



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 382 OF 2012**

**IN THE MATTER OF AN APPLICATION BY TITUS MUTUA MULINGE FOR LEAVE TO INSTITUTE THE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT CAP 212 LAWS OF KENYA AND TEACHERS SERVICE COMMISSION REGULATION ACT**

**AND**

**IN THE MATTER OF THE DECISION OF THE TEACHERS SERVICE COMMISSION TO INTERDICT TITUS MUTUAL MULINGE TSC NO. 320065, THE HEADTEACHER SENGANI PRIMARY SCHOOL VIDE THE LETTER DATED 20<sup>TH</sup> AND IN THE MATTER OF THE HEARING OF THE DISCIPLINARY CASE BEFORE THE TEACHERS SERVICE COMMISSION COUNTY DIRECTOR’S OFFICE ON THE 5<sup>TH</sup> OCTOBER, 2012**

**REPUBLIC.....APPLICAN  
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**VERSUS**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**TSC COUNTY DIRECTOR, MACHAKOS.....2<sup>ND</sup>  
RESPONDENT**

**DISTRICT EDUCATION OFFICER, MATUNGULU.....3<sup>RD</sup>  
RESPONDENT**

**DISTRICT STAFFING OFFICER, MATUNGULU .....4<sup>TH</sup>  
RESPONDENT**

**EX PARTE**

**TITUS MUTUA MULINGE** ..

## JUDGEMENT

### INTRODUCTION

1. By an amended Notice of Motion dated 25<sup>th</sup> October 2012, amended on 6<sup>th</sup> November, 2012 and filed in Court on 7<sup>th</sup> November, 2012, the *ex parte* applicant herein, **Titus Mutua Mulinge**, seeks the following orders:
  - a. **That this application be certified urgent and fit to be heard on priority basis and service of the notice required to be dispensed with.**
  - b. **An order of certiorari do issue to remove into the High Court and quash the entire Disciplinary proceedings in the TSC County Director's office, Machakos County, held on the 5<sup>th</sup> October, 2012.**
  - c. **An order of certiorari do issue to remove into the High Court and quash the remove into this court and to quash the decision of the 1<sup>st</sup> Respondent dated 12<sup>th</sup> October, 2012 to dismiss the Ex parte Applicant from the teaching service and remove his name from the Registrar of Teachers pursuant to other hearing conducted on the 5<sup>th</sup> October, 2012 at the TSC County Director's offices, Machakos.**
  - d. **An order of Prohibition do issue to forbid and prohibit the Teachers Service Commission, the 1<sup>st</sup> Respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents from implementing its decision dismissing the Ex parte Applicant from the teaching service and removing his name from the Register of Teachers pursuant to the disciplinary hearing conducted on the 5<sup>th</sup> October, 2012 concerning Titus Mutua Mulinge, TSC No. ..320065 without following the provisions of the Teachers Service Commission Act No. 20 of 2012 Laws of Kenya and the rules of natural justice thereof.**
  - e. **An order of mandamus do issue to compel the Teachers Service Commission, the 1<sup>st</sup> Respondent to constitute a fresh tribunal/committee constituting of members other than those in the current proceedings to hear and determine the matter de novo.**
  - f. **An order of mandamus do issue to compel the Teachers Service Commission, the 1<sup>st</sup> Respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to admit a crucial document in defence, to wit, a DNA report dated 14<sup>th</sup> August, 2012 and to allow the Ex Parte Applicant sufficient time to cross-examine the witnesses and/or allow him the right to legal representation thereof during the de novo.**
  - g. **That there be a stay of execution and or implementation of the decision of the 1<sup>st</sup> respondent dated 12<sup>th</sup> October 2012 dismissing the Ex parte Applicant form the Teaching Service and removing his name from the Register of Teachers pending the hearing and determination of this application.**
  - h. **That there be a variation of the leave granted herein on the 18<sup>th</sup> October, 2012 to apply for the orders of Prohibition and Certiorari do operate as a stay to the running of time within which to appeal or apply for review of the decision of the 1<sup>st</sup> Respondent dated 12<sup>th</sup> October 2012 dismissing the Ex parte Applicant from the Teaching Service and removing his name form the register of Teachers pending the hearing and determination of this application.**
  - i. **That the costs of this application be provided for.**

