REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 30 of 2013

IN THE MATTER OF APPLICATION BY HON. PETER SOITA SHITANDA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS CERTIORARI, MANDAMUS AND PROHIBITION

IN THE MATTER OF THE COMMISSION FOR HIGHER EDUCATION AND IN THE MATTER OF CONSTITUTION OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

COMMISSION FOR HIGHER EDUCATION..... RESPONDENT

EX-PARTE HON. PETER SHOITA SHITANDA

JUDGMENT
INTRODUCTION

1. By his Notice of Motion dated 1st February, 2013, the *ex parte* applicant, **Hon. Peter Soita Shitanda**, seeks the following orders:

1. THAT this Honourable Court be pleased to issue orders of certiorari removing and quashing the decision of the Secretary of the Commission for Higher education dated 22nd January 2013, refusing to recognise the degree certificate for the Applicant for the Bachelor of Business Administration conferred from the Business University of Costa Rica.

2. THAT this Honourable Court be pleased to issue orders of mandamus compelling the Secretary of the Commission for Higher education to recognise the degree certificate for the Applicant for the Bachelor of Business Administration conferred from the Business University of Costa Rica.

3. THAT this Honourable Court be pleased to issue orders of prohibition, prohibiting the Secretary of the Commission for Higher education from making any publication or communication to the effect that it does not recognise the degree certificate for the Applicant for the Bachelor of Business Administration conferred from the Business University of Costa Rica.

4. THAT the costs of this application be paid by the Respondent.

APPLICANT'S CASE

2. The Motion is supported by the Statement filed on 30th January 2013 and a verifying affidavit sworn on 29th January 2013 by the applicant herein.

3. According to the applicant, on or about the 13th day of January 2011, he enrolled for a degree of Bachelor of Business Administration fast track learning program for Adult Learners with the Business University of Costa Rica (BUCR) which according to him is a fully recognized and approved University in her country of origin and is further listed with UNESCO in Paris since 1999 to date. It is deposed by the applicant that on completion of his studies and sitting his examinations, he was invited for graduation through an e-mail letter dated 17th January 2013 and he has exhibited a copy of the same. Pursuant thereto the degree of Business Administration was conferred upon him by the said University in recognition of successfully completing the course and a copy of the same is similarly exhibited.

4. It is contended by the applicant that he paid for all the graduation costs in Oxford including rental of robe and photography at cost of Kshs.2, 500/= Sterling Pounds (sic).

5. The applicants contends that when he wrote to the Commission for Higher Education for recognition and equation of his qualifications, he got a response from the Commission Secretary and/or Chief Executive Officer vide a letter dated 11th September 2012 who recognized the Business University of Costa Rica (BUCR) as an accredited university and confirmed that the said University is in the International Data base of the Commission as an accredited university namely International Hand Book of Universities Vol.1 22nd Edition, UNESCO's International Association of Universities and World List of Universities 25th Edition, UNESCO. On conducting a thorough search of all universities listed with UNESCO and the applicant found his University listed.

9. It is the applicant's case that on or about the 22nd day of January 2013, he received a letter from the Commission Secretary and/or Chief Executive Officer to the Commission of Higher Education stating that they do not recognize his degree of Bachelor of Business Administration (BBA) a development which according to him, was shocking and unbelievable given that the same commission had earlier written to him recognizing the Business University of Costa Rica. Thereupon the applicant wrote a letter to the Commission to set the record straight that the degree he held was not obtained at DALC as stated in their letter, but was obtained from the Business University of Costa Rica through distance learning.

12. It is therefore contended by the applicant thatit is necessary for the Honourable Court to issue orders to quash the decision by the Respondent for non-recognition of his degree certificate and to prohibit the Respondent from issuing letters to interested parties regarding the same subject of qualification and to restrain the Respondent from interfering with his credentials. According to the applicant, the actions of the Respondent are in bad faith and hence it is necessary for the orders sought to be issued to protect the sanctity of the law and in the interest of justice.

RESPONDENT'S CASE

6. In opposition to the application, the respondent on 12th February 2013 filed a replying affidavit sworn by **Prof. Florence K. Lenga**, its Deputy Commission Secretary (Accreditation and Quality Assurance) on 8th February 2013.

7. According to her the Respondent that has now been succeeded by the Commission for University Education, is established pursuant to the provisions of section 4 of the ***Universities Act No. 42 of 2012***, with the mandate, *inter alia*, under section 5(1) (g) of the said Act, to recognize and equate degrees conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Respondent from time to time. In execution of the foregoing statutory mandate, it is deposed that the Respondent prescribed and published the criteria for Recognition and Equation of qualifications for purposes of recognizing and equating degrees awarded by foreign universities and institutions. Criteria Number 3(c)(g) sets out the considerations that the Respondent takes into account in equating foreign awards, including Duration of study and credit hours for a given qualification; Previous background or achievement before enrolling for the qualification; Content of what is studied and the

length of time devoted to the components of the content; the stage reached in a given programme of study; and the relevance of the qualifications for admission for further studies or for the practice of a profession.

8. The deponent avers that she is aware that in an application dated 21st January 2013, the *ex parte* applicant sought that the Respondent recognizes and equates an apparent Bachelor or Business Administration degree certificate that he allegedly obtained from *Universidad Empresarial De Costa Rica* (hereinafter, "UNEM") following six months of alleged study at the University and as part of its due diligence, the Respondent in an e-mail dated 21st January 2013 wrote to the Registrar, UNEM and copied in the email the body equivalent to the Respondent in Costa Rica called *Sistema Nacional de Acreditacion de la Educacion* superior (hereinafter, "SINAES") to confirm whether indeed UNEM, awarded the Ex-parte applicant a degree certificate in Bachelor of Business Administration after only six months of study; and whether indeed UNEM exempted the Ex-parte Applicant from taking eight of the twelve units required of one to qualify for an award of a degree certificate in Bachelor of Business Administration at UNEM. In an e-mail correspondence dated 22nd January 2013, UNEM informed the Respondent that the Ex-parte Applicant was indeed exempted from taking eight of the twelve units required of one to qualify for an award of a degree certificate in Bachelor of Business Administration in UNEM; that the *ex parte* Applicant learnt via local Kenyan educational provider, Digital Advisory and Learning Centre, popularly known as "DALC"; and that the *ex parte* Applicant was enrolled at UNEM via DALC.

9. From the foregoing confirmation by UNEM, it is deposed that it was evident to the Respondent that a local institution called DALC was purporting to collaborate with UNEM for purposes of transfer of credits and award of degree certificates and the deponent is aware that the Respondent has not authorized collaboration of the institution going by the name, DALC a post Secondary School institution in Kenya (PSSI) with UNEM or any other University as mandatory required in section 28(1), 28 (2), 28 (3) and 28 (5) of the ***Universities Act No. 42 of 2012***. On or about 24th July, 2012, DALC wrote to the Respondent seeking the approval of the Respondent for DALC to collaborate with UNEM. The Respondent considered the application and failed to approve the collaboration arrangement between DALC and UNEM for non-compliance with the mandatory provisions of rule 12 of the ***Universities (Co-ordination of Post Secondary School Institutions for University Education) Rules, 2004***. Subsequently in a letter dated 26th August, 2012, DALC sought to know from the Respondent the accreditation status of UNEM and the Respondent confirmed that UNEM is accredited. It is the deponent's position that the confirmation by the Respondent of the accreditation status of UNEM was not intended to and did not grant authority to DALC to know the accreditation status of UNEM and that notwithstanding that the Respondent failed to approve any collaboration arrangements between DALC and UNEM or any other University of higher learning, DALC proceeded to put up a public notice in the Standard Newspaper of Wednesday, 10th October, 2012 to dupe the public that students of DALC could negotiate with institutions of higher learning and transfer credits from DALC to such institutions. According to the deponent the Respondent legally exercised its statutory mandate in refusing to recognize and equate the Bachelor of Business Administration Degree certificate that the *ex parte* Applicant obtained from UNEM on grounds that the *ex parte* Applicant obtained the degree certificate through a collaborative arrangement between DALC and UNEM and by relying on credits purportedly transferred from DALC to UNEM as mandatorily required in section 28(1), 28(2), 28(3) and 28(5) of the Universities Act No 42 of 2012; that by exempting the Ex-parte Applicant from taking eight of the possible twelve units required of one to qualify for an award of a degree certificate in Bachelor of Business Administration at UNEM, the exemption exceeded a possible 49% exemption mark recognized by the Respondent since the threshold is necessary to ensure that students who hold out as studying or having studied in a particular University take up in that University and be examined on at least 51 % of courses required to qualify for the award in issue.

10. According to the advice received from the applicant's legal advice it is averred that Judicial Review court scrutinizes the lawfulness, procedural propriety, fairness and rationality of an impugned action or omission and that a decision of the respondent taken pursuant to and in accordance with statute cannot be amenable to Judicial Review hence the application is patently and incurably defective,

incompetent, raises no reasonable cause of action against the Respondent and should be dismissed with costs.

EX PARTE APPLICANT'S SUBMISIONS

11. On the part of the ex parte applicant, it is submitted that the Respondent being a body which carries out statutory functions with its decisions affecting members of the public, its decisions are subject to court supervisory jurisdiction by way of judicial review and that the improper or unreasonable exercise of its powers by administrative authority or the improper or unreasonable failure to exercise the said powers can be the subject of judicial review as is in the current instance. Reliance for this submission is placed on **Smithkline Beecham plc ex p Insurance Service plc [1989] 133 sol jo 1545, QBD**. It is submitted that before arriving at the decision not to recognise the Applicant's degree certificate, the applicant was not heard and was not given credible information as to how the decision not to recognise the Applicant's degree certificate was arrived and that the Respondent has not been open to discussion, meetings and correspondence over the matter and there had been lack of fairness in the decision making process by the Respondent over this issue. It is therefore submitted the court should interfere with its decision as there was a manifest breach of the rules of natural justice and the Constitution of Kenya in not recognising the applicant's degree certificate. According to the applicant, the applicant had a legitimate expectation that the degree certificate would be approved following the communication from the Respondent that the Costa Rica University was accredited by the Respondent and that it was completely unacceptable for the respondent to indicate that degrees from the University in Costa Rica is acceptable in September 2012 only for the same respondent to change its mind in January 2013 and state that it cannot recognise the said degrees. It is further submitted that the opinion of the respondent was not reasonable as the facts it relied upon were inconsistent and irreconcilable and the letter refusing to recognise the degree contains unfounded, wild and was based on inquiries that were not comprehensive and conclusive. According to the applicant, the rules of natural justice which are part of the protection afforded by Article 47 of the Constitution have been infringed as such the whole decision by the Respondent tainted with impropriety and the Respondent is guilty of violation of its duty to ensure a fair administrative action by them is taken in exercise of its statutory duty and functions. Relying on **Anisminic Ltd vs. Foreign Compensation Commission and Another [1969] 1 All ER 935**, **Council of Civil Service Unions and Others vs. Minister for Civil Service [1984] 3 All ER 935**, **Joseph vs. The Attorney General and the Commissioner of Police High Court Petition No. 29 of 2011**, it is submitted that the decision violates the tenets of rationality and reasonableness as well as fair hearing which according to **Lloyd vs. McMahon [1987] AC 625, 720H** depends on the character of the decision making body, the kind of decision it has to make and the statutory framework in which it operates. It is the applicant's position that the Respondent ought to have made further inquiries and sought the Applicant's views and submissions prior to reaching its decision as it had a constitutional and statutory mandate to do so.

RESPONDENT'S SUBMISIONS

12. On behalf of the Respondent it is submitted on the authority of **Associated Provincial Picture Houses Limited vs. Wednesbury Corporation [1947] 2 All ER 680**that it is trite law that in determining whether or not a party is entitled to Judicial Review Orders the applicant must demonstrate that there was an illegality, irrationality or procedural impropriety and that a legitimate exercise of statutory mandate done in terms of statutory provisions cannot be amenable to judicial review. It is submitted that the Respondent is mandated pursuant to section 5(1)(g) of the Universities Act No. 42 of 2012 to "recognise and equate degrees…conferred by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time and that the Respondent has published the guidelines it uses to recognise and equate the said degrees which include the duration of the study, credit hours for a given qualification, component of what is studied, and the contact hours devoted to the components of the content. The Respondent having conducted due diligence, it is submitted came to the conclusion that that the information rendered the apparent degree certificate invalid. Whereas the Kenyan institution, DALC is a post-secondary school institution and its Diploma Management Programme is validated by the Respondent, it is submitted that for a student of DALC to transfer credit points, pursuant to study of the Diploma in Management at DALC, to another University, whether local or foreign, DALC must have been authorised by the Respondent under Regulation 15(1) of the

Universities (Co-ordination of Post Secondary School Institutions for University Education) Rules, 2004 to enter into a collaborative arrangement with such university and the Commission has not authorised DALC to collaborate with the Costarican University. It is further submitted that DALC purported to transfer 60 points towards the ex parte applicant's earning of the degree certificate at the Costarican University in patent breach of Regulation 15(10 of the said Rules and that DALC was aware of these requirements. It is further submitted that the credit transfer of 70% from diploma course that the applicant pursued at DALC and exemptions in eight units breached the Respondent's policy of Credit Accumulation and Transfer System on Business Related Programmes for Undergraduates that the maximum number of course units to be given credit transfer shall not exceed 48% of the total required course units for the whole programme hence the applicant could not therefore legitimately earn a degree at the Costrarican University through transfer of 70% credit points from the unauthorised post-secondary school institution, DALC and exemptions. It is therefore submitted that the Respondent legitimately exercised its statutory mandate in failing to recognise and equate the degree purportedly awarded to the applicant by the said University hence the orders sought are untenable. In support of the submissions the Respondent relies on **Daniel Taleng'o Kiptunen vs. Commission for Higher Education and Others Nairobi High Court Petition No. 24 of 2013**. Based on **Kenya National Examinations Council vs. Republic *ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** it is submitted that the applicant has not established any case for granting the orders sought and since the application was intended to enable the ex parte applicant the post of Governor in the just concluded elections, the mischief intended to be cured is already overtaken by events and the continued prosecution of the application id merely academic and calculated to have this Court issue vain orders.

DETERMINATIONS

13. I have considered the application, the Statement, the affidavits both in support of and in opposition to the Notice of Motion herein. If I understand the application well, the applicant's contention is not that the Respondent has no mandate under section 5(1) (g) ***Universities Act No. 42 of 2012*** to, *inter alia*, to recognize and equate degrees conferred or awarded by foreign universities and institutions. In fact if that were the position the orders sought herein would not have been sought by the applicant since the applicant seeks that the Respondent be compelled to recognise his degree certificate.

14. What the applicant contends, in summary is that the Respondent having pursuant to his request confirmed that Business University of Costa Rica (BUCR) was an accredited university and confirmed that the said University is in the International Data base of the Commission as an accredited university could not later on unilaterally alter its said position decide that the applicant's degree was not recognised. He contends that the said decision which was arrived at without him being afforded an opportunity of being heard went against his legitimate expectations that the degree certificate would be approved following the communication from the Respondent that the Costa Rica University was accredited by the Respondent and that it was completely unacceptable for the respondent to indicate that degrees from the University in Costa Rica is acceptable in September 2012 only for the same respondent to change its mind in January 2013 and state that it cannot recognise the said degrees.

15. This contention calls for an examination of what in law amounts to legitimate expectation. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way…..Public authorities must be held to their practices and promises by the courts and the only exception is where a public

authority has a sufficient overriding interest to justify a departure from what has been previously promised.…..In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power."

15. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) the learned Judge further expressed himself as follows:

"Statutory power must be exercised fairly. Perhaps it is important to recall the observations made in the English case of *Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531* **as follows: "The rule of law in its wider sense has procedural and substantive effect…..Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural." The unilateral change of tariff indicate that this change was done nearly nine (9) years after its use by the applicant company with its predecessors who shared the same licence that was based on tariff 22.04. The applicant has over this period arranged its business affairs in reliance with the principle of certainty of law – and that should there be a change it will only apply to the future. I hold that the applicant is entitled to hold the taxman to its bargain and its business expectations based on the principle of legality ought not to be thwarted. The respondents should have exercised their power to change the tariff …..in a spirit of legality and fairness.……..The applicant has in the circumstances of this case the right to protect its reliance on legitimate expectations as elaborated elsewhere in this judgment. The applicant in conducting its affairs is entitled to rely on certainty and regularity of law. The capriciousness, oppression and arbitrary application of the tariff retroactively is the antithesis of certainty and regularity of law. … Despite its antiquity nothing expresses the principles involved in the above holdings than the American case of *Hurtado vs. Califonia 110 US 51-0535-36 (1884)*: "Law is something more than mere will exerted as an act of power. It must not be special rule for a particular person on a particular case but ..., the general law ..." so that every citizen shall hold his life, liberty property and immunities under the protection of the general rules which govern society, and this excluding as not due process of law acts of attainder bills of pains and penalties acts of confiscation ...' and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."……..The fact that the respondents have arbitrarily and without notice imposed, the tariff, goes against governmental regularity and the rule of law as well. One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law.....Although the law under which the tariffs are imposed is not a new law which is being applied retrospectively as in the illustrations above there is nothing in the Customs & Excise Act or the other relevant Acts which supports expressly the retroactive operation of the tariff and such application is patently illegal. There are no express words or necessary implication by the legislation to support that a new tariff could be applied retrospectively. This also goes against the principle of certainty of law….On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land ……regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public**

