REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 29 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE UNIVERSITIES ACT 42 OF 2012 AND UNIVERSITY OF NAIROBI CHARTER 2013

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

VICE CHANCELLOR OF THE UNIVERSITY OF NAIROBI....1ST RESPONDENT

UNIVERSITY OF NAIROBI.....2ND RESPONDENT

EX PARTE: MEYO VICTOR MANDELA

JUDGMENT

The Application

1. The application before this Court for determination is the Notice of Motion dated 8th February 2019 by Meyo Victor Mandela, who is the *ex parte* Applicant herein (hereinafter "the Applicant"). The said Applicant states that at the time of filing the application, he was a Fourth Year student undertaking a Bachelor's degree in Electrical and Electronics Engineering at the University of Nairobi, which he has sued as the 2nd Respondent herein. The Applicant is aggrieved by the action of the 2nd Respondent to suspend him from his studies, through a letter dated 11th December 2018 by its Vice Chancellor (the 1st Respondent herein).

2. The Applicant therefore seeks the following orders in his application:

> **a. An order of certiorari directed towards the 1st and 2nd Respondents jointly and severally, quashing the decision suspending the Applicant vide the letter dated 11th December 2018.**
>
> **b. An order of Mandamus directed towards the 1st and 2nd Respondents jointly and severally, compelling them to reinstate**

unconditionally the Applicant back to the 2nd Respondent Institution to proceed with his studies, until completion of the course programme he is undertaking.

c. An order of Mandamus directed towards the 1st and 2nd Respondents jointly and severally, compelling them to allow the Applicant unconditionally, the opportunity to sit for FEE 402: Electronic B examination.

d. An order of Prohibition directed towards the 1st and 2nd Respondents jointly and severally, prohibiting them jointly and severally from the subjecting the Applicant through prejudicial disciplinary hearing.

e. Costs of the application be borne by the Respondents.

3. The application was supported by a statutory statement dated 4th February 2019, and a verifying affidavit sworn by the Applicant on the same date. The Applicant's case, as summarized from the pleadings he filed, is as follows.

4. On 26th October 2018, while the Applicant was undertaking the FEE 402: Electronic B examination, he was directed by the examination supervisor, one Dr. Abraham Nyete to sit at a specific place. That upon commencement of the examination, the said supervisor confiscated his examination and answer booklet after thirty (30) minutes, while the examination which was scheduled to last for two (2) hours. Further, that without being granted an opportunity to be heard, the 2nd Respondent through the 1st Respondent issued him with a letter dated 11th December 2018 suspending him with immediate effect.

5. The Applicant faulted the suspension on the ground that it was done arbitrarily, without according him the opportunity to be heard, was based on a non-existent offence and provision namely Part IV (b)(ii)(d) of the Regulations Governing the Organisation, Conduct and Discipline of Students. Furthermore, that the procedure in the said Regulations in Part IV (a)(ii) is unconstitutional as it takes away the right to a fair hearing and natural justice. The Applicant annexed copies of the 2nd Respondent's Regulations Governing the Organisation, Conduct and Discipline of Students and of the letter dated 11th December 2018 in support of his averments.

6. The Applicant's Advocates on record, TLO Law Associates, filed written submissions dated 31st October 2019. Reliance was placed on various judicial decisions including **Nyongesa & Others vs Egerton University College**, **(1990) e KLR 692**, **Republic vs Registrar of Companies ex parte Githongo, (2001) eKLR** and **Republic vs Chuka University ex parte Kennedy Omondi Waringa & 16 Others, (2018) e KLR** for the requirement of fairness and observance of natural justice in decision making. Also cited was section 4(3) of the Fair Administrative Action Act and the requirements therein for fair decision making.

7. The Applicant in this regard pointed out that the decision to suspend him affected his right to education, and that Article 47 and 50 of the Constitution on the right to fair administrative action and a fair hearing required to be observed. He also referred the Court to the requirements of Part IV(c) of the 2nd Respondent's aforestated regulations on the manner of conducting disciplinary procedures which envisage a fair hearing at all stages of the proceedings, including suspension. The Court of Appeal's decision on the application of Article 47 to administrative bodies in **Judicial Service Commission vs Mbalu Mutava & Another (2014) e KLR** was cited in this regard.