### APPLICANTS' CASE

2. The said Motion is supported by an amended Statement of Facts filed on 7<sup>th</sup> November 2012 and supporting affidavit sworn by the applicant **Titus Mutua Mulinge** on 25<sup>th</sup> November 2012.
3. According to the applicant, the Court on the 18<sup>th</sup> October, 2012 granted the ex parte Applicant leave to commence Judicial review proceedings and that leave was to operate as a stay of all proceedings including but not limited to the making and delivery of the Decision of the

respondents pursuant to the disciplinary hearing conducted on the 5<sup>th</sup> October, 2012 to remove the name of **Titus Mutua Mulinge** TSC No. 320065 from the Teachers Register till the 5<sup>th</sup> November, 2012 when the case will be mentioned for directions or further orders. The said order, according to the applicant's advocates was served upon all the respondents on the 19<sup>th</sup> October 2012 with the 1<sup>st</sup> Respondent being served as early as 8 am but it proceeded to post a decision apparently issued on the 12<sup>th</sup> October, 2012 on the same date they were served with the order. To the applicant if the said notice is anything to go by, the time within which the Ex parte Applicant is to appeal expires on or about the 8<sup>th</sup> November, 2012 and it is noteworthy that the said decision was apparently issued on the 12<sup>th</sup> October, 2012 and the same was posted on the 19<sup>th</sup> October, 2012 and was received by Post office, at Tala on the 22<sup>nd</sup> October, 2012 and received on the 24<sup>th</sup> October, 2012 by the ex parte Applicant.

4. According to the applicant, he is a teacher of over 20 years of unblemished record having been employed as an assistant teacher and serving as a Deputy Head teacher at Tala Township for over 17 years and finally as Head teacher of Sengani Primary School for over three and half years. However, without any justifiable cause, the 2<sup>nd</sup> Respondent on behalf of the served (sic) was interdicted by the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> respondent and on the recommendation of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents served him with a letter of interdiction dated 20<sup>th</sup> June, 2012. Prior to the said interdiction, the applicant had on the 24<sup>th</sup> May, 2012 been arraigned in court facing two counts of defilement of two former girls of the Sengani Primary School with alternative charges of indecent acts in each count. He was subsequently served with a Notice of the hearing of his disciplinary case dated 7<sup>th</sup> September, 2012 by post that reached him on the 26<sup>th</sup> September, 2012 indicating that the hearing thereof was scheduled for the 5<sup>th</sup> October, 2012 at 8.30 am. According to him the allegations levelled against him had been by the minor way after the birth of her child hence the Police investigating the matter had forced samples of blood for purposes carrying out DNA tests to be taken from him to establish whether the allegations thereof had any basis whatsoever. The investigating officer availed a copy of the DNA Report by a Government Analyst, a **Mr. H. K. Sang**, from the Ministry of Public Health and Sanitation dated 14<sup>th</sup> August, 2012 that excluded him being the biological father to **Baby Sheila Asha**, the subject of the allegations. Despite the notice referred to at Paragraph 3 above requiring him to avail any documents that may be useful in his defence, he was shocked when the tribunal hearing the case chaired by the 2<sup>nd</sup> Respondent refused, failed and or neglected to admit the said DNA Report and further denied him the right to be represented by **Ms. Carolyne Kamende Advocate**, who had accompanied him for the said hearing and as if that was not enough, the tribunal denied him the chance to substantially cross-examine the witnesses arguing that the complainant had already covered all the matters in her statement, a clear picture of biasness on the part of the 2<sup>nd</sup> Respondent. According to his advocate's advice, the decision not to admit the DNA report, not to allow him that chance to substantially cross-examine the witnesses and also to deny him that right to legal representation was irrational, unreasonable, biased, unconstitutional and arrived at in breach of the rules of the Natural Justice. He thus believes that he will suffer immeasurably should the Respondents make and deliver its decision on the hearing of 5<sup>th</sup> October, 2012 without due regard to the DNA Report, proper cross-examination of the witnesses and also the right to counsel thereof.
5. According to legal advice, it is axiomatic that statutory power can only be exercised validly if it is exercised reasonably and that no statute can allow anyone on who it confers a power to exercise such power arbitrarily, capriciously or in bad faith. Further where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuses to take relevant factors in to its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body in each case abused its powers. The reason why the court has to intervene is because there is a presumption that where parliament gave a body Statutory Power to act, it could be implied that parliament intended it to act in a particular way.
6. He therefore believes that it is necessary and in the interest of justice that he be granted the orders sought herein since the failure by the respondents to admit the DNA Report, allow him sufficient time to cross-examine the witnesses and also deny him the right to representation by counsel