good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them……when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance.……..… From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene. This is the essence of this decision…The court has in each case analysed the relevance of each ground to the outcome herein. Of great significance is the principle of certainty of law especially on taxation in a democratic state such as ours. Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. While the applicants are evidently successful on all the judicial review grounds as indicated above, I think it is significant to stress on the ground of certainty of law as an ingredient of the rule of law because it is easy for public authorities and bodies to overlook it in their decision making processes, as has happened in this case. The respondent's argument that the applicant should not have come to court before exhausting the internal objection arrangements in respect of each tax regime should also be considered from the standpoint of the rule of law. While judicial review could be a collateral attack, the right of access to court is a fundamental principle and cannot be taken away except in exceptional cases. It is the basis of an orderly society and the rule of law. The rule of law is the cog upon which all the provisions of the Constitution turn. For example, the intended tariff change has clearly been shown to have been discriminatory in its effect contrary to s 82 of the Constitution. I hold that the pubic bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case….. My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – *see* *Benett* case (*supra*). Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority

guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law. The courts conclusion that the change of tariff and its retrospective application are a threat to the rule of law and the principle of legitimate expectation and constitutes abuse of power, is supported by the House of Lords' decision in the case of *Bennett v Horse Ferry Road Magistrate's Court and anor [1993] 3 All ER at page 150* **where the following significant observations were made by Lord Griffiths: 1. ..."there is a clear pubic interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain" 2. ...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."…..I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the** *Benett case* **above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law. In the result, I find that the applicant company is entitled to the reliefs claimed. The judicial review orders sought to forthwith issue as prayed with costs to the applicant."**

16. In **Republic vs. The Honourable The Chief Justice of Kenya & Others ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA NO. 1298 OF 2004**the Court held:

"The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons, or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right of interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Whereas some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is now perhaps the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted. However flexible that code of procedure may be and however, much the decision-maker is said to be master of his own procedure. The rules of procedure are generally formulated as the rule against bias ***(nemo judex in sua causa)*** **and in respect of the right to a fair hearing** ***(audi alteram partem)*****…….A recently developed and potentially very broad concept that has been held to attract natural justice is that of "legitimate expectation". The true extent of the notion that an expectation may be the foundation of a right to compel the observers of the principles of natural justice has yet not been fully worked out or stated with precision. It may generally be said that to cover any situation where the circumstances are such as to give the individual an expectation based on reasonable ground to receive or not be deprived of, some right, liberty, prestige, or other interests, or that the relevant authority, will exercise or not exercise its powers in relation to his or her interests in a particular**

way…….. Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence..... Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as top the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated because there is no particular safeguards provided under section 62 that deals with the removal of a Judge in instances where there is a complaint against him."

See *Principles of Australian Administrative Law*, [16th Edn] 1985 at 180 by Professor Hotop; De Smith & Brazier in *Constitution and Administrative Law* (6th Edn) 1999 at 557; Sir William Wade in *Administrative Law* 6th Edn [1988] 496;Tellis vs. Bombay Municipal Corporation [1987] LRC (Constitution) 351 At 375, 376; Judicial Commission Of Inquiry Into The Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 Of 2003 [2003] KLR 249; Hon. Justice Amraphael Mbogholi Msagha vs. The Hon. The Chief Justice of The Republic of Kenya & 7 Others HCMA No. 1062 of 2004.

17. Therefore if the Respondent had given assurance to the applicant that the applicant's degree certificate was recognised by the Respondent it would be against the applicant's legitimate expectation for the Respondent to suddenly turn round and disown the said certificate. Whereas it is not correct to hold that a public authority is bound by its earlier decisions or promises even if mistaken or illegal, fairness demands that a reasonable notice be given to persons who relied on the said promise and organised their affairs in accordance therewith so that they may alter their positions accordingly.

18. In this case, the Respondent's action being an administrative action would be subject to Article 47 of the Constitution which provides:

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

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

19. Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person's academic qualification is not recognised by the State on unreasonable grounds. Where therefore the authorities concerned hold the view that a particular person's educational qualification is not recognised, the authority is under a Constitutional duty to furnish the person with written reasons for non-recognition. Once those reasons are furnished, it is not for the Court in the exercise of its judicial review jurisdiction to investigate the merits of the decision. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

20. 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.***

21. Judicial review is, therefore, 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.

22. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

23. The respondent contends that the confirmation by the Respondent of the accreditation status of UNEM was not intended to and did not grant authority to DALC to know the accreditation status of UNEM and that notwithstanding that the Respondent failed to approve any collaboration arrangements between DALC and UNEM or any other University of higher learning, DALC proceeded to put up a public notice in the Standard Newspaper of Wednesday, 10th October, 2012 to dupe the public that students of DALC could negotiate with institutions of higher learning and transfer credits from DALC to such institutions. According to the deponent the Respondent legally exercised its statutory mandate in refusing to recognize and equate the Bachelor of Business Administration Degree certificate that the *ex parte* Applicant obtained from UNEM on grounds that the *ex parte* Applicant obtained the degree certificate through a collaborative arrangement between DALC and UNEM and by relying on credits purportedly transferred from DALC to UNEM as mandatorily required in section 28(1), 28(2), 28(3) and 28(5) of the ***Universities Act*** No 42 of 2012; that by exempting the ex-parte Applicant from taking eight of the possible twelve units required of one to qualify for an award of a degree certificate in Bachelor of

Business Administration at UNEM, the exemption exceeded a possible 49% exemption mark recognized by the Respondent since the threshold is necessary to ensure that students who hold out as studying or having studied in a particular University take up in that University and be examined on at least 51 % of courses required to qualify for the award in issue. In effect the Respondent's contention is that even if UNEM was accredited, the award of the degree certificate did not meet the criteria set out by the Respondent in order to justify the applicant's degree certificate being recognised.

24. Whereas I cannot fault the merits of he decision made by the Respondent, it is my view and I so hold that the Respondent, in light of its letter dated 11th September 2012 ought to have afforded the applicant a hearing before making its decision so that if the applicant intended to dispute the Respondent's version that the Degree Certificate was obtained at DALC and not from the Costa Rican University, he could do so.

25. As already stated hereinabove judicial review jurisdiction is merely concerned with the decision making process and not the merits thereof. In Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court citing **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** held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

26. It is therefore my view and I so hold that the Respondent's decision did not meet the test of procedural fairness towards the applicant who was likely to be affected by the decision. I am, however, unable to agree with the applicant that the decision was tainted with unreasonableness and once the body concerned proves that its action is hinged upon a particular piece of legislation whose legality is not under challenge and that the process has been followed the Court would not be justified in quashing the said decision. As was held in **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112:**

"The remedy of judicial review is concerned with the reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. 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 not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question.... Section 31 vests the power to make the decision and to impose conditions on Kenya Anti-Corruption Commission. The mandate of the Court is to ascertain if the implied duty to act fairly has not been discharged and if the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that KACC can make it again in accordance with the law. The Court cannot, however substitute its own decision and impose its own conditions, as this would be a usurpation by the Court of the power clearly vested in KACC"

27. Having found that the decision made by the Respondent did not meet the threshold of procedural fairness, the Court's power is limited to quashing the same so that the Respondent can follow the law. It is not for the Court to direct the Respondent on how to proceed.

ORDER

28. Accordingly, the order that commends itself to me and which I hereby grant is that an order of certiorari be and is hereby issued bringing into this Court the Respondent's decision dated 22nd January 2013, refusing to recognise the degree certificate for the Applicant for the Bachelor of Business Administration conferred from the Business University of Costa Rica and the same is hereby quashed.

29. As the applicant has not succeeded in the other prayers sought in the Notice of Motion dated 1st February, 2013, there will be no order as to costs.

Dated and Delivered at Nairobi this 17th May 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Makori for Mr Enonda for ex parte applicant