8. Lastly, the Applicant submitted on the orders he seeks and relied on the decisions in **Pastoli vs Kabale District Local Government Council & Others (2008)** and **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** and **Republic vs Cabinet Secretary for Internal Security ex parte Gregory Oriaro Nyauchi & 4 Others (2017) e KLR** on the circumstances when the orders of certiorari, mandamus and prohibition can issue.

The Response

9. The application was opposed through a replying affidavit sworn on 8th April 2019 by Dr. Abraham Mutunga Nyete, a Lecturer in the Department of Electrical Engineering & Information at the 2nd Respondent University. He averred to the happenings on 26th October 2018 while he was invigilating and examining the examination in FEE 402: Electronics B.

10. He stated that he caught the Applicant with an examination booklet with written notes, which he forwarded to the Chairman of the Electrical & Information Engineering Department through an internal memo. Further, that the Applicant was subsequently suspended from the University pending investigations and further disciplinary action. The deponent annexed copies of the booklet with the handwritten notes and a copy of the internal memo dated 26th October 2018.

11. The Respondent's Advocates on record, Donald Kipkorir of KTK Advocates, filed written submissions dated 21st February 2020, and were of the opinion that the Applicant is not deserving of the orders and relief sought as firstly, the allegations he makes have no basis, and he is the author of his own misfortune. The decision in **Monicah Karimi Njiru vs Egerton University, (2011) e KLR** and **Albert Mandela Ogendi vs University of Nairobi, (2016) e KLR** were cited in this regard.

12. Secondly, that the Applicant has not met the threshold for the grant of the orders of certiorari and prohibition, as he has not demonstrated that the Respondent acted in error of law, in excess of their jurisdiction or contrary to natural justice. The decisions in **Fredrick Masaghwe Mukasa vs Director of Public Prosecutions & 3 Others (2016) e KLR, Republic vs Cabinet Secretary for Internal Security ex parte Gregory Oriaro Nyauchi & 4 Others (supra), Republic vs Egerton University ex parte Robert Kipkemoi Koskey (2006) e KLR** and **Paul Kiplagat Birgen & 25 Others vs Interim Independent Electoral Commission & 2 Others (2011) e KLR** were cited on the threshold and requirements required to be met for the grant of these orders.

13. Furthermore, that the Respondents' actions were sanctioned by their Rules and Regulations Governing the Organisation, Conduct and

Discipline of Students, and were made in good faith and in furtherance of their mandate, as they have the powers and jurisdiction to discipline students. The decision in **Peris Wambogo Nyaga vs Kenyatta University (2014) e KLR** was relied upon for this position.

14. Lastly, on the infringement of the Applicant's right to fair administrative action and a fair hearing, the Respondents submitted that after making their decision undertook investigations into the matter, and the Applicant has prematurely moved to court alleging infringement, as he is yet to be invited to a disciplinary hearing. In addition, that the Applicant has not demonstrated how the Respondents have denied him his right to education. The decision in **Linus Simiyu Wamalwa vs University of Nairobi & Another, (2015) e KLR** was cited for this submission.

The Determination

15. From the pleadings and submissions made by the parties, it is evident that the Applicant does not dispute, and indeed recognizes the existence of the 2nd Respondent's Rules and Regulations Governing the Organisation, Conduct and Discipline of Students. Therefore, there is no dispute in this respect as regards the existence of the Respondents' powers and mandate to discipline their students.

16. The Applicant's case revolves around the manner of exercise of these powers by the Respondents. In this respect, three issues have been raised by the pleadings and submissions in this application, that require determination. These are firstly, whether the Respondent's decision to suspend the Applicant was procedurally unfair; secondly, whether the said decision was made in excess of the Respondents' powers and *ultra vires*; and lastly, whether the Applicant is entitled to the relief he seeks.

17. Before analyzing the evidence and arguments made on the three issues, it is necessary to lay down the basis and extent of this Court's intervention in cases such as this one. The parameters of the exercise of this Court's judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
>
> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

18. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action**, *the* **reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.**

19. In addition, section 7(2) of the Fair Administrative Action specifically provides for the grounds on which this Court may review an administrative action or decision as follows:

> **"(a) the person who made the decision-**
>
> > **(i) was not authorized to do so by the empowering provision;**
> >
> > **(ii) acted in excess of jurisdiction or power conferred under any written law;**
> >
> > **(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**
> >
> > **(iv) was biased or may reasonably be suspected of bias; or**
> >
> > **(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**
>
> **(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power."

