



Republic v Cabinet Secretary, Ministry of Education & another; University of Nairobi & 2 others (Interested Parties) (Application E019 of 2023) [2024] KEHC 2489 (KLR) (Judicial Review) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW
APPLICATION E019 OF 2023**

**J NGAAH, J
MARCH 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

UNIVERSITY OF NAIROBI INTERESTED PARTY

PROFESSOR MIRIAM WERE INTERESTED PARTY

GEORGE OMONDI OTIENO INTERESTED PARTY

JUDGMENT

Applicant’s Application

1. The application before court is the ex parte applicant’s motion dated 23 August 2023. It is expressed to be brought under Articles 22 and 23 of *the Constitution*; sections 4, 5, 7, 8, 9 and 11 of the *Fair Administrative Action Act*, 2015 and section 3A of the *Civil Procedure Act*, cap. 21.
2. The applicant moves this Honourable Court for the following orders:
 - “1. That an order of certiorari to remove into the High Court for the purposes of it being quashed the Kenya Gazette Notice No. 6767 dated 22nd of May 2023



and published on 23rd of May 23 appointing the chairperson and members of the Council of the University.

2. That an order of prohibition prohibiting the implementation of the Kenya Gazette Notice No. 6767 dated 22nd of May 2023 and published on 23rd of May 23 appointing the chairperson and members of the Council of the University.
3. That the costs of the application be provided for.”
3. The application is based on a statutory statement dated 21 August 2023 and an affidavit sworn on even date by Dr. Constantine Wasonga verifying the facts relied upon. Dr. Wasonga has sworn that he is the secretary general of the applicant.
4. According to Dr. Wasonga’s depositions, by a gazette notice No. 6767 dated 22 May 2023 which was published in the Kenya Gazette of 23 May 2023, the 1st respondent appointed the chairperson and five members of the University of Nairobi Council. In the same notice, the 1st respondent revoked gazette notices nos. 8074, 8075, 9959 of 2022 under which the former chairperson and other members of the University of Nairobi council had been appointed. The persons whose appointment was effectively revoked have been named as:
 - (i) Professor Miriram Were
 - (ii) Flora Mutuweta
 - (iii) Charles Orony Ogalo
 - (iv) Alison Kariuki
 - (v) Engineer Kariuki Muchemi
 - (vi) Hassan Abdi Muhamud
5. Professor Miriam Were had been appointed as the chairperson of the Council in gazette notice no. 8074 of 2022. She was to serve a term of three years effective 8 July 2022. Flora Mutuweta, Charles Orony Ogalo and Alison Kariuki were appointed as members of the Council on the strength of gazette notice No. 8075 of 2022. They were also to serve as members of the Council for a term of three years from 8 July 2022. Engineer Kariuki Muchemi and Hassan Abdi Muhamud were appointed as members of the Council vide gazette notice no. 9959 of 2022 and, similarly, their term of office was three years effective 5 August 2022. The revocations of the appointments prematurely ended the terms for which the officers whose appointments had been revoked were to serve.
6. According to Dr. Wasonga, although the 1st respondent purported to invoke section 36 (1) of the Universities Act, No. 42 of 2012, in disbanding the previous Council and reconstituting a new one, this provision of the law does not allow him to act as he did. It has been sworn there was no vacancies in the Council as to necessitate fresh appointments through gazette notice no. 6767 of 23 May 2023. And even if a vacancy arose, any person appointed to fill the vacancy would serve for the remainder of the term of the previous member and not for three years.
7. The process of appointment or filling any vacancy, it has been sworn, ought to be open, transparent and accountable and, in any event, consistent with Article 10 and 232 of the Constitution and section 36(3) of the Universities Act. In the instant case, no vacancy in the Council was ever declared and no particular advertisement was made for vacancies in the Council specific to the University of Nairobi.



