all through exonerated herself from all the allegations against him but the commission chose to hear none of them and that his complaint through his letter dated 26th September about the 1st interested party and many other complaints about the bad blood that had become evident between himself and the 1st interested party were totally ignored. He avers that the 1st interested party neither informed the principal nor the Board of the said allegations nor the District Education Office before writing directly to the respondent. In his view, there are material contradictions whether the alleged affair took place in the office or at "Mogonga" as alleged and the dates the same happened and such inconsistence shows that the allegations were unfairly flamed on me. Further, the respondent's annextures clearly show that the 2nd interested party was forced by the DEO to write a statement implicating him.

18. According to the applicant, the alleged Board was not properly constituted as it was held behind the back of the chairman, the previous Board meeting which was chaired by the chairman having exonerated him of any wrong doing and that is why the 1st interested party had to complain again and that he was not notified in time of the alleged hearing of my case and the same never specified which type of case. In his view, the alleged Teacher's Service Commission Discipline Committee Meeting held on 26th February, 2009, was haphazardly held as the records clearly shows that he was the first one asked to defend myself

before any allegations could be labelled against him. In his opinion, the purported proceedings are not proceedings but a mere report which is poorly done and the same does not depict what transpired on the material day as was harassed and not given a fair nearing nor heard or at all. According to him, the respondent had no mandate of handling his appeal and its only duty was to pass on the appeal to the Appeals Tribunal established under section 11 of the ***Teachers Service Commission Act*** and the Rules made there under hence denying me the opportunity of being heard by the said Tribunal. It is his view that he could have been entitled and benefited from services of an advocate as per Rule 3 of the Teachers Service Commission (Appeals Tribunal) (practice and procedure) Rules made under Cap. 212, Laws of Kenya.

EX PARTE APPLICANT'S SUBMISSIONS

13. In the submissions filed on behalf of the ex parte applicant, it was contended that the applicant was not given a hearing and if any, the same was not fair since it is the applicant who was asked to defend himself before any accusation was laid against him and that the letter simply informed the applicant of the hearing of disciplinary cases without specifying the exact nature of the cases. It is submitted that the Respondent acted inn total contravention of section 9(2)(a) of the ***Teachers Service Commission Act*** by not being informed of the nature of the allegation made against him, not being afforded adequate time for preparation and presentation of his defence, not being afforded an opportunity to be heard in person or a fair and impartial trial or at all.

14. It is submitted that the Respondent usurped the powers donated by section 10(4) and 12 of Cap 212 to the Tribunal established under section 11 of the same Act hence acted in excess or ultra vires its mandate. By bypassing the Board, the DEO and ignoring the Head Teacher, it is deposed that Respondent acted in bad faith and that the whole act was actuated by malice and mala fide intentions. In support of the submissions the applicant relied on *inter alia*, **Charles Orinda Dulo vs. Kenya Railway Corporation Nairobi High Court Misc. Appl. No. 208 of 2000** and **Republic vs. Nakuru Water & Sewerage Services (Ministry of Environment & Natural Resources & Another) Nakuru High Court Misc. Appl. No. 6 of 2003**.

15. In his oral address, **Mr Onsembe**, learned counsel for the applicant while reiterating the foregoing, added that the period between 24th February 2009, when the letter summoning the applicant to attend the hearing the hearing on 26th February 2009 was not an adequate period.

RESPONDENT'S SUBMISSIONS

16. On behalf of the respondent, it was submitted that the applicant's dismissal was effected lawfully and in devotion to both the spirit and provisions of the law being the ***Teachers Service Commission Act***, the Code and the rules of natural justice. While reiterating the contents of the replying affidavit, it is submitted that the acts and/or allegations of sexual relations with school girls, expressed variously, and by different people against the applicant constitute acts of gross immoral behaviour and thus offend the express provisions of the law, specifically the Code of Regulations for Teachers. It is submitted that the Respondent not only subjected the applicant to due process of the law but religiously adhered to the demands and principles of natural justice. In the Respondent's view, judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and therefore the court is not entitled on application for judicial review to consider whether the decision itself was fair and reasonable. In support of this submission reliance is placed on **Chief Constable of North Wales Police vs. Evans All ER Vol. 3**.