20. The above-stated considerations and provisions will guide this Court's examination of the issues raised by the Applicant's application, which now follows.

Whether the Respondents' Decision was Procedurally Unfair

21. It is not in dispute that the 1st Respondent suspended the Applicant by way of a letter dated 11th December 2018. It is also not in contention that the applicable rules in this regard are the 2nd Respondent's Regulations Governing the Organisation, Conduct and Discipline of Students, which were cited by both the Applicant and Respondent. The said Rules and Regulations are made by the 2nd Respondent's Senate and Council in accordance with the provisions of the Respondent's Charter.

22. Under sections 19 and 20 of the Universities Act of 2012, a University Charter is the instrument that establishes and gives legal status and authority to a University to *inter alia* undertake its academic programmes. The University of Nairobi Charter was granted to the 2nd Respondent by Legal Notice 192 of 2012, and provides that Senate shall propose regulations for the discipline of students which are approved by its council, and under section 22 of the Charter, it is the Council that is given the power to make statutes that prescribing Student's conduct.

23. At the procedural front, Part 1V(C) of the Regulations Governing the Organisation, Conduct and Discipline of Students is dedicated to the procedure to be followed when a student is alleged to have committed a disciplinary offence as follows:

"(C) Disciplinary Procedures

(i) All disciplinary offences shall, in the first instance be reported to and dealt with by Committees constituted as follows:-

A) At the residential level (hereinafter the Halls Disciplinary Committee)

The Warden - Chair

The Dean of Students

The Director of S.W.A.

A representative of the Faculty of the student concerned

The Head Custodian of that Hall

The Student Hall Chairperson

The Hall Administrator - Secretary

2. At the College level (hereinafter the College Disciplinary Committee);

The Principal - Chair

The Dean of Faculty/Director of Institute or School

The Chairperson of the student's Department where appropriate one representative nominated by the College Student 's organization one representative from the Students' Hall of Residence nominated by the Students' Hall Chair

The College Registrar - Secretary

(ii) All disciplinary offences committed within the Halls of Residence or all such offences as relate essentially to the proper conduct of residential affairs shall be reported to the Halls Disciplinary Committee for action.

(ii) If any matter reported to a Halls Disciplinary Committee is, in its opinion essentially of an academic nature or involves issues extraneous to the residential affairs of the hall concerned, such a matter shall be transmitted at once to the appropriate College Disciplinary Committee for action.

(iii) All other disciplinary offences wherever committed shall be reported to the appropriate College Disciplinary Committee for action.

(iv) All appeals from the decisions of Halls and College Disciplinary Committees in respect of matters falling within their respective jurisdictions shall lie with the Senate Disciplinary Committee constituted as follows:-

Deputy Vice-Chancellor (Academic Affairs) - Chair

Principal / Director of S.W.A.

Dean of Students

Dean of Faculty

Warden or equivalent

Two (2) Senate Representatives

Three (3) Students Representatives

Academic Registrar - Secretary

(v) Provided that student representation shall be excluded in offences related to examination and other academic matters.

(vi) At all proceedings or a Disciplinary Committee before which he/she is summoned, the student shall be entitled to a fair hearing and to representation either in person or by somenone of his/her choice, to call witnesses in his/her defence, and to appeal to the Senate Disciplinary Committee. Legal representation is not allowed.

Disciplinary Committee at the Halls or College levels shall have power to impose any one or more of the following penalties:-

a) A letter of warning or reprimand

b) The payment of damages commensurate with the nature and gravity of the offence committed,

c) Suspension from the University for a specified period,

d) Expulsion from the Halls of Residence,

e) Any other penalty which the Committee in question may deem fit to impose or recommend to the Senate Disciplinary Committee.

(ii) No student may be expelled from the University, and any penalty imposed by a Disciplinary Committee in accordance with sub clause (1)- (5)- herein shall not take effect without the approval of the Senate Disciplinary Committee.

(iii) In arriving at an appropriate penalty or combinations thereof, the appropriate Disciplinary Committee shall be at liberty to consider the total conduct (past and present) of the student within or outside University and not merely the immediate circumstances furnishing the reason for disciplinary action against him/her.

(iv) The record and decision of any disciplinary action taken against a student shall be reported to his/her Warden, Chair of the Department, Dean of Faculty, College Principal and the Vice-Chancellor and shall form part of the student's record at those levels.

2. Nothing in this section shall preclude Senate from proceeding against any student under Statute XX (6), nor shall anything in these regulations be read so as to impede."

24. In addition, it is now a core requirement of the Bill of Rights in Article 47 of the Constitution that every person who is to be affected by a decision must be accorded fair administrative action, which is also reiterated by the Fair Administrative Action Act of 2015. Article 47 of the Constitution in this regard provides as follows:

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

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

25. Section 4(3) and (4) of the Fair Administrative Action Act provides the key procedural steps that are required to satisfy the requirements of fairness as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

26. In this respect, the letter of suspension dated 11th December 2018 sent to the Applicant read as follows:

"F17/30406/2015 11th December 2018

Meyo Victor Mandela

C/O Dean's Office

School of Engineering

Dear Mr. Meyo

SUSPENSION FROM THE UNIVERSITY

It has been reported to me that on 26th October 2018, while sitting University examination namely FEE 402: Electronics B. in Room American Wing 212, you were found with an examination booklet with written notes which were relevant to the examination.

This is in contravention of Part IV (b) (ii) (d) of the Regulations Governing the Organization, Conduct and Discipline of Students, which regulations you are well aware of.

By the authority conferred on me by the University Council and by virtue of Part IV (a) (ii) of the same Regulations, I hereby on behalf of the Council suspend you from the University with immediate effect pending investigation and further disciplinary action. A detailed copy of the specific charges and particulars and any other related matters will be communicated to you in due course.

You will be invited to appear before the appropriate disciplinary committee as per statute prescribed at a date to be communicated.

In the meantime, you are required to keep away from all University precincts including any and all lectures, and activities of the University unless expressly authorized in writing by my office or until such a time as the investigations/disciplinary process shall be finalized.

Yours sincerely,

Peter M.F. Mbithi

VICE CHANCELLOR AND

PROFESSOR OF VETERINARY SURGERY"

27. The Applicant argues that he was not given any hearing before the decision was made, and that due process was not followed. The Respondents did not provide any evidence to rebut this allegation, or demonstrate that the Applicant was afforded any hearing before being suspended, or that the procedure in Part 1V(C) of the Regulations Governing the Organisation, Conduct and Discipline of Students was followed. The 1st Respondent's letter dated 11th December 2018 is also clear that the Applicant was to be suspended with immediate effect pending investigations and further disciplinary action. The Respondent's position is that this action sufficed as a fair administrative action on its part.

28. It is noteworthy in this respect that it is specifically provided for in Part 1V(C) of the Regulations Governing the Organisation, Conduct and Discipline of Students Regulations that penalties including suspension can only be recommended and imposed after a student has been accorded a hearing and upon approval by the Senate Disciplinary Committee. In addition, the core aspect of the duty to act fairly under the provisions of the Constitution and Fair Administrative Action Act and also under the common law rules of natural justice is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it.

29. In the present case, as shown by the letter of suspension, the Applicant was suspended without being accorded a chance to state his case and/or defend himself as regards the accusations made against him. The Respondents therefore not only breached their constitutional and statutory duties to act fairly, but also failed to comply with the disciplinary procedure set by its own statutes.

30. This Court finds for these reasons, that the 1st Respondent acted with procedural unfairness in reaching the decision in the letter to the Applicant dated 11th December 2018. It is also important to emphasize at this juncture that while this Court in normal circumstances will not interfere with the Respondents' disciplinary powers over students, it is a necessary pre-condition in the exercise of the said powers that the Respondents comply with the provisions of the Constitution, applicable laws and its own statutes. Non-compliance will rightly attract judicial review of the Respondents' actions by this Court as provided by Article 165 of the Constitution and section 7 of the Fair Administrative Action Act.

Whether the Respondents' Decision was ultra vires

31. The Applicant on this issue submitted that the basis of his suspension was Part IV (b) (ii) (i) of the rules, which does not exist, and was thus illegal and unreasonable. The Respondents maintained that they had the powers under their Rules and Regulations to act as they did.

32. The ground of *ultra vires* in judicial review requires a public body to act within the scope of its powers and duties, and should not purport to exercise a power it does not possess. It is my view that the fact that a non-existent provision of the Regulations was cited in relation to the offence alleged to have committed by the Applicant did not make the 1st Respondent's decision *ultra vires* for two reasons.

33. Firstly, there was no specific decision made by the Respondents in the letter dated 11th December 2018 to charge the Applicant with an offence, and it was specifically stated therein that the specific charges would be communicated to him in due course. There was no evidence presented in this regard to show that the Applicant had subsequently either been charged or penalised under the said non-existent provisions. It is therefore premature at this stage to determine whether or not the was an illegality committed on account of a non-existent provision of the regulations being used for the offence alleged to have been committed by the Applicant.

34. Secondly, the decision being impugned by the Applicant is the one suspending him, which is the decision contained in the letter dated 11th December 2018. In this regard Part IV A of the Regulations Governing the Organisation, Conduct and Discipline of Student empower the Respondent to suspend the students as follows:

> **"(A) Disciplinary Authority:**
>
> **For purposes of these regulations the Vice-Chancellor, acting on behalf of Council, is the disciplinary authority of the University and may in that capacity:-**
>
> > **(i) Vary or add to the list of disciplinary offences specified herein until such action shall cease to have effect unless approved at the next meeting of Council;**
> >
> > **(ii) Suspend any student suspected of committing any disciplinary offence under the regulation from the University pending disciplinary actions.**
> >
> > **(iii) Take any other measures necessary for the proper operation of disciplinary procedures set out herein**."

35. The decision to suspend the Applicant was therefore within the disciplinary jurisdiction and powers given to the 1st Respondent and was not *ultra vires* to this extent.

On the Relief Sought

36. The threshold for the grant of judicial review orders sought by the Applicant was set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others ,(supra)** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

37. This Court's powers to grant relief in judicial review is discretionary, and once it reaches a conclusion that a particular decision or action was unlawful, it has discretion to grant or refuse a final remedy. if it does grant a final remedy it has discretion as what remedy should be granted. The Courts take into account the circumstances of each case, and in practice will only refuse a remedy unless there is good reason to do so arising either from the action or inaction of the claimant, the impact of the remedy on others, and the practical value of the remedy.

38. This Court has found that the Respondents' decision in the letter dated 11th December 2018 was procedurally unfair, and it therefore

merits the order sought by the Applicant of certiorari. The Respondent did not plead any prejudice that will be suffered if this order is granted. The effect of quashing the decision is to revert to the position before the decision was taken, which is that the Applicant will be deemed to still be a student of the 2nd Respondent University. To this extent, the Respondents are under a duty to restore him back to the said position, and the order of mandamus sought in this respect is merited, but limited only to the reinstatement of the Applicant.

39. As regards the outstanding orders of mandamus that are sought by the Applicant, he is yet to establish any dereliction of duty on the part of Respondents in terms of continuation of his studies, or the opportunity to sit for the FEE 402: Electronic B examination upon his reinstatement as a student in the 2nd Respondent University. To this extent the said prayers are premature.

40. Likewise, as regards the prayer for a prohibition order, while the Applicant has demonstrated the illegality of the Respondents' past disciplinary decisions which are as a result liable for quashing, he has not shown or demonstrated the illegality of any future or impending disciplinary action by the Respondents. In addition, the Respondents cannot in the absence of such evidence be restrained from exercising the disciplinary powers it is granted under statute.

41. In the premises, I find that the Applicant's Notice of Motion dated 8th February 2019 is merited only to the extent of the following orders:

> **I. An order of certiorari be and is hereby issued directed towards the 1st and 2nd Respondents jointly and severally, to bring to this Court for purposes of quashing, the decision suspending the Applicant from the 2nd Respondent University contained the 1st Respondent's letter dated 11th December 2018.**
>
> **II. An order of Mandamus be and is hereby issued directed towards the 1st and 2nd Respondents jointly and severally, compelling them to consequently reinstate the Applicant back to the 2nd Respondent University to proceed with his studies.**
>
> **III. The Respondents shall meet the Applicant's costs of the Notice of Motion dated 8th February 2019.**

42. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE