REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 17 OF 2018

IN THE MATTER OF ARTICLES 2(1), 2(5), 3(1), 10, 19, 20, 22(1), 23(3) & 24 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDEMS UNDER ARTICLES 26, 27, 28, 35, 43 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

JOYCE CHEPKOECH TOO.....PETITIONER

VERSUS

EGERTON UNIVERSITY.....1ST RESPONDENT

AFRICAN INTERNATIONAL COLLEGE.....2ND RESPONDENT

JUDGMENT

[1] The Petition dated **12 November 2018** was filed herein by the petitioner, **Joyce Chepkoech Too**, for the following reliefs:

> **[a]** A declaration that her fundamental rights and freedoms as enshrined under **Articles 26, 27, 28, 35, 43 and 47** of the **Constitution of Kenya, 2010**, have been contravened and infringed upon by the respondents;
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> **[b]** A declaration that the petitioner is entitled to the payment of damages and compensation to be assessed by the Court for violation and contravention of her fundamental human rights by the respondents herein as provided for under **Articles 26, 27, 28, 35, 43 and 47** of the **Constitution of Kenya;**
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> **[c]** An order compelling the respondents to unconditionally release to the petitioner her official transcripts and original official Master of Business Administration degree certificates;
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> **[d]** Costs of the Petition;
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> **[e]** Any other relief that this Court may deem just to grant.

[2] In support of her Petition, the petitioner averred that the 1st respondent is a public university within the Republic of Kenya, while the 2nd respondent is a constituent college of the 1st respondent; and that she applied for admission to pursue a Master of Education degree in respect of which she was admitted by the 1st respondent in the year **2010**. She further averred that, upon paying the requisite tuition fees, she embarked on her course work; and that, as a requirement for completion of the Master's degree, she developed a proposal entitled "**The Influence of Selected Socio-Economic Factors on Parental Involvement in Public Pre-School Education in Turbo Division of Uasin Gishu County, Kenya."**

[3] It was further the contention of the petitioner that she diligently worked on her thesis under the guidance of her supervisors and submitted the same to the 1st respondent for purposes of examination; and that, thereafter, on **18 September 2013**, she was invited for an oral defence of the thesis. She added that she was thereafter given 90 days to make some amendments as had been suggested to her by her supervisors; and that whereas she was invited for another oral defence in the year **2014,** upon making the suggested amendments, this was never to be.

According to her, one of her supervisors was replaced, hence precipitating the postponement of the oral defence. She complained that, since **2015** when she re-submitted her thesis, the respondents have failed, ignored and/or neglected to offer any form of communication on the status of her post-graduate studies. It was her assertion that she nevertheless wrote and passed her examinations and was issued with a provisional transcript of the results.

[4] It was accordingly the case of the petitioner that she has to date been waiting for her formal graduation in vain. She added that she had a legitimate expectation that she would graduate and be furnished with her Master's degree and transcripts at the end of her course to enable her move on in life. She was therefore aggrieved that the respondents' actions and/or omissions have continued to violate and/or infringe on her fundamental rights and freedoms as enshrined in the **Constitution of Kenya**. She furnished particulars thereof at paragraph 16 of her Petition and prayed for the Court's intervention in her behalf by granting the orders prayed for.

[5] In response to the Petition, the 1st respondent relied on the affidavit of its Legal Officer, **Janet C. Bii**. It conceded that, in the year **2010**, the petitioner submitted an application to it expressing the desire to pursue a Master of Education in Educational Foundation; and that, upon admission, she was required to do both course work as well as a thesis paper. **Ms. Bii** averred that the petitioner undertook and completed her course work but did not successfully complete her thesis. According to **Ms. Bii**, the petitioner's research proposal was approved on **7 November 2012** by the Board of Postgraduate Studies, but with proposed corrections; and that this information was communicated to the petitioner in writing. A copy of the communication was annexed to **Ms. Bii's** affidavit as **Annexure "JB 1".**

[6] It was further the contention of the 1st respondent that whereas the petitioner re-submitted the corrected version of her research proposal, and thereafter compiled and submitted her thesis, she was not successful and had to be deferred twice. According to her, the second deferment meant an automatic discontinuation; and that this position was communicated vide a letter dated **3 September 2014** (marked **Annexure "JB 19")**. She set out the chronology of events leading to the petitioner's discontinuation and further averred that, on **27 September 2016**, when the petitioner visited the 2nd respondent and met with the director, she was again informed of the reasons for her discontinuation. **Ms. Bii** concluded her affidavit by asserting that it is disingenuous for the petitioner to now claim that she was not given an opportunity to make a second defence of her thesis; adding that the petitioner, having been lawfully discontinued as a student, has no recourse to the court in the circumstances.

[7] In response to the averments set out in the 1st respondent's affidavit, the petitioner filed a Supplementary Affidavit on **25 October 2019** reiterating her assertion that she was never accorded an oral examination on **28 May 2014** as alleged; and that on that day, she was simply informed that the oral defence could not take place because her supervisors had been changed. That she was then assigned **Dr. Joel Ng'eno** who guided her from **14 July 2014** to **22 September 2015**. She explained that, despite numerous visits to the offices of the Director of Postgraduate Studies and the Dean of Students, she received no response after the re-submission of her thesis; and that this is what precipitated her letters of **27 September 2016** and **12 September 2017**; which elicited no response from the 1st respondent. She annexed copies of those letters to her Supplementary Affidavit and asserted that at no point was she informed of the alleged discontinuation from the University.

[8] Upon directions being given on **26 June 2019** that the Petition be canvassed by way of written submissions, the petitioner filed her written submissions herein on **25 October 2019**, proposing the following issues for determination:

> **[a]** Whether the petitioner defended her thesis the second time; whether she was discontinued, and if so, whether the right procedure was followed;
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> **[b]** Whether the petitioner's constitutional rights were violated;
>
> **[c]** Whether the petitioner is entitled to the reliefs sought in the Petition;
>
> **[d]** Who should bear the costs of this Petition.

[9] In respect of the first issue, **Mr. Amanya,** learned counsel for the petitioner, submitted that the petitioner was never given the opportunity for a second defence; and therefore was never discontinued from the University as alleged by the 1st respondent. He adverted to some discrepancies in the documents relied on by the 1st respondent, by which the 1st respondent attempted to demonstrate that a second oral defence took place. He, consequently, urged the Court to agree with the petitioenr that no such oral defence ever took place **28 May 2014** as alleged. An example of the alleged discrepancies, according to counsel, is the variance in the petitioner's Registration Number as reflected in the Minutes of the alleged meeting of **28 May 2014** (**Annexure JB 17** to the Replying Affidavit), wherein the petitioner's Admission Number is reflected as **EM13/2999/11** instead of **EM17/0023/10**. He consequently submitted that if, indeed, there was any such discontinuation, then the same was wrongfully done by the respondents.

[10] With regard **Article 26** of the **Constitution**, counsel for the petitioner urged the Court to adopt an expansive interpretation that includes the right to a dignified livelihood. He therefore posited that the respondents' continued refusal to issue the petitioner with her Master's degree certificate has had the effect of curtailing her prospects of finding better employment so as to improve her standard of life. He relied on **Douglas Moturi Nyairo vs. University of Nairobi** [2018] eKLR for the holding that:

> **"Education forms part and parcel of the basic minimums that guarantee not only the dignity of man but also his inalienable right to life. This Court is alive to the fact that the reason why most people pursue education is so that they can attain a higher standard of living through the acquisition of better paying jobs, upon graduating, and this must have been the force that drove the petitioner to seek admission in the respondent's university for a post graduate course…"**

[11] For purposes of **Article 27** of the **Constitution**, counsel for the petitioner was of the posturing that, to the extent that the petitioner did not graduate along with her classmates, her right to equal treatment under **Article 27(4)** of the **Constitution** was violated. He urged the Court

so to find. Moreover, counsel submitted that, being a public university, the 1st respondent and its constituent college, the 2nd respondent, were under obligation to provide the petitioner with information as to their alleged decision to curtail her quest for further education; which the respondents did not do. It was therefore the submission of counsel that that failure amounted to an infringement of the petitioner's constitutional right to information as enshrined in **Article 35** of the **Constitution.**

[12] Counsel further submitted that the petitioner's right to fair administrative action pursuant to **Article 47** of the Constitution was, likewise, violated. He submitted that the respondents took a decision to discontinue the petitioner without affording her an opportunity to present her case before the alleged discontinuation. He pointed out that the alleged meeting with the petitioner on **27 September 2016** was inconsequential if, as averred by the 1st respondent, the discontinuation was effected on **18 May 2016**. In his view, it was pointless giving the petitioner a hearing 4 months after the decision to discontinue her had already been taken. He quoted **Baker vs. Canada (Minister of Citizenship & Immigration** 2 S.C.R 817 6 in which it was held that:

> **"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

[13] On whether the petitioner was given written reasons for her discontinuation, her counsel submitted that, despite writing several letters to the 1st respondent, the petitioner was never accorded any written explanation regarding the delay and/or refusal by the respondents to issue her with her Master's degree. He relied on **Onjira John Anyul vs. University of Nairobi** [2019] eKLR for the proposition that the right to fair administrative action is now entrenched in the Bill of Rights Section of the **Constitution**; and therefore must be strictly observed by state organs, public officers and other administrative bodies in the discharge of their duties.

[14] Accordingly, **Mr. Amanya** submitted that the petitioner has proved her case to the requisite standard; and is therefore entitled to the prayers sought. He added that **Article 23(3)** of the **Constitution** clothes the Court with the powers to grant the reliefs sought, together with costs of the Petition.

[15] On behalf of the 1st respondent, **Mr. Kisila** relied on the written submissions filed by him on **31 October 2019**. He was of the view that a petitioner who cites a violation of the Constitution must, by cogent evidence, relate the alleged breaches with real, concrete and direct loss and damage or injury arising out of the alleged violation. The case of **Andrew Laird White vs. Director of Criminal Investigations & 2 Others; Betty Tett & Another (Interested Parties)** [2019] eKLR was cited to underscore that argument. In his view, the petitioner's right to life and dignity under **Articles 26 and 28** of the **Constitution** have at all material times remained intact; and that in no way were such rights ever violated by the acts of the 1st respondent herein. He also took the stance that the petitioner had not presented any evidence of loss, damage or injury to demonstrate any loss of life or dignity arising from the alleged actions of the 1st respondent. He too, relied on **Douglas Moturi Nyairo vs. University of Nairobi** (supra) but for the holding that:

> **"The Petitioner did not however demonstrate, through tangible evidence, that he missed employment opportunities or that his standard of living and dignity was compromised/lowered following the Respondent's refusal to release his academic documents to him and on this score, I find that the claim that his right to life was violated was not proved."**

[16] In response to the assertion that the petitioner was discriminated against, counsel referred the Court to **Article 1** of the **UNESCO Convention against Discrimination in Education, 1960**, for the exact definition of discrimination for purposes of education. He added that the said Article defines discrimination in education to mean the exclusion of any person or group of persons from access to education of any type or at any level; or the act of limiting any person or group of persons to education of inferior standard, or of establishing or maintaining separate education systems or institutions for persons or groups of persons.

[17] Thus, in counsel's submission, it was not enough for the petitioner to allege differential treatment, without disclosing the personal characteristics that made her susceptible to the alleged discrimination. He urged the Court to note the petitioner's concession that those classmates of hers who graduated from the Master's degree programme had qualified for such graduation. He added that the petitioner's failure to graduate was as a direct consequence of her own failure when it came to defending her thesis, for which she was deferred twice.

[18] On the right to information and fair administrative action, counsel for the 1st respondent submitted that all the necessary steps were taken in respect of the petitioner; and that she was afforded two chances to defend her thesis but was unsuccessful on both occasions. In his view therefore, the 1st respondent was within its remit to discontinue the petitioner as it did. He drew the attention of the Court to what he referred to as the **Egerton University Act**, **Cap 214**, and in particular **Section 39(11)(i)** thereof, to which he attributed the quotation here below:

> **"In the event that the Board of Examiners requires that the candidate re-submit and defend the Thesis/Project, this shall be done ONCE only."**

[19] Mr. Kisila further submitted that it is not for the Court to examine the merits or demerits of the policy behind the aforementioned provision; and that, in so far as the 1st respondent did not act capriciously in discontinuing the petitioner from its Master's degree programme or in declining to issue her with a Master's degree certificate, no breach occurred. Accordingly, he urged the Court to dismiss this Petition with an order that the costs thereof be borne by the petitioner.

[20] I have carefully considered the Petition, the Supporting and Supplementary Affidavits, as well as the response made thereto by the 1st respondent. It is noteworthy that, although the Supporting Affidavit filed in support of the Petition makes reference to certain annexures, there are in fact no documents annexed to that particular affidavit. Thus, I have had to make reference to the documents annexed to the

Supporting Affidavit filed with the Notice of Motion dated **12 November 2019**, which affidavit is a word-for-word replication of the affidavit filed in support of the Petition.

[21] Thus, from a consideration of the entire body of evidence placed before the Court, there is no dispute that, in the year **2010**, the petitioner**, Joyce Chepkoech Too**, applied for admission to Egerton University, the 1st respondent herein, to pursue a Master's degree at its African International College, Eldoret Campus (the 2nd respondent herein). Her application was allowed and she was accordingly assigned **Admission No. EM17/00023/10**. The documents marked **Annexure "JCT-1"** to the Supporting all go to show that she paid the requisite tuition fees over the years between **2010** and **2013**. There is further no dispute that the petitioner successfully completed her course work; and that all she was left with before her graduation was the oral defence of her thesis. **Annexure "JCT-5"**, for instance, is a Provisional Transcript that confirms that the petitioner performed quite well in the course work component of the programme.

[22] Although counsel for the respondents made reference to the **Egerton University Act**, that piece of legislation was repealed by **Section 71** of the **Universities Act, No. 42 of 2012.** In place thereof, provision has been made in the Act for each university to formulate its own governance statutes and regulations. Accordingly, **Section 23** of the **Universities Act** states thus:

> **"(1) Subject to this Act and to the Charter a University Council may, and where required by this Act to do so shall, make such statutes and regulations as it considers appropriate to regulate the affairs of the university.**
>
> **(2) A university Council shall, as soon as practicable and in any event not later than three months after the making of a statute or regulation under this section, submit it to the Cabinet Secretary for publication in the *Gazette*.**

[23] Henceforth, the 1st respondent has been governed in accordance with its own Statutes, namely, the **Egerton University Statutes, 2013**, formulated pursuant to **Sections 23 and 34** of the **Universities Act**. And, in respect of Postgraduate Master's programmes, an elaborate procedure has been set out therein in **Statute 39** of the said Statutes. In connection with research papers or theses, **Statute 39(11)** of the **Egerton University Statutes** provides thus in part:

> **(a) At least three months before a Thesis/ Project is submitted, a candidate shall with the consent of the supervisor(s) give notice in writing to the Director, Board of Postgraduate Studies, indicating intention to submit Thesis/ Project. The notice must be accompanied by an Abstract of the Thesis/ Project.**
>
> **(b) The Thesis/ Project shall be loosely bound and submitted in quadruplicate and shall be accompanied by a signed declaration by the candidate confirming that the Thesis/ Project has not been previously submitted for a Degree in any other university and that the Thesis/ Project is the original work of the candidate.**
>
> **(c) The Thesis/ Project shall bear the signature(s) of the supervisor(s) indicating approval to submit.**

[24] There is unquestionable evidence herein that the petitioner duly complied with the aforementioned requirement and submitted her research proposal to the 1st respondent for approval; and that the 1st respondent replied, vide a letter dated **19 November 2012**, communicating its approval of the research proposal entitled: **The Influence of Selected Socio Economic Factors on Parental Involvement in Public Pre-school Education in Turbo Division in Uasin Gishu County, Kenya.** Copies of that letter were annexed to both the Supporting Affidavit **(Annexure "JCT-2")** and the Replying Affidavit **(Annexure JB 1).**

[25] The parties are further in agreement that the said approval was subject to certain corrections being made; which the petitioner worked on before re-submission. Again, both sides relied on the 1st respondent's letter dated **17 December 2012 (Annexure JB 3)**, by which it acknowledged receipt of the corrected proposal and by which the petitioner was given the go-ahead to commence her field work. The 1st respondent, likewise, appointed two supervisors, namely: **Dr. Thomas K. Ronoh** and **Dr. Emily Sitienei,** to oversee the petitioner's research undertaking, including the compilation of her thesis.

[26] The petitioner further presented documentary proof, in the form of the bundle of letters marked **Annexure "JCT-4"** to demonstrate that, following the approval by the 1st respondent of her research proposal, she sought and obtained the requisite authorization of the Ministry of Education, the Office of the President and the National Council for Science and Technology, to undertake her research in line with her proposal.

[27] That the petitioner compiled and submitted her thesis in accordance with **Statute 39(11)(a)-(c)** of the **Egerton University Statutes** is also manifest in the 1st respondent's letter dated **22 March 2013**, by which the 1st respondent acknowledged and intimated to the petitioner that:

> **[a]** it had received 7 loosely bound copies of the petitioner's thesis;
>
> **[b]** the thesis copies had been forwarded to the examiners for assessment; and that once the Board received communication she would be called upon for an oral examination of the thesis; and that,
>
> **[c]** the verdict on whether she was successful or not would be conveyed to her during the oral examination.

[28] The 1st respondent also presented evidence, which is not in dispute, that it proceeded to constitute a Board of Examiners to consider the petitioner's thesis, vide letters dated **22 March 2013**. Copies of the 1st respondent's letters to the board members were annexed to the 1st respondent's Replying Affidavit and all marked **Annexure JB 6** thereto. Consequently, the petitioner was invited, vide a letter dated **28**

August 2013, to avail herself for the oral defence of her thesis on **18 September 2013**. In this regard, the 1st respondent relied on the documents marked **Annexures JB 7, JB 8, JB 9a and JB 9b** to buttress its assertions that the laid down procedure was followed, and that the petitioner was given an opportunity to defend her thesis on **18 September 2013**. Indeed, the petitioner conceded as much, at paragraph 10 of her Supporting Affidavit, wherein she averred as follows:

> **"THAT on the 18th September, 2013, I was invited for an oral defence of the thesis and after zealously presenting defending my thesis, I was given 90 days to make some amendments as had been suggested to me by my supervisor."**

[29] The outcome of the oral examination is confirmed by the Minutes annexed to the 1st respondent's Replying Affidavit, marked **Annexure JB 10;** namely, that the candidate was deferred and given a timeline of three months to redo her work. According to her, she worked on the corrections as advised and re-submitted her thesis to the 1st respondent for consideration but was never advised of the outcome, neither was she given an opportunity to make an oral defence as anticipated. While conceding that the petitioner made a re-submission in **December 2013** which was duly acknowledged vide a letter dated **17 December 2013 (Annexure JB 11b),** the 1st respondent took a divergent position from that of the petitioner, who denied that an oral defence of her re-submitted thesis ever took place. Thus, according to the 1st respondent, an oral examination did take place as scheduled. It exhibited a copy of the Notice of Intention to Submit a Master's Degree Thesis for Examination received from the petitioner. It was marked **Annexure JB 11** to the Replying Affidavit. The 1st respondent also exhibited the documents marked **Annexure JB 12** to **JB 18** to prove that the petitioner was accorded a second opportunity to defend her thesis and that upon being deferred a second time, was discontinued in accordance with **Statute 39(11)(i)** of the **Egerton University Statutes.**

[30] It is in the light of the foregoing that learned counsel for the parties settled on the following issues, which I hereby adopt, for determination:

> **[a]** Whether the petitioner defended her thesis the second time; whether she was discontinued and if so, whether the right procedure was followed;
>
> **[b]** Whether the petitioner's constitutional rights were violated;
>
> **[c]** Whether the petitioner is entitled to the reliefs sought in the Petition;
>
> **[d]** Who should bear the costs of this Petition.

[a] On whether the petitioner defended her thesis a second time; whether she was discontinued and whether the applicable procedure was followed:

[31] Statute 39(11) of the **Egerton University Statutes** is explicit as to the applicable procedure for the submission and examination of research papers. It provides, at **Sub-statutes (d) and (e)** thus:

> **(d) Upon receipt of the Thesis/ Project, the Board of Postgraduate Studies shall forward the same to the Examiners within two weeks.**
>
> **(e) The Senate, on the recommendation of the Board of Postgraduate Studies, shall appoint in respect of each candidate presenting a Thesis/ Project a Board of Examiners consisting of:**
>
> **(i) In the case of Project: The Dean of Faculty – Chairperson; The Chairperson of the Department; One Internal Examiner who supervised the candidate; One Independent Internal Examiner; a Senate representative; a Faculty representative to the Board of Postgraduate Studies.**
>
> **(ii) In the case of the Thesis: The Dean of Faculty – Chairperson; The Chairperson of the Department; Two Internal Examiners who supervised the candidate; One Independent Internal Examiner who is competent in the candidate's area of study; One External Examiner; a Senate representative; and the Faculty representative to the Board of Postgraduate Studies.**

[32] As to the role of the Board of Examiners, **Sub-statutes (f) and (g)** of the **Egerton University Statutes** provide thus:

> **(f) The External and Internal Examiners shall be required to submit within two months an independent written assessments of the Thesis/ Project to the Director, Board of Postgraduate Studies, indicating:**
>
> > **(i) Whether or not the Thesis/ Project is adequate in form and content;**
> >
> > **(ii) Whether or not the Thesis/ Project reflects an adequate understanding of the subject, and, in consequence; (iii)Whether or not the Degree should be awarded.**
>
> **(g) The Thesis/ Project shall be graded as Pass or Fail.**

[33] Thus, upon the members of the Board of Examiners giving their independent written assessments of the thesis, **Statute 39(11)** required further action of them as hereunder:

(h) The Director, Board of Postgraduate Studies, shall notify the Dean of the relevant Faculty to set a date for the oral examination/defense which shall be fourteen (14) days from the day of the notice. On this date, The Faculty Board of Examiners shall consider the reports and other academic matters arising from the Thesis/ Project and subject the candidate to an oral examination to enable it arrive at a satisfactory recommendation on the merit of the Thesis/ Project.

(i) The passing of the candidate shall be based on consensus, or failing to arrive at a consensus, on the decision of the majority of the Board of Examiners.

(j) In the event that the Board of Examiners requires that the candidate re-submit and defend the Thesis/ Project, this shall be done once only.

(k) If the Board of Examiners will judge the candidate to have failed in both the quality of the Thesis/ Project and the defense, the decision of the Board of Examiners shall be final.

(l) The decision of the Board of Examiners shall be communicated verbally to the candidate immediately following the defense and in writing by the Director, Board of Postgraduate Studies, within two weeks of the defense.

(m) Where correction to the Thesis/ Project are required, a signed certificate of corrections shall be issued by the supervisor(s) before the Thesis/ Project is submitted to the Director, Board of Postgraduate Studies.

(n) The Director, Board of Postgraduate Studies, shall submit the results to the Dean of Faculty who shall present the same to the Faculty Board of Examiners to ratify and recommend to the Senate.

[34] Although the petitioner denied that she was given an opportunity to make a second defence, the 1st respondent has availed documents before the Court which make a clear demonstration of the fact that a Board of Examiners was duly appointed to reconsider the petitioner's theses, as amended; and that communication was made to the petitioner, inviting her to appear before the Board of Examiners on **28 May 2014** to orally defend her thesis. The letter was annexed to the Replying Affidavit and marked **Annexure JB 15**. Moreover, the Minutes of the meeting of the Board of Examiners were, likewise, produced and marked **Annexure JB 17** to the Replying Affidavit. They confirm that the petitioner was in attendance before the Board; and that, upon being heard in defence of her thesis, a decision was made as hereunder vide **MIN. 3/MD/2014:**

"The candidate was deferred. She was advised to work closely with supervisors. She was given 30 - 90 days to make corrections…"

[35] A formal recommendation to that effect was, consequently, made to the Senate and was duly approved by **Prof. J.K. Tuitoek** on **11 September 2014** on behalf of the Senate. A copy thereof was annexed to the 1st respondent's Replying Affidavit and marked **Annexure JB 18**. The tenor and effect of the aforementioned Minute and its formal expression per **Annexure JB 18** was to give the petitioner the legitimate expectation that she would be given another opportunity to make a defence of her thesis after 90 days.

[36] On legitimate expectation, the Supreme Court of Kenya took the following view in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others** [2014] eKLR:

[263] "Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, In re Westminster City Council, [1986] A.C. 668 at 692 (Lord Bridge):

> **"…the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".**

[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has *locus standi* to make a claim on the basis of legitimate expectation.

[37] Upon reviewing both local and comparative jurisprudence on the point, the Supreme Court concluded thus at paragraph [269] of its Judgment**:**

"The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

[38] In the instant case, an express and unambiguous promise was given by the representatives of the 1st respondent to the petitioner that she would have another opportunity to defend her thesis after 90 days. The expectation is not unreasonable and is one which the 1st respondent and its decision-making organs were competent to make. Since, the decision of the Board of Examination affording the petitioner another opportunity to defend her thesis is neither in contravention of the law or the Constitution, it is plain that the petitioner's expectation meets the aforestated criteria of legitimacy.

[39] It is not lost on the Court that the 1st respondent's Statutes provide that a deferral can only be made once; or that the 1st respondent relied on the document marked **Annexure JB 19** to the Replying Affidavit to support its contention that the decision of **28 May 2013** was equivalent to a discontinuation. It is noteworthy, however, that the issue of the petitioner's discontinuation was not made promptly on the date of oral defence. In fact, available evidence shows that the issue never arose until over one year later on **3 September 2014** when it was raised vide the document marked **Annexure JB-19** to the Replying Affidavit. And even then, it appears not to have prevented the Senate from approving the petitioner's deferment on **11 September 2014** as aforementioned.

[40] Additionally, it is evident from the 1st respondent's own documentary exhibits that even by **8 March 2016**, there was still an impasse in connection with the petitioner's status due to a mix-up in her records. This is apparent in the letter dated **8 March 2016 (Annexure JB 20)** to the Replying Affidavit; a letter by **Prof. Okiror**, to the Dean Faculty of Education on behalf of the Board of Postgraduate Studies to the effect that:

> **"…I have studied this students file critically and particularly your letter to R(AA) (Ref: EU/AA/R/36) of 6th November, 2015 and fail to see the mix up of thesis and proposal submission leading to no second deferral at thesis defence.**
>
> **Please submit supportive documents for the board to support or reject your disclaimer!..."**

[41] That being the position, the recommendation for the petitioner's discontinuation, made at the 247th Meeting of the Board of Postgraduate Studies on **18 May 2016** was clearly unwarranted. At any rate, there is no indication that the recommendation was presented to the Senate for approval as required by **Section 39(11)(n)** of the **Egerton University Statutes.** Clearly then, the posturing that the petitioner was discontinued is not supported by the evidence presented herein by the respondents.

[b] On Whether the Petitioner's Constitutional Rights were violated:

[42] The petitioner moved the Court for redress alleging the following violations of her constitutional rights:

> **[a]** The right to life pursuant to **Article 26** of the **Constitution**.
>
> **[b]** The right to equality and freedom from discrimination under **Article 27** of the **Constitution;**
>
> **[c]** Right to human dignity under **Article 28** of the **Constitution.**
>
> **[d]** Right to information and fair administrative action under **Articles 35 and 47** of the **Constitution.**

[43] In respect of the right to life, **Article 26** of the **Constitution** provides that:

> **(1) Every person has a right to life.**
>
> **(2) The life of a person begins at conception**
>
> **(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.**
>
> **(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.**

[44] On the face of it, therefore, **Article 26** has no direct relevance to the petitioner's situation. She however contended that the respondent's continued withholding of her Master's degree certificate and/or delay in her graduation has adversely curtailed her ability to secure better employment opportunities so as to enable her improve her standard of living. It is in this connection that her counsel, **Mr. Amanya,** urged the Court to adopt an expansive interpretation of **Article 26** that includes the right to a dignified livelihood. Counsel relied on **Peter K. Waweru vs. Republic** [2006] 1 KLR 677 in which the meaning of the right to life under **Section 71** of the retired **Constitution** was expressed thus:

> **"We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not sustainable and ought to be halted. In Environmental law, life must have this expanded meaning."**

[45] It is noteworthy however, that the above authority was decided before the promulgation of the **2010 Constitution**. Now we have **Article 28** that separately provides for the protection of human dignity; and **Article 43** that enshrines economic and social rights, including the right to education. **Article 43** in particular safeguards the right to clean and safe water, which was the central issue in the case of **Peter K. Waweru** (supra). Needless to say that in that case, the discharge of raw sewage into the only water source in **Kiserian area** of what is now

Kajiado County was held to have the effect of threatening not only the very lives of the residents, but also the lives of those living downstream. Thus, the Court held that:

> **"Whereas the literal meaning of life under s 71 means absence of physical elimination, the dictionary covers the activity of living. That activity takes place in some environment and therefore the denial of wholesome environment is a deprivation of life. Although the point does not call for authoritative determination in this case, it has arisen to the extent that the court has found it necessary to compare the affected lives downstream Kiserian River with the economic activities of the Kiserian Town developers in polluting their environment and therefore denying them of life…We have added the dictionary meaning of life which gives life a wider meaning including its attachment to the environment."**

[46] I have similarly looked at **Douglas Moturi Nyairo vs. University of Nairobi** (supra), and would agree with it in so far as it was not confined to **Article 26**, but embraced a bird's eye-view of the related constitutional safeguards, such as the right to dignity in **Article 28** as well as the economic and socio economic rights provided for in **Article 43** of the Constitution. It is instructive too that, the Court in that case was not convinced that the petitioner had demonstrated a violation of his right to life, even in its expanded sense. Accordingly, the Court held that:

> **"The petitioner did not however demonstrate, through tangible evidence that he missed employment opportunities or that his standard of living and dignity was compromised/lowered following the respondent's refusal to release his academic documents to him and on this score, I find the claim that his right to life was violated was not proved."**

[47] Hence, in my considered view, it would be unnecessary, in the particular circumstances of this case, to stretch the plain meaning of **"life"** for purposes of **Article 26** to include the right of the petitioner to further her education for the purposes of bettering her standard of living. This is because the petitioner's concerns, such as her right to higher education and to an improved quality of life, are well provided for in **Article 43** of the **Constitution**. Of greater significance however is the fact that the petitioner utterly failed to avail evidence in proof of her contention that she has been adversely affected by the respondent's decisions and actions. No indication at all was given that she has applied for and missed opportunities for advancement in her career. I therefore find that aspect of the petition, including allegations of violations of her **Article 43** rights, untenable.

[48] As to whether the petitioner was discriminated against, reliance was placed on **Article 27** of the **Constitution**. She alleged that her right to equal treatment under the law as envisaged under **Article 27(4)** of the Constitution was violated by the respondent who failed, refused and/or ignored to cause her to graduate and/or issue her with her Master's degree certificate, yet it issued degree certificates to other qualified graduates. **Sub-Article (4)** of **Article 27** of the Constitution provides that:

> **"The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."**

[49] It is manifest, from the case presented by the petitioner that she did not allege any of the 17 grounds listed in **Sub-Article (4)** quoted above. She simply complained that, to the extent that she did not graduate alongside her classmates, she was discriminated against. That however is a simplistic approach to the matter because, even in her own petition, she acknowledged that all those classmates of hers who graduated **"qualified"** for the award of their respective degrees. She, likewise, conceded that, whereas she did well in her course work, she was unable to go past the stage of defending her thesis; which was a critical component of her examinations. Clearly therefore, she did not "qualify" for the award of a Master's degree in Education (Educational Foundations).

[50] It is noteworthy that discrimination, according to **Black's Law Dictionary**, is defined to mean:

> **"Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."**

[51] In the circumstances hereof, it cannot be said that there was no reasonable distinction between the appellant and her classmates who graduated. For the specific purposes of education, **Article 1** of the **Convention against Discrimination in Education, 1960 by UNESCO states that:**

> **(1) For the purposes of this Convention, the term discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:**
>
> **(a) Of depriving any person or group of persons of access to education of any type or at any level;**
>
> **(b) Of limiting any person or group of persons to education of an inferior standard;**
>
> **(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or**
>
> **(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.**
>
> **2. For the purposes of this Convention, the term `education' refers to all types and levels of education, and includes access to**

education, the standard and quality of education, and the conditions under which it is given.

[52] Article 2 on the other hand provides that:

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:

> **(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;**
>
> **(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level ;**
>
> **(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.**

[53] Thus, in **Jacqueline Okeyo Manani & 5 others vs. Attorney General & another** [2018] eKLR it was held that:

> **"...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups…The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."**

[54] Thus, rather than compare her situation to the situation of her classmates who qualified, it would have made more sense for the petitioner to demonstrate that there were some among her classmates who were deferred twice and who were nevertheless approved for the conferment of the degree of Masters of Education (Educational Foundations), and who have since graduated. No such evidence having been availed before the Court, it is my finding that the petitioner's allegation, that she was discriminated against by the respondents, is without basis.

[55] The same observations would apply in respect of the allegation that the petitioner's right to have her dignity respected under **Article 28** of the **Constitution** was violated. That Article provides that:

> **"Every person has inherent dignity and the right to have that dignity respected and protected."**

[56] Human dignity connotes self-worth and respect. Hence, according to **Black's Law Dictionary, Tenth Edition**, dignity is defined as:

> **"The quality, state, or condition of being noble; the quality, state or condition of being dignified."**

[57] It is therefore apt, that in **J W I vs. Standard Group Limited & Another** [2013] eKLR **Hon. Lenaola, J.** (as he then was) took the view that:

> **"27…the right to human dignity has been recognised as the basis of fundamental rights and the Universal Declaration of Human Rights in its Preamble states that;**
>
> > ***"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."***
>
> **28. In the context of the issue under consideration, human dignity need not be pleaded as a right for it to be enforced because it is inherent and together with the right to life, they form the basis for all other rights to be enjoyed by a human being qua human being. I need not say more…"**

[58] And, in the South African case of **S vs. Makwanyane & Another (CCT3/94) [1995] ZACC 3,** the importance of dignity was underscored thus:

> ***"The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of***

respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Constitution".

[59] In what sense, then, was the petitioner disrespected by the respondents? At paragraph 16C of the Petition, she averred that she mainly chose to pursue the Master's degree programme to enable her attain a higher standard of living through the acquisition of better paying jobs, upon graduating; and that the respondents' actions and/or inactions have grossly violated her right to dignity as **"…she has missed very many jobs hence her standards of living have not improved as expected of a person of her status and education levels..."** However, a careful perusal of the Supporting Affidavit reveals that, at no point did the petitioner disclose what she was doing before her admission at the 1st respondent's university for the Master's degree programme, or what her standard of living was at the time. And, as has been pointed out hereinabove, no evidence was adduced to demonstrate, either that the petitioner missed better paying job opportunities on account of the actions or inactions of the respondents or that, comparatively, her standard of living had not improved since **2010**. And when one considers that she was yet to successfully complete her course, it becomes even more indistinct in what sense her right to dignity or self-worth was violated.

[60] Consequently, I am in agreement with the view expressed by **Hon. Okwany**, **J.** in **Andrew Laird White vs. Director of Criminal Investigations & 2 Others; Betty Tett & Another (Interested Parties)** [2019] eKLR that:

> **"36…Courts have held the view that it is not enough to merely cite a violation of the constitution and maintained that there must be concrete evidence relating to the alleged breaches and real concrete and direct loss damage or injury arising out of the violation. (see Josephat Koli Nanok & Another –vs Ethics & Anti- Corruption Commission [2018] eKLR).**
>
> **37. In the instant case, …I find that not only has the petitioner not furnished this court with concrete evidence pointing towards the violation of his rights but that he has also not provided cogent evidence of the loss/injury that has arisen out of the alleged violation.**

[61] Consequently, I am far from satisfied that, in the circumstances presented herein, the petitioner's inherent dignity and the right to have that dignity respected and protected as entrenched in **Article 28** of the Constitution, was infringed by the respondents.

[d] Right to information and fair administrative action under Articles 35 and 47 of the Constitution.

[62] The petitioner contended that despite completing her course work, passing her examinations and completing her thesis, the respondents have failed to cause her to graduate and/or issue her with her official Master's degree. She further complained that, several written reminders by her, seeking to know the reason for the delay in her graduation, went unanswered by the respondents. Thus, it was the submission of her counsel that, being a public university, the 1st respondent and its constituent college, the 2nd respondent, were under obligation to provide the appellant with information; including information as to their alleged decision to discontinue her quest for further education; which obligation the respondents failed to discharge.

[63] Additionally, it was the submission of **Mr. Amanya** that the petitioner's right to fair administrative action pursuant to **Article 47** of the Constitution was, likewise, violated, in that the respondents discontinued the petitioner without affording her an opportunity to present her case before the decision to discontinue her was taken.

[64] As noted hereinabove, credible evidence was placed before the Court to prove that the petitioner was invited to make a defence of her thesis a second time; and that the opportunity was given by the 1st respondent on **28 May 2014** before a Board of Examiners, comprising of the following persons, according to the Minutes, marked **Annexure JB-17** to the 1st respondent's Replying Affidavit:

[a] Prof. J. Changeiywo - Chair

[b] Prof. M. Kariuki - COD, Psychology

[c] Dr. T.K. Ronoh - Internal Examiner/Supervisor

[d] Dr. E. Sitienei - Internal Examiner/Supervisor

[e] Dr. J. Ngeno - Faculty Representative

[f] Mr. Kaptingei - Dean, AICO

[g] Dr. E. K. Maranga - Senate Representative

[65] I note that **Annexure JB 17** was impugned on the ground that it contained an error in so far as the petitioner's Admission Number was reflected therein as **EM13/2999/11** instead of **EM17/0023/10**. On this account, **Mr. Amanya** urged the Court to find that no such opportunity to defend was accorded the petitioner, and therefore that no such oral defence ever took place **28 May 2014** as alleged. He implied that if there was an oral defence then it may have involved a different student. I however have no hesitation in dismissing this argument because **Annexure JB 17** bears not only the correct name of the petitioner, but also her acknowledged **Admission No. EM17/0023/10**. Secondly, it is manifest from the receipts relied on by the petitioner herself, notably the receipts marked **Annexure "JCT-1"** that the same mistake was made therein. For instance, in the receipt dated **17 August 2011**, the petitioner's Admission No. was reflected as **EM16/AICO/00023/100**; yet there was no controversy that it was issued in respect of the petitioner. Indeed, the petitioner relied on those receipts to prove that she paid tuition fees, notwithstanding the discrepancy. Consequently, not much turns on those errors, which appear to

be entirely typographical in nature and have little to do with the fact that the 1st defendant had the petitioner in mind, at all material times.

[66] Pursuant to **Statute 39(11)(l)** of the **Egerton University Statutes,** which provides that the decision of the Board of Examiners **"…shall be communicated verbally to the candidate immediately following the defence…",** it is presumed that the decision to defer the petitioner was intimated to her after the meeting of **28 May 2014**. I say so because, in its letter to the petitioner dated **17 December 2013 (Annexure JB 11b),** the 1st respondent made it clear to her that the verdict on whether she was successful in her second defence or not would be conveyed to her during the oral examination. But that notwithstanding, it was also a requirement of the aforementioned provision of the **Egerton University Statutes** that the verbal communication be backed up in writing within two weeks of the defence.

[67] There is no evidence herein that such communication, or any other communication for that matter, was made to the petitioner, giving her the result of her defence; be it deferment or discontinuation. This was notwithstanding the fact that the petitioner wrote several letters to the respondents seeking to know her status. The petitioner exhibited copies of her letters dated **27 September 2016** and **12 September 2017** as annexures to her Supplementary Affidavit to demonstrate that indeed she asked for information and the same was never supplied to her.

[68] It is noteworthy that, among the documents exhibited by the respondents is a handwritten version of the petitioner's letter dated **27 September 2016.** It is marked **Annexure JB 24** to the 1st respondent's Replying Affidavit. That was the last document exhibited by the 1st respondent; a confirmation that it neither notified the petitioner in writing of the outcome of her defence, nor responded to her enquiries about her fate as a student. Clearly therefore, the respondents thereby violated the petitioner's constitutional right to information for purposes of **Article 35(1)** of the **Constitution**; which Article is explicit that:

> **"Every citizen has the right of access to—**
>
> **(a) information held by the State; and**
>
> **(b) information held by another person and required for the exercise or protection of any right or fundamental freedom."**

[69] The 1st respondent is a public institution of higher learning; and is funded by the citizens' taxes. It is therefore a manifestation of the State. It is also a person for purposes of **Article 35(b);** and the information it withheld from the petitioner was necessary for her to exercise her right to education as enshrined in **Article 43(1)(f)** of the Constitution.

[70] Last, but certainly not least, is the pertinent question as to whether the petitioner's right to fair administrative action pursuant to **Article 47** of the **Constitution** was violated by the respondents in relation to the decision to discontinue her from the Masters programme that she had set out to pursue. On his part, counsel for the 1st respondent submitted that all the necessary steps were taken in respect of the petitioner; and that she was afforded two chances to defend her thesis but was unsuccessful on both occasions. In his view therefore, the 1st respondent was within its remit to discontinue the petitioner as it did pursuant **Statute 39(11)(i) of the Egerton University Statutes.**

[71] I have given due consideration to these rival submissions within the backdrop of **Article 47** of the C**onstitution**. That Article states thus:

> **"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;**
>
> **(2) If a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action;**
>
> **(3) Parliament shall enact legislation to give effect to the right in Clause (1) …**

[72] There is no gainsaying that by dint of **Article 47**, the right to fair administrative action has been elevated from being a common law doctrine to a constitutional tenet. Thus, in **Judicial Service Commission vs. Mbalu Mutava** [2015] eKLR, the Court of Appeal held that:

> **"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed."**

[73] Accordingly, upon taking the decision to defer the petition a second time, the respondents were under obligation to give the petitioner reasons for that decision in writing within two weeks of **28 May 2014**. Indeed, the right to be given the reasons is not just a requirement of **Section 39(11)(l)** of the 1st respondent's Statutes but is a constitutional imperative embedded in **Article 47** aforestated. No such communication was made to the petitioner in the timeous manner demanded by both the 1st respondent's Statutes and the Constitution, or at all. And, as has been pointed out herein above, there is ample proof that the petitioner's inquiries were met with total silence on the part of the respondents. She was therefore unable to take the necessary steps to prepare for a re-submission of her thesis within the 30-90 days' window that she had been given by the Board of Examiners on **28 May 2014.**

[74] Also reprehensible is the 1st respondent's decision to unilaterally convert the deferral into a discontinuation without any notice

whatsoever to the petitioner. Reprehensible because, by the time the Board of Examiners took the decision to defer the petitioner, it was fully cognizant of the provisions of **Statute 39(11)** of the 1st respondent's Statutes. The Board of Examiners was similarly aware, or ought to have known, that the petitioner had been deferred once before. Hence, a decision for the rejection of her thesis, and hence her discontinuation, did not have to be postponed. She ought to have been told right away and a letter to that effect dispatched within two weeks of **28 May 2014** to communicate the decision. Indeed, **Section 39(11)(k)** of the 1st respondent's Statutes is explicit that:

> **"If the Board of Examiners will judge the candidate to have failed in both the quality of the Thesis/ Project and the defense, the decision of the Board of Examiners shall be final."**

[75] The Board, having consciously taken a decision, not to declare that the petitioner had failed in her thesis, but to give the petitioner another opportunity to work closely with her supervisors and make the necessary corrections to her thesis within 30-90 days from **28 May 2014**, it was neither open to it, nor was it procedurally fair, for that decision to be converted into a discontinuation at a board meeting held two years later, as the 1st respondent purported to do, without giving the petitioner a hearing.

[76] More importantly, a perusal of the documents annexed to the 1st respondent's Replying Affidavit, marked **Annexures JB 19** to **JB 23** reveals a disturbing level of confusion and prevarication amongst the relevant decision-making bodies within the 1st respondent that were handling the petitioner's case. Thus, it was not until **18 May 2016** that the Board of Postgraduate Studies sat and made a recommendation for the discontinuation of the petitioner. The question to pose in the circumstances, and which was not answered herein by the respondents is, why it took so long for this decision to be taken, and why was the petitioner excluded from the entire process? Also noteworthy is the fact that, even then, a final decision sanctioning the petitioner's discontinuation, on the basis of the recommendation aforementioned is yet to be made.

[77] In **Baker vs. Canada (Minister of Citizenship & Immigration** 2 S.C.R 817 6 it was held that:

> **"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

[78] Likewise, in **Nyongesa & 4 Others vs. Egerton University College** [1990] eKLR, the Court of Appeal held thus (per **Nyarangi, JA):**

> **"…courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for anyone to question or criticise the particular posture of courts. It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character…"**

[79] I am therefore satisfied that the petitioner has proved to the requisite standard that her constitutional right to fair administrative action under **Article 47** of the **Constitution** was grossly violated by the respondents; and that she is therefore entitled to redress in that regard.

[d] On whether the petitioner is entitled to the reliefs sought:

[80] Article 23(1) of the Constitution gives this Court the jurisdiction, in accordance with **Article 165,** to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Accordingly, **Sub-Article (3)** is explicit that:

> **In any proceedings brought under Article 22, a court may grant appropriate relief, including—**
>
> **(a) a declaration of rights;**
>
> **(b) an injunction;**
>
> **(c) a conservatory order;**
>
> **(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
>
> **(e) an order for compensation; and**
>
> **(f) an order of judicial review.**

[81] It is now settled that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence, **Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties)** [2019] eKLR **Hon. Chacha, J.** held that an appropriate relief should be an effective remedy for purposes of enforcing the Constitution, human rights and the rule of law. He relied on **Fose vs. Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851** wherein it was held that:

> **"[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."**

[82] Similarly, in **Hoffmann vs. South African Airways (CCT17/00) [2000] ZACC 17,** it was held that:

> **"[45] The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, ''we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source''.**

[83] Hence, although the petitioner prayed for a declaration that her fundamental rights and freedoms as enshrined under **Articles 26, 27, 28, 35, 43 and 47** of the **Constitution of Kenya, 2010**, have been contravened and infringed upon by the respondents, from the totality of the evidence presented herein, she was unable to prove violations of **Articles 26, 27, 28 or 43** of the **Constitution**. Nevertheless, and for the reasons adverted to hereinabove, she has proved violations of her right to information and to fair administrative action under **Articles 35 and 47** of the **Constitution** and is therefore entitled to declaratory orders in that respect.

[84] The petitioner also prayed for damages to be assessed by the Court for violation and contravention of her fundamental human rights by the respondents herein as provided for under **Articles 26, 27, 28, 35, 43 and 47** of the **Constitution of Kenya.** In this respect, it is to be appreciated that from a constitutional standpoint, an award of damages is not intended to serve a punitive end; but for vindication of a right. Thus, in **Dendy vs. University of Witwatersrand, Johannesburg & Others** [2006] 1 LRC 291, the Constitutional Court of South Africa held that:

> **"…an award of damages was a secondary remedy to be made in only the most appropriate cases…The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringed and to deter their future infringement. The test was not what would alleviate the hurt which the plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."**

[85] As observed by counsel for the respondents, no attempt was made by the petitioner to address this aspect of her claim or to demonstrate the basis for her claim to damages, granted the unique circumstances of her case and the fact that she was yet to qualify. In the premise, I find no basis for awarding her damages.

[86] The petitioner also prayed for an order compelling the respondent to unconditionally release to the petitioner her official transcripts and original official Master of Business Administration degree certificates. I have no hesitation in holding that this prayer is also untenable. Untenable because there is a policy consideration behind the promulgation of the **Egerton University Statutes, 2013**; and therefore the 1st respondent is best placed to determine whether or not the petitioner qualifies for the award of the subject degree. To that end, it is not only undesirable but also unwarranted for the Court to issue an order compelling the petitioner to be awarded with a Master's degree in Education as proposed. I therefore agree with the position taken by **Nyamu, J**. in **Republic vs. The Council of Legal Education, Ex-Parte James Njuguna & 14 Others** [2007] eKLR that:

> **"In discharging the mandate and policy as per the Act and the supporting Regulations it must be appreciated that Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education…"**

[87] A similar position was taken in **Maharashtra State Board vs. Kurmarsheth & Others** [1985] CLR 1083 thus:

> **"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."**

[88] To the extent, therefore, that the petitioner is yet to qualify for the award of Master of Education (Educational Foundations), I would be remiss if I were to compel the 1st respondent to issue her with such a degree. Nevertheless, having found that the petitioner's right to fair administrative action under **Article 47** of the **Constitution** was violated by the respondents, it is within the powers of the Court to compel the 1st respondent to accept a corrected thesis from the petitioner and to resume the examination process in the manner envisaged by **Statute 39(11)** of its Statutes, granted that it had given the petitioner the legitimate expectation that it would afford her another opportunity to make a defence of her thesis.

[89] In the result, the orders that commend themselves to me, and which I hereby grant, are as hereunder:

> **[a]** A declaration be and is hereby issued that the petitioner's fundamental rights and freedoms as enshrined under **Articles 35 and 47** of the **Constitution of Kenya, 2010**, have been contravened and infringed upon by the respondents.
>
> **[b]** An order be and is hereby issued to the 1st respondent compelling it to provide the petitioner with an opportunity to re-submit and defend her thesis in the manner envisaged by **Statute 39(11)** of the **Egerton University Statutes**, **2013**, within 90 days from the date hereof.
>
> **[c]** That Costs of the Petition shall be borne by the respondents.

It is so ordered.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 13TH DAY OF APRIL 2021

OLGA SEWE

JUDGE