amounts to acting unreasonably, irrationally, unfairly and its acts are tainted with procedural impropriety. To him, there could be no decision within the meaning of the statute if there was anything done contrary to the essence of justice, a natural justice and any event all quasi judicial body including the respondents must uphold the rule of Natural justice and accord each party a fair hearing. The applicant's contention is that the respondents are duty bound to lead by example by complying with the written law and in this case the provisions of the **Teachers Service Commission Act** Chapter 212 and the rules of natural justice and the failure to abide by the law exposes its decision to judicial review proceedings. It is his position that overall the respondents acted so unreasonably that no reasonable authority could make such a decision.

7. There was a further affidavit sworn by the applicant on 15<sup>th</sup> February 2013 and filed in court on 19<sup>th</sup> February 2013. According to the said affidavit, the applicant instructed his advocates on record and was advised by the said advocates that his application to the 1<sup>st</sup> Respondent to be supplied with the proceedings of the County Director's office of the 5<sup>th</sup> October, 2012 and the ruling thereof solicited no response from them, a clear evidence that they are hiding the truth from this Honourable Court. It is his view that the proceedings before the County Director's office were instigated on the basis of complaints made by **Ms. Miriam Mutio Mwende** soon after the birth of her child and the police have through their very own letter dated 18<sup>th</sup> December, 2012 confirmed that the only available evidence was the DNA sampling which exculpated him hence any charges against suffice. It is his belief based on his said advocate's advice that the same charges levelled against him by the same **Ms. Miriam Mutio Mwende** with the 1<sup>st</sup> Respondent and heard by the 2<sup>nd</sup> Respondent on the recommendation of the 2<sup>rd</sup> and 4<sup>th</sup> Respondents must also fail without more. To him, the DNA Sampling Report was a must document given the circumstances of the case and the 1<sup>st</sup> Respondent's failure to even look at it is and was very prejudicial and a grave travesty of justice. The applicant further deposed that the subordinate court sitting at Kangundo on the 24<sup>th</sup> day of January, 2013 discharged him of the same charges pursuant to the strength of the letter aforementioned and also owing to loss of interest of the case by the complainants. He believes that the vendetta acts of the Respondents herein are now proved beyond peradventure and it is only fair that the application dated 6<sup>th</sup> November 2012 should be allowed forthwith.

### **RESPONDENT'S CASE**

8. On the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents, a replying affidavit was filed on 23<sup>rd</sup> February 2013 sworn by **Simon Musyimi Kavisi**, the Director in charge of Administration at the Teachers Service Commission Headquarters Nairobi (the Commission) on 26<sup>th</sup> February 2013.
9. According to him, the Commission is established under Article 237 (1) of the Constitution of Kenya, 2010, with its primary functions under Article (237) (2) thereunder being the management of teachers employed for service in public schools and institutions. In this regard, the functions and mandate of the Commission include; the registration of trained teachers; recruitment and deployment to public institutions of learning and the exercise of disciplinary control over registered the teachers. The operations of the commission are further buttressed by provisions of the **Teachers Service Commission Act**, No. 20 of 2012, **The Teachers Service Code of Conduct and Ethics** and the **Code of Regulations for Teachers** hence the Commission has a broad constitutional and statutory mandate which includes the exercise of disciplinary control over teachers who breach provisions of the law.
10. He deposes that the Applicant, upon realizing that the allegation of carnal knowledge levelled against him was in public domain, and knowing the legal consequences of his said act, purported to resign from service. However on or about 22<sup>nd</sup> May, 2012, the ex parte Applicant was interdicted by the Commission for being of immoral behaviour in that while being the Head teacher of Sengani Primary School, he had carnal knowledge of Mirriam Mutio Muindi, a student of Kawethie Secondary School, Form I, 2012, Admission No. 5967, while she was a pupil of Sengani Primary School, Class Eight, Index No. 345114011, and that this happened in the Third term (September, 2011), at around 11.00 am during the morning lessons in his office. In the deponent's view, these allegations, constituted serious breach of the Code, hence in exercise of its