8. Again, there was no shortlisting of candidates and neither was there any invitation to members of the public to make representations on the applicants. It is also alleged that the names of the appointees were not made public prior to their official appointment in the Kenya Gazette.
9. The 1st respondent's conduct, it is alleged, is arbitrary and constitutes abuse of discretion. It has been sworn that this conduct has been the subject of numerous complaints and judicial decisions reprimanding the 1st respondent yet the latter has persistently ignored the reprimands and acted ultra vires the *Universities Act*. For instance, by a judgment dated 3 March 2017 delivered in judicial review application no. 56 of 2016, the 1st respondent's arbitrary instructions to the University of Nairobi not to transact any business and an advertisement in the press inviting the public to apply for membership of the council were stopped.
10. In a judgment delivered in judicial review application no. 131 of 2017, the court stayed the appointments by the 1st respondent in gazette notice no. 2334 of 10 March 2017. The appointments to the council made in gazette notice no. 3236 of 5 April 2017 were also thwarted by this Honourable Court in application no. 184 of 2017.
11. Again, the 1st respondent's appointments made vide gazette notices nos. 7609 and 7610 of 2017 were nullified in judicial review application no. 506 of 2017. In this latter case, the court noted that the 1st respondent had consistently ignored the court's directions on how to undertake his statutory mandate. The 1st respondent is alleged to continue acting with impunity and the latest purported disbandment and reconstitution of the council is a demonstration of the respondent's improper conduct.
12. It is further sworn that the applicant, being a representative of the members of staff of the University of Nairobi, is directly affected by what has been described as "fluidity of the terms" of the chairperson and members of the Council of University of Nairobi who now occupy their offices at the whim of the 1st respondent. This may lead to a drop in the academic standards at the University.
13. Dr. Wasonga has also sworn that if the candidates had been duly shortlisted and interviewed before their names were gazetted, the applicant would have provided proof that they were not suited for the positions to which they were purportedly appointed and, in any event, they fall short of the qualifications prescribed by section 7 of the *Universities Act*. In gazetting the persons respectively as the chairperson and members of the Council, the 1st respondent is said to have acted in an unreasonable and irrational manner.

Respondents' and interested parties' response

14. The 1st respondent opposed the motion. Dr. Beatrice Muganda Inyangala swore a replying affidavit to this effect. At the time of swearing the affidavit, she was the Principal Secretary for the State Department for Higher Education and Research in the Ministry of Education.
15. Dr Inyangala has sworn that the University of Nairobi is a public university established under the *Universities Act* No. 42 of 2012 and was granted a charter in 2013. The university is a body corporate.
16. Section 35 of the *Universities Act* provides for governance organs of a public universities such as the University of Nairobi. These organs include the Council whose mandate include employment of staff; approval of statutes of the university; approval of policies of the university and approval of the university budget.



According to section 36(1) of the *Universities Act*, the council consists of nine members and Section 36(1)(d) gives the cabinet secretary powers to appoint chairpersons and members of the councils of public universities.

17. By a gazette notice no. 6767 of 22 May 2023, the Cabinet Secretary appointed Professor Amukowa Anangwe as the chairperson of the Council of the University of Nairobi in accordance with section 36(1) (a) of the Act. The Cabinet Secretary also appointed Ahmed Sheik Abdullahi, Dr. Damain ole Warkae, Caren Omwenga and Dr. Sally Ngeringwory Toroitoch as members of the University Council for a period of three years.
18. Dr Inyangala also admitted that the Cabinet Secretary revoked gazette notice no. 8074 under which Professor Miriam Were had been appointed the chairperson of the Council of the University of Nairobi for a term of three years. The Cabinet Secretary also revoked gazette notices nos. 8075 and 9959 of 2022 under which Flora Mutuweta, Charles Ogalo and Alison Kariuki had been appointed as members of the Council. Others who had been appointed in the same capacity vide the same gazette notice were Engineer Kariuki Muchemi and Hassan Abdi Mohamed.

According to Dr. Inyangala, section 51 of the Interpretations and General Provisions Act, cap. 2 gives the Cabinet Secretary power to appoint and revoke appointments.

19. Through an advertisement in the Daily Nation Newspaper dated 9 February 2023, the Ministry of Education called for applications for suitable candidates for the positions of chairpersons and members of councils of public universities. This was intended to fill vacancies where the terms of the councils had expired, or for councils of universities that were newly chartered and those that required reconstitution for various reasons.
20. It is the respondents' position that the fact that the appointment of members was revoked does not necessarily imply that the members cannot be called upon to serve as council members in other institutions. As a matter of fact, Alison Kariuki who was serving as a council member at the University of Nairobi was appointed to serve in the same capacity at the Technical University of Mombasa for a period of three years. Similarly, Abdi Mohamed was appointed as a member of the council of Jomo Kenyatta University of Agriculture and Technology.
21. The respondents maintain that the cabinet secretary acted within the law when he reconstituted the Council of the University of Nairobi to strengthen governance in the institution.
22. According to Dr. Inyangala, the positions were advertised, shortlisting was done and applicants interviewed. The appointment of council members was done competitively in accordance with the provisions of Articles 10 and 232 of *the Constitution*. She has also sworn that the Council of any public university is a critical institution of governance and oversight and any orders quashing or suspending the implementation of gazette notice no. 6367 of 23 May 2023 will have far-reaching consequences since the University will not have an operational Council to provide oversight and strategic direction in academic programs or otherwise ensure compliance with the university's obligations under the *State Corporations Act* and the *Universities Act*.
23. If the orders sought by the applicant are granted, the smooth operations of the university will be disrupted. It is also sworn that the applicant has not demonstrated that the persons appointed as the members of the Council of the University of Nairobi do not meet the Constitutional threshold of diversity in expertise, gender and regional balance.



Interested Parties' Response

24. The 2nd interested party, Professor Miriam Were opposed the application and raised a preliminary objection urging that the application is bad in law, it is frivolous, vexatious, an afterthought and an abuse of the due process of law. She averred that the University of Nairobi Council members are not members of the applicant and for that reason, the applicant lacks the requisite locus standi to institute this suit on their behalf. The applicant also lacks locus standi to sue on behalf of the former Council members under Article 22(2) (b) of [the Constitution](#)

25. George Omondi Otieno, the 3rd interested party swore a replying affidavit on his own behalf and on behalf of 23 other interested parties opposing the applicant's motion.

According to Mr. Otieno, members of the applicant were never consulted before this suit was filed. In any case, according to the applicant's constitution, the National Executive Committee has the sole right to decide whether or not legal advice or assistance is necessary in the best interests of the union or the members concerned. There is no proof that the secretary general brought this suit with the approval of National Executive Committee.

26. Mr. Omondi has also sworn that Prof. Miriam Were, Flora Mutuweta, Charles Oriny Ogalo, Alison Kariuki, Engineer Kariuki Muchemi and Hassna Abdi Mohameed are not ordinary, honorary or special members of the applicant but are members of the management. The applicant cannot, therefore, purport to be representing them.

It is alleged that the sole purpose of this suit is to protect the interests of some "unknown persons allied to the top officials" to the detriment and prejudice of the members.

Submissions

27. In its submissions, the applicant has urged that it has filed a public law suit seeking judicial review remedies against an administrative action of the respondents which affect the applicants, stakeholders and the public at large. Contrary to the interested party's suggestions, the applicant is not seeking a private law remedy on behalf of any member of the disbanded council. These proceedings, it has been urged, are meant to interrogate the process leading to removal and subsequent appointment of council members of the University of Nairobi. They have been lodged pursuant to section 7 of the [Fair Administrative Action Act](#) according to which any person aggrieved by an administrative action or decision may apply for the review of the decision. The applicant, according to the learned counsel for the applicant, fits the description of a person aggrieved by the decision of the respondents and hence has the requisite locus standi to file and maintain these proceedings.

28. It has also been submitted on the applicant's behalf that it has sufficient interest the suit because the Council of the 1st interested party is central in the employment and the making of decisions concerning the welfare of the applicant's members. The applicant has a valid recognition agreement and the appointment of the Council affects the union, its members, the stakeholders and the public at large. The proceedings are intended to safeguard the interests of this category of people.

29. Article 258 of [the Constitution](#) grants the right to every person to institute court proceedings claiming that [the Constitution](#) has been contravened or is threatened with contravention. Such a person can act in their own interest or an association acting in the interest of one or more of its members. The applicant relied on the decision in R versus Cabinet Secretary, Ministry of Education & Another, ex parte Thadayo Obanda (2017) eKLR where it was held that Article 3(1) of [the Constitution](#) obliges every person to protect, uphold and defend [the Constitution](#) and that where a person is of the bona fide



view that a provision of the Constitution has been violated, or is threatened with violation, the person is not only entitled to but he is also enjoined to bring an action to protect the Constitution.

30. As far as the 1st respondent's powers are concerned, it was submitted that under section 36(1) of the Universities Act, the powers to appoint can only be invoked when a vacancy exists. The 1st respondent cannot rely on section 51 of the Interpretations and General Provisions Act because that provision is subject to a contrary intention. The contrary intention is that there exist provisions governing removal of a council member in the University of Nairobi Charter and section 6(2) of the State Corporations Act. It is for this reason that the argument that the 1st respondent could rely on section 51 of the Interpretation and General Provisions Act was dismissed in R versus Cabinet Secretary, Ministry of Education & Another, ex parte Thadayo Obanda (supra).
31. The applicants have submitted that the appointment of the chairperson and the members of the Council when no vacancy existed in the Council constituted abuse of power and discretion. It has also been submitted that while section 36(1) of the Universities Act grants general powers to the 1st respondent to make appointments with respect to section 36(1)(a) and (d) thereof, it does not behoove upon the 1st respondent to exercise the discretion in an arbitrary and opaque manner.
32. It is further submitted that transparency and accountability are the cornerstone of exercise of public power as stipulated in Article 10(2) (c) of the Constitution. And under Article 232 (1) (f) the 1st respondent was always under obligation to act transparently and to provide the public with timely and accurate information.
33. On the question of whether it would be in the public interest to issue the orders sought, the applicant once again relied on Republic versus Cabinet Secretary, Ministry of Education & Another, ex parte Thadayo Obanda (supra) where a similar argument is said to have been made. This Honourable Court dismissed it and held that it is trite that contravention of the Constitution or a statute cannot be justified on the plea of public interest because public interest is best served by enforcing the Constitution and the statute. In that case the court is said to have cited with approval the decision in Republic versus County Government of Mombasa, ex parte Outdoor advertising Association of Kenya (2014) eKLR where it was held that there can never be public interest in breach of the law and that any decision made in the name of public interest must consistent with the Constitution and the law generally. Also cited along the same lines is the decision in Resley versus City Council of Nairobi (2006) 2 EA 311.
34. As far as I gather only the 3rd interested party filed written submissions in response to the applicant's submissions. The 3rd respondent reiterated that the applicant has no legal basis to institute this suit on behalf of the Council members whose appointments had been revoked. It is urged that the applicant is only a trade union whose mandate is to represent the academic staff of the University of Nairobi. Like the 2nd interested party, the 3rd interested party urged that the Council members whose appointment was revoked are not members of the applicant and, therefore, the applicant cannot purport to be pursuing their interests in this suit. The learned counsel relied on the decision in Communication Workes Union & Another versus Communication Authority of Kenya (2015) eKLR where it was held, inter alia, that trade unions are not representatives of management.
35. It was also submitted on behalf of the 3rd interested party that this was not a public interest matter but a private contract between council members and the University of Nairobi. Counsel for the 3rd interested party relied on Communication Workers Union & Another versus Communication Authority of Kenya (2015) eKLR where the court cited with approval the case of Republic v. Mwangi S. Kaimenyi ex parte KIPPRA (2013) eKLR in which it was held that the breach or the threatened breach of the aggrieved parties contracts of service is not a public act or a matter of public law. It is urged that Council



members whose appointment was revoked were on contractual terms and, therefore, the argument that the revocation of their appointment is a constitutional breach cannot hold.

36. The 3rd respondent has also urged that the University of Nairobi Chapter of the applicant did not sanction the suit. The 3rd interested party is apprehensive that if the application is allowed, the applicant's university of Nairobi chapter members who have been shortlisted and are awaiting interviews for promotion to the positions of associate and full professorship will suffer delays and career stagnation.

Analysis and determination:

37. A preliminary issue to be disposed of at this early opportunity is whether the applicant has locus standi to institute this suit.
38. It is not in dispute that the applicant is a trade union registered to represent all members of the academic staff of public universities which include the University of Nairobi. Its objectives are set out in Article 3 of its constitution and they include bringing together and uniting academic staff of Kenya's universities. It is also registered to regulate and improve relations between its members and the universities' councils.
39. According to section 2 of the *Universities Act*, the University Council is the governing body of a university and, under section 35 of the Act, the Council employs staff, approves the budget of the universities which certainly include salaries and other remuneration of the applicant's members.
40. Besides the aims and objectives of the applicant, the interaction between the applicant and the universities' councils would, in my humble view, elevate the applicant to the category of persons whom the law regards as having 'sufficient interest' in the subject of litigation.
41. 'Sufficient interest' in these circumstances is that the applicant has a stake in the process of appointment of members of the Universities' councils and, in particular, whether the law relating to their appointment or their departure from office has been followed.
42. A few authorities explain this point in clearer terms.

In *R versus Thames Magistrates Court' ex parte; Greenbaum* (1957) 55 LGR 129 Lord Denning LJ said of locus standi for judicial review orders as follows:

“When application is made to (the court) by a party or person aggrieved, it will intervene (it is said) *ex debito justitiae*, in justice to the applicant. When application is made by a stranger it considers whether the public interest demands its intervention. In either case it is a matter which rests ultimately in the discretion of the court.”

43. And in an earlier case of *R versus Liverpool Corporation, ex parte; Liverpool Taxi Fleet Operators' Association* (1870) LR 5QB 446, the learned judge had this to say:

“The writs of prohibition and certiorari lie on behalf of any person who is a person aggrieved and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him: but it does include any person who has a genuine grievance because something has been done or may be done which affects him.” (Emphasis added).

44. I am satisfied the applicant's members' rights are likely to be affected, either directly or indirectly, if the law is not followed in the appointment of persons who are entrusted with governance of the



institutions in which they are employed. They will similarly be affected if those duly appointed are removed from office arbitrarily.

45. For these reasons, I would be hesitant to regard the applicant as a “a mere busy body who is interfering with things that do not concern him.” I am, instead, satisfied that the applicant has a genuine grievance because the 1st respondent’s impugned conduct affects the applicant’s constituents, in one way or the other.

The 2nd interested party’s preliminary objection is, accordingly, overruled. For the same reasons, the arguments by the 3rd interested party that the applicant has no locus to bring this suit are rejected and I will proceed to consider the applicant’s application on merit.

46. I must start by saying that having considered the application and the respondents’ and interested parties’ response, I am satisfied that the facts upon which the application is grounded are not in dispute. The respondents have owned up to the impugned gazette notice no. 6767 of 22 May 2023 according to which the 1st respondent appointed Professor Amukowa Anangwe as the chairperson of the Council of the University of Nairobi and appointed Ahmed Sheik Abdullahi, Dr. Damain ole Warkae, Caren Omwenga and Dr. Sally Ngeringwory Toroitoch as members of the University of Nairobi Council for a period of three years.
47. It is also not in dispute that, by the same token, the 1st respondent revoked gazette notice no. 8074 under which professor Miriam Were had been appointed the chairperson of the Council of the University of Nairobi for a term of three years and gazette notices nos. 8075 and 9959 of 2022 under which Flora Mutuweta, Charles Ogalo and Alison Kariuki had been appointed as members of the Council. Others whose appointment was also revoked in the same gazette notice were Engineer Kariuki Muchemi and Hassan Abdi Mohamed.
48. The terms for which persons appointed under gazette notices nos. 8074, 8075 and 9959 of 2022 were to serve either as chairperson or members of the University Council were yet to expire when these notices and the appointments were revoked.
49. The crux of the applicant’s application and which is the overarching question before court is whether the 1st respondent acted ultra vires the Universities Act when he appointed the chairperson and members of the University Council and revoked the appointment of the previous chairperson and members of the same council when their terms had not expired.
50. All the parties in these proceedings agree that the legal basis upon which the 1st respondent would make appointment or appointments to the University Council is section 36 of the Universities Act. As a matter of fact, it this provision of the law which the 1st respondent invoked in making the impugned appointment and revoking the gazette notices under which the previous appointments had been made. The notice read as follows:

“Gazette Notice No. 6767

The *Universities Act* (No. 42 of 2012)

University of Nairobi

Appointment

In exercise of the powers conferred by section 36(1) of the *Universities Act*, Cabinet Secretary
for Education appoints-

Under paragraph (a)



Amukowa Anangwe (Prof.)-Chairperson

Under paragraph (d)-

Ahmed Sheikh Abdullai

Darmain Ole Warkae (Dr.)

Caren Kerubo Omwenga,

Sally Ngeringwony Toroitich (Dr.),

As chairperson and members of the Council of the University of Nairobi, for a period of three (3) years, with effect from the 23rd May, 2023. Gazette Notice No. 8074, 8075 and 9959 of 2022 are revoked.

Dated the 22nd May, 2023

Ezekiel Machogu

Cabinet Secretary for Education” (Emphasis added).

51. A reading of section 36(1) (a) of the Act reveals that the cabinet secretary’s power is limited to appointment and not revocation of an appointment already made. It is necessary to quote here the entire section 36 in order to appreciate the extent of the powers of the cabinet secretary. It reads as follows:

36. Council of a public university

(1) The council of a public university or constituent college of such a university shall consist of nine persons appointed by the Cabinet Secretary as follows—

- (a) chairperson;
- (b) the Principal Secretary in the Ministry for the time being responsible for the university education;
- (c) the Principal Secretary in the Ministry for the time being responsible for Finance;
- (d) five members appointed by the Cabinet Secretary through an open process in such a manner as may be prescribed in guidelines issued by the Cabinet Secretary; and
- (e) the Vice-Chancellor or, in the case of a constituent college, the Principal of such college who shall be an ex officio member of the Council.

52. The powers of the cabinet secretary under this section do not extend to revocation of appointment or appointments already made. For the avoidance of doubt, circumstances under which a member of the university Council may leave the Council are captured under section 8 of the [Universities Act](#). That section reads as follows:

8. Vacancy of office

(1) Subject to the provisions of this Act, the office of a member of the Commission shall become vacant if the member—

- (a) resigns by notice in writing addressed to the Cabinet Secretary;



- (aa) is absent from three consecutive meetings of the Commission without the permission of the Chairperson, or, in the case of the Chairperson, the permission of the Cabinet Secretary;
 - (b) is unable to perform the functions of office by reason of prolonged physical or mental incapacity;
 - (c) is adjudged bankrupt by a court of competent jurisdiction or enters into a composition or scheme of arrangement for the benefit of creditors;
 - (d) is guilty of gross misconduct;
 - (e) fails to meet the requirements of Chapter Six of *the Constitution*; or
 - (f) is convicted of an offence and sentenced to imprisonment for a period of six months or more.
- (2) Where the office of a member of the Commission becomes vacant, the Cabinet Secretary may, subject to the provisions of this Act, appoint another person to fill the vacancy for the remainder of the term of such member.
 - (3) Notwithstanding the generality of the foregoing, any member of the Commission suspected of having contravened Chapters 6 or 13 of *the Constitution* shall vacate office to pave way for investigations.
 - (4) Where a person who has vacated office under subsection (3) is not found culpable of any unlawful act by a competent legal authority, the person shall be reinstated to the position of a Commissioner.
 - (5) The First Schedule shall apply with respect to the conduct of the business and affairs of the Commission.
53. The commission referred to here is the Commission for University Education established under section 4 of the Act but these provisions apply mutatis mutandis to the office of the University Council by virtue of section 36(4) which states that “the provisions of section (8) relating to the vacancy of office of the chairperson and members of the Commission shall apply with necessary modifications to the chairperson and members appointed under subsection (1) (a) and (d). 36(4) of the Act.”
54. It is quite clear from this section, in particular section 8(2), that the cabinet secretary may only intervene when the office of a member becomes vacant in which event the cabinet secretary may appoint a replacement to serve the remainder of the term.
55. Although the Honourable Attorney General has urged that section 51 of the *Interpretation and General Provisions Act* would apply in the absence of an express provision in the *Universities Act* giving the cabinet secretary the power to revoke an appointment of a Council member, or a chairperson of the University Council, I am not persuaded that the Cabinet Secretary would have such drastic powers without express provisions to that effect. That section reads as follows:
51. Power to appoint to include power to suspend, dismiss, etc., and to reappoint, etc.
- (1) Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke



the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.

(2) Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears be exercisable only upon that recommendation or subject to that approval or consent. (Emphasis added).

56. The power of a person to revoke an appointment under this section is qualified in the sense that the power to remove, suspend, dismiss or revoke an appointment is only exercisable where there is no intention to the contrary. No doubt, if the legislature intended the cabinet secretary to revoke the appointment of a member or chairman of the University Council, it would have clearly stated so. In my humble view, the absence of an express provision allowing the cabinet secretary to revoke an appointment would imply a contrary intention against the exercise of such a power.

57. Better still, the circumstances under which any member of the council, including the chairman may be removed have been prescribed in section 8 of the *Universities Act*. By necessary implication, the appointment of any member to the council may only be revoked when any of those circumstances are proved to obtain. Section 8 of the Act would, therefore, befit what has been described in section 51 of the *Interpretation and General Provisions Act* as a “contrary intention”.

58. It is worth bearing in mind that, going by the depositions in the affidavit of Dr. Inyangala, the appointment to the University Council is a culmination of a rigorous exercise. Membership to the Council and the position of the chairperson are competitive positions and those appointed to the Council must either prove their worth or their appointment is by virtue of the positions they hold in particular government departments.

It follows that it cannot have been the intention of Parliament that members of the Council would be recruited competitively only for the Cabinet Secretary to revoke their appointment arbitrarily.

59. In all likelihood, the impugned gazette notice would be quashed on the ground of illegality for it is apparent the Cabinet Secretary acted ultra vires section 31 of the University’s Act. This ground of illegality was explained in English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 where Lord Diplock noted as follows:

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

60. When the Cabinet Secretary went beyond the scope of his powers as donated by section 36 of the *Universities Act*, it cannot be said with any sense of conviction that he understood correctly the law that regulates his decision making power; neither can it be said that he gave effect to it.

61. That said, judicial review remedies are discretionary. The court has a discretion whether to grant a remedy at all and, if so, the form of remedy it may grant.



62. In exercising its discretion whether or not to grant a judicial review remedy, the court will take account such factors as the conduct of the party applying, and consider whether it has been such as to disentitle him to relief.

Undue delay (see *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, [1990] 2 All ER 434, HL.), unreasonable or unmeritorious conduct (*R v Crown Court at Knightsbridge, ex p Marcrest Ltd* [1983] 1 All ER 1148), acquiescence in the irregularity complained of (*R v Secretary of State for Education and Science, ex p Birmingham City Council* (1984) 83 LGR 79) or waiver of the right to object (*R v Williams, ex p Phillips* [1914] 1 KB) may all result in the court declining to grant relief.

63. Another consideration in deciding whether or not to grant relief is the effect of doing so (*R versus Brent Health Authority, ex p Francis* [1985] QB 869, [1985] 1 All ER 74,). Factors which may be relevant include whether the grant of the remedy is unnecessary (*R v GLC, ex p Blackburn* [1976] 3 All ER 184) or futile(*R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164), whether practical problems, including administrative chaos and public inconvenience (*Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141; *R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd* [1964] 3 All ER 200 at 208), would result, the effect on third parties (*R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842,), and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment(*R versus Peak Park Joint Planning Board* (1976) 74 LGR 376 at 380, DC, per Lord Widgery CJ).

64. According to Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/ paragraph 692, the court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully (See *R versus Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257). The demands of good public administration may lead to a refusal of relief (*R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257 at 266). However, there is a public interest in establishing that action taken by a public body is invalid and there needs to be good reason for not granting an appropriate remedy; thus, in some instances, the courts may refuse to quash a decision where there is good reason to do so but may grant a declaration that there has been a breach of the relevant principles of public law (See *R (on the application of Gavin) v London Borough of Haringey* (2003) EWHC 2591 (Admin), [2004] 2 P & CR 209, [2003] All ER (D) 57).

65. Turning back to the applicant's application, as early as, 22 August 2023, when the application for leave was first brought to my attention, I raised the red flag that considering the grievances of the applicant, the latter may have been lethargic in seeking judicial review reliefs. To be precise, I noted as follows:

“I am hesitant to certify the application as urgent considering that the impugned Gazette notice was published way back in May 2023. One of the considerations the court takes into account in exercising its discretion whether or not to grant leave to file an application for judicial review is the speed at which the applicant makes the application for leave upon the occurrence of the alleged grievances. I am unable to find any satisfactory reason why the applicant had to wait till now, when the Honourable Court is on recess, to file the present application. Nonetheless, I will allow the application to the extent that leave is granted in terms of prayers 2 and 3 of the summons. For reasons I have given, and considering that a lot may have happened in the intervening period between May and the time this application was filed; and in order to forestall any disruptions that may ensue in the administration of



the University of Nairobi as a result of an order of stay, I decline to grant the order for leave to operate as stay.”

66. The application was made three months after the impugned gazette notice was published. There is no doubt the application was made within the limitation period for seeking judicial review reliefs and in particular, the order for certiorari.
67. But the fact that a claim for judicial review has been made within the limitation period or otherwise from the date when the grounds for the application first arose, does not necessarily mean that it has been made promptly. (See *R versus Education Committee of Blackpool Borough Council, ex p Taylor* (1999) ELR 237).
68. There are circumstances when it is necessary that the application for judicial review be filed as soon as the grounds for review arise. It has been held that wherever there is a failure to act promptly in such circumstances there is 'undue delay'. And where there has been undue delay in making an application for judicial review, the court may refuse permission for the application to be brought or may refuse a remedy at the substantive hearing, if it considers that granting the remedy sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. (See *Caswell v Dairy Produce Quota Tribunal for England and Wales* (1990) 2 AC 738).
69. The circumstances of the applicant's case were such that the application ought to have been made promptly. Promptness was necessary because a lot seem to have happened between the time the impugned gazette notice was published and when the application was filed. For instance, according to Dr. Inyangala, two of the members of the Council whose appointments were revoked were appointed to similar positions in other universities. Although the applicant disputed this assertion insisting that there is no proof for such appointments, neither of the two members has refuted the deposition that they now hold positions similar to those they held at the University of Nairobi prior to the revocation of their appointments.
70. It is possible that the other three members may have possibly moved on in life and were engaged elsewhere. If the applicant had joined them to this suit, at least, as interested parties, they would possibly have been heard on their disposition in life after the revocation of their appointments. Professor Miriam Were who was the chairperson of the defunct council took the initiative to take part in these proceedings as an interested party and disowned the suit. As has been noted, she even raised a preliminary objection to the hearing of the suit.
71. The applicant is bound to bear the consequences of its conduct in delaying the institution of this suit. As far as this Honourable Court is concerned, the delay has a lot to do with the court's exercise of its discretion against the grant of the judicial review reliefs which the applicant seeks in its application.
72. For the same reason of what has either transpired or may have transpired in the intervening period, grant of the judicial review reliefs could possibly throw the University of Nairobi into governance in chaos. I say so because if Professor Were, the immediate former chairperson of the University Council is against the grant of the orders sought and two other members of her team have since been appointed as members of councils of other universities, the administration of the University of Nairobi would be in limbo if the impugned gazette notice is revoked. At the very least, the Council will not have three members one of whom is supposed to be the chairperson of the Council.
73. It is worth noting that under the *Universities Act*, section 2 thereof, the University Council is the governing body of a university and, according to section 35 of the *Universities Act*, the Council employs staff, approves the budget of the university and approves policies of the university, amongst



- the council's other functions. In the absence of a properly constituted and functional council, these tasks which, for all intents and purposes, are core to the existence of a university will not be discharged.
74. This is a situation that this Honourable will not countenance because granting the reliefs sought would likely cause substantial hardship to, or substantially prejudice the rights of the staff and student community of the University of Nairobi or any other person including the public who would ordinarily be interested in the well-being of this esteemed institution. As was stated in *Caswell v Dairy Produce Quota Tribunal for England and Wales* (supra) granting the reliefs would be detrimental to good administration of the University of Nairobi.
75. I am minded the applicant has reservation about the suitability of members of the Council who have been appointed to replace those whose appointment was revoked. In his affidavit verifying the facts relied upon, Dr. Wasonga expressed his reservations as follows:
15. "That had there been shortlisting and interview of the candidates before gazettement, the ex parte applicant would have submitted relevant materials before the interview panel demonstrating why some of the persons who were gazetted as members of the governing council of the interested party do not qualify for the position since they do not possess the relevant qualifications as required under the provisions of section 7 of the *Universities Act*.
16. That in arriving at the impugned decision to gazette the persons, the 1st respondent acted in an unreasonable and irrational manner since the 1st respondent did not take into account the fact that the individuals he purported to appoint as chairperson and members of the council of the interested party had not been interviewed for the said positions."
76. There is annexed to the affidavit of Dr. Inyangala a copy of the advertisement made in the Daily Nation newspaper of 9 February, 2023 by the Ministry of Education calling for applications for the positions of chairpersons and members of councils of public universities. There is also attached to the same affidavit a copy of a list of applicants who applied to be considered for these positions. The list of candidates who were shortlisted for the interviews is also exhibited. Finally, the list of successful candidates is also provided.
77. The new members of the Council including the chairperson are among those who successfully applied to be considered for the positions of the chairpersons and members of the councils of public universities. Notwithstanding the applicant's reservations about the advertisements, the least the applicant ought to have done is to join these new members to its application, if not for anything else, for them to respond to what, in my humble view, are disparaging remarks about their suitability for office of council member or council chairperson. Granting the application on the strength of the applicant's remarks about the current members and the chairperson of the Council of the University of Nairobi would be tantamount to condemning them unheard.
78. For the reasons I have given, I would exercise my discretion against granting the judicial review orders sought. Accordingly, I would dismiss the applicant's application. Considering that I have held that the 1st respondent acted ultra vires the *Universities Act* and the application would have succeeded were it not for the tardiness of the applicant and the consequences that would ensue as result of granting the reliefs on the basis of a belated application, parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND UPLOADED ON CTS ON 13 MARCH 2024

NGAAH JAIRUS

JUDGE