17. It is submitted that where parliament has entrusted to an administrative authority the duty of making a decision which affects the rights of an individual, the court's supervisory function on judicial review of that decision is limited and the Court cannot, in the circumstances be expected to possess knowledge of the reasons of policy which lay behind the administrative decision nor is it desirable that evidence should be called before the court of the implications of such policy. Hence the Court is urged not to weigh the merits of the particular decision but should confine its functions to a consideration of the manner in which the decision was reached since the Court is concerned, not with the decision but with the

decision making process.

18. It is submitted that the relationship between the applicant and respondent being purely that of an employer/employee, grievances arising therefrom are not amenable to judicial review process. It is submitted that in this case, it is not the applicant's case that the procedure has been exercised in excess or in want of jurisdiction or that the rules of natural justice have been overlooked by the public body making the decision hence the application does not satisfy the criteria in law for grant of the orders sought under Order 53 of the Civil Procedure Rules. To warrant grant of judicial review in a pure contract of employment situation, it is submitted based on **Eric Makokha vs. University of Nairobi & Another Civil Appeal No. 20 of 1994**, that the contract must have statutory underpinning and that the offices recognised as having statutory underpinning are the Honourable Judges of the Court, the Honourable the Attorney General, the Controller General and Auditor General, the Honourable the Chief Justice, among others. It is therefore submitted that the present application falls outside the purview of judicial review as the Applicant's contract of Employment with the Respondent was not in any way "statutorily underpinned".

19. It is further submitted that the totality of the orders sought will have the effect of returning the applicant to his previous employment as a teacher in public service yet the Respondent through the elaborate disciplinary process indicated its resolve to irreversibly revoke its contractual relationship with the applicant. Relying on **Eric Makokha vs. University of Nairobi & Another** (supra) it is submitted that principle of mutuality of equitable remedies dictate against the grant of the application as the remedy he has chosen is wrong, inconvenient and by its very nature not efficacious to grant. The applicant, it is submitted, ought to have instituted a suit for recovery of damages under the common law and not sought orders which by their very nature will have the effect of reinstating him to a relationship the respondent is not comfortable with. In the Respondent's view the application ought to be dismissed.

20. In his oral address to the Court, **Mr Sitima**, learned counsel for the respondent submitted that the Teachers Service Appeals Tribunal was established under section 12 of the Old Act as an independent Tribunal and not under the control of the Teachers Service Commission. Pursuant to section 9 thereof it had no jurisdiction to determine this appeal since in this case the applicant was merely dismissed without being removed from employment. According to learned counsel section 10(4) deals with dismissal and removal.

DETERMINATIONS

21.Before going into the merits of the application, as already noted at the beginning of this judgement the applicant swore two affidavits in support of the Chamber Summons, a verifying affidavit and a supporting affidavit. The verifying affidavit was itself very thin on the facts as opposed to the supporting affidavit. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal held:

"We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: 'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.' At page 283 of the report of the case of *R v. Wandsworth* Justices, Viscount Caldecote CJ said: 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an

inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "

22.It follows that the verifying affidavit filed herein was deficient in material respects.

23.Apart from that Order 53 rule 4(1) of the Civil Procedure Rules provides:

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

24. Therefore unless leave is granted under rule 4(2) of the said Order to file further affidavits, there is no room for filing any other affidavits other than the affidavit verifying the Statement of Facts filed in support of the application for leave. This position was restated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**where **Nyamu, J** (as he then was) was of the view which view I associate myself with that:

"There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."

25. However, in this case the applicant filed both a verifying affidavit and a supporting affidavit, the latter of which is not provided for. Nevertheless, as no issue was taken with respect to the filing of the two affidavits, I will say no more on that issue.

26. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs.**

Minister for the Civil Service [1985] AC 2 and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

27.The scope of the remedy of certiorari was considered in **Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996** in which the Court of Appeal held:

"the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated; "Certiorari deals with decisions already made ….Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice..."

28. However, as was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"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."

29. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

30. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

31. 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."

32. 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 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."

33. 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.

34. However, where the relationship between the parties has "statutory underpinning" the matter is thereby taken out of the realm of the ordinary employer/employee relationship and the termination must adhered to the statutory provisions and if not the Court is properly entitled to issue judicial review remedies. 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."

35. Similarly, **Visram JA** in **Maseno University & 2 Others vs. Prof. Ochong' Okello [2012] eKLR** 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."

36. In this case, it has not been alleged that the relationship between the ex parte applicant and the Respondent had any statutory underpinning. The allegation however, is that the ex parte applicant was never given a fair hearing before his termination. Without any allegation of statutory underpinning, even if the allegations made by the ex parte applicant were correct, that would not give rise to a remedy under judicial review. The Court of Appeal in **Rift Valley Textiles Ltd Vs. Edward Onyango Oganda Civil Appeal No. 27 Of 1992 (CAK) [1990-1994] EA 526** was of the view that:

"Rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better-paid job, and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves. Unless there is a specific provision for the application of the rules of natural justice to a simple contract of employment those rules are irrelevant and cannot found a cause of action."

37. 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 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.

38.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."

39. 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."

40. Similarly in **Consolata Kihara & 241 Others Vs. Director Kenya Trypanosomiasis Research Institute [2003] KLR 232,** it was held:

"It is an elementary principle of our law that in the ordinary situation of employer and employee cases, or cases which are sometimes referred to as cases of master and servant, if an employer or a master wrongfully dismisses an employee or servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. In a straightforward relationship of employer and employee, normally and, apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of employer and employee. Dismissal might be in breach of contract and so unlawful, but it would only sound in damages. In ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract, and the contract having been wrongfully put to an end to a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more…….These cases clearly show, that in normal situations of ordinary occurrence, there cannot be specific performance of a contract of service, and an employer can terminate the contract with the employee at any time and for any reason or for none; but if he does so in a manner not warranted by the contract, he must pay damages for breach of contract. The law is well settled that if, where there is an ordinary relationship of master and servant, the master terminates the contract, the servant cannot obtain an order of *certiorari.* If the master rightfully ends the contract there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages…….In ordinary contracts of employment, an employee may be dismissed by his employer without any prior observance of natural justice; and if the dismissal was contrary to the terms of the contract, the appropriate remedy is a suit in damages for the unlawful dismissal, or the employee may have a remedy for unfair dismissal before an industrial court, but the court will not review the employer's decision to dismiss, or quash the decision on the ground that natural justice has not been observed. This applies to private and public contracts of employment. The question in any ordinary case of master and servant does not at all depend on whether the employer has heard the employee in his defence but it depends on whether the facts emerging at the trial prove breach of contract……It therefore becomes important to consider whether the applicants had any other position or status than that of employees or servants. In this case they had none since they say they were employees, and no more. On the foregoing principles the applicants have sought wrong reliefs and their application for judicial review is therefore dismissed."

41. Therefore, whereas the ex parte applicant's grievance may be sound in an ordinary civil claim, his claim for judicial review remedies was, with due respect misplaced.

42. With respect to the denial of opportunity of being heard, I wish to draw the ex parte applicant's attention to **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** in which 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."

43. With respect to procedural fairness it 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".

44. 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."

45. 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."

46. 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."

47. 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."

48. 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."

49. 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

50. Having said that it must now be clear that the Notice of Motion dated 22nd September 2009 is unmerited and the same fails with costs to the Respondent.

Dated at Nairobi this day 24th of April 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Onsembe for the ex parte applicant