- disciplinary mandate cited in paragraph 3, 4 & 5 above, the commission investigated the matter further, with a view to administer a fair decision in the matter and to this end, recorded statements from witnesses who included: **Mirriam Mutio Muind**, (the complainant), **Patrick M. Mulwa** and **Ash Muindi Mulwa**, ( the complainant's parents) and **Azra W. Najmee**, (the deputy head teacher, Kawethei Sec. School). The Commission summoned the Applicant and the witnesses referred to above, for the hearing of the case, at the Commission's held a hearing at the Teachers Service Commission County Director's office, Machakos, where the Applicant was given an opportunity to present his case, adduce evidence and cross examine the witnesses.
11. According to information received by the deponent from **Loice A. Nyaseda**, the Deputy Director, Discipline Division, the deponent believes that the evidence adduced by the Applicant before the Commission's Panel which heard his case on the 5<sup>th</sup> October, 2012, did not include, or in any way refer to a DNA Report. Consequently, the Applicant's claim that the Panel failed, declined and/or refused to admit that report is not true and is intended to mislead the Court. However, according to the deponent, the DNA Report, if at all is in possession of the Applicant, was/is not relevant as the issue before the Commission the material time related entirely to allegations of professional misconduct of the Applicant, i.e. having carnal knowledge with his pupil and not the paternity of any child. It is therefore his view that the Commission took a wholesome approach to this matter; and upon evaluating the evidence, it reached the decision to dismiss the Applicant from public service, and further to remove his name from the Register of teachers hence the decision by the Commission is legal and as a creature of the law, the Commission has an obligation under law to, inter alia, promote, protect and safeguard both public interest and the rights of the girl child to access education hence the action taken against the applicant was both justified and merited, the Commission having satisfied itself that it followed due process of its own disciplinary procedure.
12. Based on advice by **Mr. Allan M. Stima**, the advocate on record for the Commission, the deponent believes that the punishment meted out to the Applicant was commensurate to this professional misconduct; and was in strict compliance with Regulation 66(5) (c) of the Code and that the Commission operated within the confines of the law, and hence exercised its mandate lawfully, procedurally, in good faith, and in conformity of the laws of natural justice, specifically that: a) At the earliest opportunity the Applicant was informed of allegations against him and was invited to write his defence; b) The Applicant made his representations by way of a written defence statement which was presented and duly considered by the Commission; c) Further, the Applicant appeared before the Commission, heard the evidence against him and had the opportunity to cross examine witnesses; d) The Applicant was accorded the opportunity to present his evidence: both oral and written and to rebut the adverse evidence; e) The Applicants' evidence was duly considered by the Commission's decision; f) The Commission was not influenced or actuated by bad faith as alleged by the Applicant.
13. It is further deposed that without unjustified delay the Commission communicated its decision to the Applicant in conformity to the rule of natural justice requiring the same from an administrative action of the nature of a disciplinary proceeding. To him, the Commission did not act in contempt of a court order granting leave to operate as a sty of all proceedings including but not limited o the making and delivery of the decision of the Commission pursuant to the disciplinary hearing on the 5<sup>th</sup> October, 2012, to remove the name of the Applicant from the register till 5<sup>th</sup> November, 2012 when the case would be mentioned for directions and further orders. In his view, the Commission having conducted its disciplinary process against the Applicant on 5<sup>th</sup> October, 2012; and reached the decision to dismiss him from its service, and to remove his name from the Register, the said order dated 18<sup>th</sup> October, 2012, was incapable of implementation and the Applicant must therefore take responsibility for his late action in the matter since the said court order was served on the Commission on 19<sup>th</sup> October, 2012, after the letter communicating the Commission's decision of the disciplinary proceedings had been transmitted to the Applicant's last known address hence the Applicant in these proceedings has withheld material facts from the Court and is therefore not entitled to the relief sought.

#### **SUPPLEMENTARY AFFIDAVIT**

14. On 16<sup>th</sup> April 2013, the applicant filed a supplementary affidavit sworn on 15<sup>th</sup> April 2013.

15. According to him, the said Reply has been filed hopelessly out of time and without leave of court, the Respondent having been granted leave to file its response within 14 days service on the 5<sup>th</sup> November, 2012 and hence the same should be struck out in limine. In his view, his resignation from work or otherwise had nothing to do with the allegations before the Disciplinary Body. To the contrary, it is clear that the Commission and the rest of the Respondents had already made up their decision that he was guilty hence the failure to accord him the opportunity to defend himself and also denying him the right to legal representation and admission of crucial defence documents. He deposes that it is clear that the Respondents judged him guilty before hearing him contrary to the cardinal principle of law that every person is assumed innocent until proven guilty and that the Respondents are making an attempt to justify the reasons for the decision rather than respond to the issues the subject of the Judicial Review proceedings herein. According to him, he is not aware of any investigations conducted herein as he was not supplied with any witness statements prior to the hearing thereof as all he was served with is an invitation to attend the hearing. To him, the proceedings annexed to the said Affidavit are not a true reflection of the proceedings that took place at the office of the 2<sup>nd</sup> Respondent and the same have been deliberately tailored to have this Honourable Court to believe that he was given an opportunity to cross-examine witnesses, which is not the case. He surmises that this is the reason for delay in supplying the same since a request was made on 5<sup>th</sup> October, 2012 and the belated filling of the Reply. He reiterates that he was only allowed and/or told to ask the complainant 3 questions, which again are not the ones produced in proceedings hereinabove mentioned and none to the other witnesses and if the said proceedings are anything to go by, it is evident that he was not given any chance and/or opportunity to defend himself or even produce any document in his defence or call any witness(es) and further that he was never given any opportunity to defend myself and his attempt to present the DNA report fell on deaf ears as the disciplinary panel threw it back to him stating that the complainant's statement was sufficient.
16. It is his contention that it is absurd for the respondents to state that the DNA Report was unnecessary in the circumstances of the issue before the tribunal and this is a clear indication that the Panel had already made up their mind that he was guilty as charged taking into account the fact that a baby had been born without any investigations or even complaint lodged and from the complainant's very own statement/s, it was after she named the 'father' of the child as the ex parte Applicant herein that the disciplinary proceedings commenced. That without more, is clear that an exculpatory Report is extremely relevant in such proceedings and ought to be given due weight and consideration. To him, the proceedings hereof are not about the merits or lack thereof of the decision, it is about whether due process of the law and the rules of natural justice were followed or not and further the deponent, who never sat or participated in the said proceedings has not indicated his source of information but states that he is relying on the information and or the advice of the advocate, not even any member of the Disciplinary Committee/Panel. In any event, the deponent has not denied that the ex parte Applicant was not allowed legal representation, a germane rule of natural justice and it has also not been denied that the Applicant was not given sufficient time to cross-examine witnesses and he was not accorded any time at all to defend himself. He denied that he has concealed any material facts from the court as alleged.

### **APPLICANT'S SUBMISSIONS**

17. On behalf of the applicant it was submitted that it is not denied the basis of the charges herein against the ex parte applicant was a baby having been born by the complainant at the disciplinary proceedings, one **Miriam Mutio Muindi** and that the applicant was not allowed to rely on the DNA Report, a key document in the proceedings. According to the applicant without the DNA report there would be no other proof of the allegations of defilement levelled against him since the said report was in his favour hence the failure to admit the said report is a grave travesty and miscarriage of justice.
18. It is further submitted that the disciplinary proceedings were held in breach of the right to legal representation as the factual basis of the application is not challenged and reliance is placed on **R vs. Jomo Kenyatta University of Agriculture and Technology, ex parte Kinguru Mark** JR No. 58 of 2012.
19. It is further submitted that the applicant was denied sufficient time to cross-examine the witnesses

- and defend himself hence the only remedies available to him are to quash those proceedings and compel the said body to conduct the trial in accordance with the rules of natural justice which require that those who make decisions that affect others should act fairly by affording the person to be affected an opportunity to be heard otherwise such decision is amenable to the remedy of judicial review either for error in so acting or for failure to act fairly towards the person who will be adversely affected. On this submissions the applicant relies on Miscellaneous Application No. 85 of 2011- **R vs. Hon. Musalia Mudavadi & Another ex parte Richard Kwoba Nabiba**; JR No. 138 of 2010 - **Rev. David Mulei Mbuvi & Others vs. The Registrar General & Others**; and **Chief Constable of the North Wales Police vs. Evans [1982] 3 All ER 141**.
20. Suffice to state that the applicant has also relied on **Commissioner of Lands vs. Kunste Hotel [1995-98] EA 1**; **R vs. Communications Commission of Kenya [2001] EA 199**; **Ridge vs. Baldwin [1963] 2 All ER 66**; **Republic vs. Panel on Take-Overs [1987] 1 A ER 564**; **R vs. Secretary for State of Foreign and Commonwealth Affairs [1989] 1 All ER 655**; Misc Application No. 966 of 2000 – **Peter Kuria & 3 Others vs. AG**; Civil Appeal No. 228 of 2003 – **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi**; Civil Appeal No. 6 of 1996 – **R vs. KNEC ex parte G G Njoroge**; and Civil Appeal No. 39 of 1997 – **R vs. The Commissioner of Co-operatives ex parte Co-operatives Savings & Credit Society Limited**.
21. It is therefore submitted that the denial of the rules of natural justice to the ex parte applicant rendered the dismissal by the 1<sup>st</sup> respondent null and void and hence the said decision ought to be removed into this court by an order of certiorari and the 1<sup>st</sup> respondent be compelled to revoke the same and carry out a fresh hearing and admit the said DNA report while being prohibited from removing the applicant's name from the register.

## **DETERMINATIONS**

13. 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**.
14. The scope of the remedy of certiorari was considered in **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji 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...”**

15. 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.”**

16. 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 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

17. 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.

18. 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 Kadamvas 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.”**

19. 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.”

20. 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.
21. 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 adhere 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 strengthen. 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.”

22. 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.”

23. 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.”

24. Therefore the mere fact that a statute provides the procedures to be followed before an employee can be dismissed does not necessarily make the employment statutorily underpinned. What it means is that in the event that the employment is not terminated in accordance with the provisions of the statute, the termination of the employment may be wrongful in which event damages may be awarded in accordance with the law governing labour relations.

25. 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.”

26. 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.”

27. 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.”

28. 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.

29. With respect to the denial of opportunity of being heard and denial of the right to legal representation, it is not alleged that the applicant was never afforded an opportunity of being heard. The complaint however goes to the sufficiency of that opportunity. It is the applicant’s case that he was not afforded an opportunity to cross-examine the witnesses and that he was not allowed to adduce his evidence in form of the DNA report. It is, however stated by Michael Fordham in *Judicial Review Handbook*; 4<sup>th</sup> 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”.

30. 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.”**

31. 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 in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.”**

32. In Russel vs. Duke of Norfolk [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.”**

33. 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.”**

34. Therefore the complaint by the applicant that he was never afforded an opportunity of being heard cannot be sustained. Where the sufficiency of the evidence and the fact that he was not afforded as much leeway as he would have wished to cross-examine the witnesses may be a good ground for an appeal, that is not necessarily a ground for the grant of the judicial review remedies since those grounds would require re-evaluation of the evidence which was presented. If the allegation was that the applicant was never heard at all that would be a different story altogether.

35. 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.”**

36. The applicant further claims that he was denied an opportunity to adduce his evidence in form of the DNA report. As rightly contended by the respondents and admitted by the applicant the complaint was not paternity but defilement and whereas the evidence contained in the DNA report could have been favourable to the applicant that does not necessarily mean that defilement was thereby overruled. Whether or not the offence of defilement was actually committed is not within the scope of these proceedings. However the mere fact that the DNA report was not admitted did not preclude the panel from arriving at a decision on whether or not the offence of defilement was committed. In my view, nothing turns on the allegation of refusal to admit the said DNA report.
37. Apart from the foregoing, vide his Chamber Summons dated 17<sup>th</sup> October 2012, the applicant sought *inter alia* leave to apply for an order of certiorari to remove into the High Court and quash the entire Disciplinary Proceedings in the TSC County Director’s Office held on 5<sup>th</sup> October 2012 as well as the decision of the said Director refusing to admit the said DNA report. On 18<sup>th</sup> October 2012 this Court granted the leave as sought. However, it seems that the applicant was subsequently dismissed from service and his name removed from the register of teachers. This is what prompted him to file the amended Notice of Motion the subject of these proceedings on 7<sup>th</sup> November 2012 by which he is now seeking *inter alia* an order quashing the decision to dismiss him and remove his name from the register. Suffice it to say that the leave that he sought and which he was granted did not allow him to challenge the decision to dismiss him and remove his name from the register. Without such leave being granted the applicant’s application was still-born and could not be cured by simply amending the Notice of Motion. Without leave being granted to quash the decision to dismiss the applicant and remove his name from the register the court has no power to quash the said decision. It follows that the orders of mandamus and prohibition would not be efficacious without the order quashing the impugned decision. See **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others** (supra).

### **ORDER**

38. Having said that it must now be clear that the amended Notice of Motion dated 25<sup>th</sup> October 2012, amended on 6<sup>th</sup> November, 2012 and filed in Court on 7<sup>th</sup> November, 2012 is unmerited and the same fails and is dismissed with costs to the Respondents.

**Dated at Nairobi this 2<sup>nd</sup> day of August 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties***