



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 6 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION

AND

IN THE MATTER OF THE RULES AND REGULATIONS OF THE UNIVERSITY OF NAIROBI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

UNIVERSITY OF NAIROBI RESPONDENT

EX PARTE: MAXWELL MAGAWI ODHIAMBO

JUDGMENT

The Application

1. The Application before the Court for determination is an application by way of a Notice of Motion dated 23rd January 2019 by Maxwell Magawi Odhiambo, who is the *ex parte* Applicant herein, (hereinafter “the Applicant”). The said Applicant is seeking the following orders:

a) **An order of prohibition restraining the Respondent from further carrying on with the unlawful and unprocedural disciplinary proceedings against the ex-parte Applicant.**

b) **Costs of the application be provided for**

2. The application was supported by a statutory statement dated 8th January 2019, and a verifying affidavit sworn by the Applicant on the same date. The counsel for the Applicant, Ochieng Achach & Kaino Advocates, in addition filed written submissions dated 15th February 2019. The Applicant’s case, as summarized from the pleadings he filed, is as follows. The Applicant is a University student undertaking his undergraduate studies in law at the University of Nairobi, which is the Respondent herein. The genesis of the proceedings before the Court is a letter dated 19th December 2018 from the Respondent’s Deputy Vice Chancellor (Student Affairs), which suspended the Applicant from the Respondent’s precincts for contravening the institution’s rules and regulations, until such a time that the disciplinary proceedings shall be finalised.

3. The Applicant is aggrieved by the decision of the Respondent and faults the letter for one; that it was issued by the Deputy Vice Chancellor in charge of student affairs, contrary to Part VI (1)(A) of the Regulations Governing the Organisation, Conduct and Discipline of Students which reposes the disciplinary powers upon the Vice Chancellor of the Respondent only; that the Rules and Regulation Governing Student Conduct that form the basis of the suspension are not penal provisions and therefore the decision is not only illegal but unreasonable;

that the disciplinary powers under the said Rules and Regulations are vested in the Council of the Respondent and exercised by the Vice Chancellor on behalf of the Council, and cannot be further delegated; and that the letter of suspension does not indicate when the disciplinary hearings will be conducted .

4. It was the Applicant's submission that the Deputy Vice Chancellor (Student Affairs) does not have the mandate of suspending or disciplining the students, and therefore the purported suspension is illegal, *ultra vires* and in conflict with the principle of *delegatus non poteste delegare*. He further submitted that the office of the Vice Chancellor is established under section 39 of the Universities Act, 2012, under which he is mandated with the overall responsibility of giving direction organisation administration and programs of the university. That the Rules and Regulation Governing the Conduct and Discipline of Students vests disciplinary authority to the Vice Chancellor, and he is the only one with the power to suspend.

5. In addition, that the letter dated 1st March 2018, which purported to delegate the disciplinary function of the Vice Chancellor to Prof. Isaac M. Mbeche relied on section 14(2) of the University of Nairobi Charter 2013, and on Part IV(A) of the Rules to delegate the authority to the Deputy Vice Chancellor. However, that neither section 14 of the University Charter nor Part IV (A) of the rules give the Vice Chancellor the power to delegate. Reliance was placed on the case of **Shah Munge & Partners Limited & 4 others vs Capital Markets Authority (2008) e KLR** for the proposition that where there is a clear procedure for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament, the procedure should be strictly followed.

6. The Applicant also cited the cases of **Vine vs National Doc Labour Board (1956) 3 ALL ER 939**, **Republic vs Chuka University ex parte Kennedy Omondi Waringa & 16 others (2018) eKLR** and **Hardware & Ironmongery (k) Ltd vs Attorney General, (1972) EA 271** for the proposition that express disciplinary powers cannot be delegated, and that no power of delegation can be inferred in the exercise of disciplinary powers. Lastly, the Applicant 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 Response

7. The application was opposed through a replying affidavit sworn on 15th February 2018 by Prof. Isaac M. Mbeche, the Respondent's Deputy Vice Chancellor(Student Affairs). The Respondent's Advocate, Lutta & Company Advocates in addition filed written submissions dated 27th February 2019. According to the deponent, on the 7th, 8th, and 9th of December 2018, the Applicant together with others engaged in unlawful activities in various campuses of the Respondent. Consequently the Respondent's Director of Security made a report to the Vice Chancellor who marked the report to the deponent for action. The deponent in turn received a report recommending the suspension of the Applicant, and approved the preparation of the suspension letters to pave way for investigations and/or the disciplinary process. He annexed copies of the various reports.

8. Prof. Mbeche further averred that he has authority to issue the suspension letters according to the Respondent's instruments, and attached a letter dated 1st March 2018 from the Vice Chancellor delegating authority to him in matters of student disciplinary cases. Further, that a Student Disciplinary Charge Sheet had been prepared requiring the Applicant to respond, and that the Applicant intends to use the court process to avoid the disciplinary process, and should therefore not be allowed to abuse the process of the court.

9. The Respondent's counsel submitted that the Applicant has omitted a prayer for certiorari, and is only seeking an order of prohibition which cannot lie on its own, and which cannot remedy his suspension. Reliance was placed on the case of **Environmental & Combustion Consultants Ltd vs Kenya Pipeline Company Limited & 2 Others, (2016) eKLR** for the proposition that the remedy of prohibition is only lost where a decision has been made, and not where the proceedings in question are still continuing. The counsel asked the Court to be guided by the case of **Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge & Others, Civil Appeal No 266 of 1996**.

10. Further, that the actions of the Respondent's Vice Chancellor were neither illegal or *ultra vires*, as Part IV (a) (ii) of the Regulations Governing the Organisation, Conduct and Discipline of Students which provides for the disciplinary authority of the Vice Chancellor is not worded in mandatory terms, and must not necessarily be exercised by the Vice Chancellor. That even if the wording was mandatory, any person acting with written authority and delegation by the Vice Chancellor would have authority to exercise disciplinary authority, and that such a letter of authority dated 1st March 2018 was issued by the Vice Chancellor to Prof. Mbeche.

11. Lastly, that nothing in the Regulations prohibits the Vice Chancellor from delegating disciplinary authority, and he has the authority to delegate his disciplinary authority using the power donated in Part 1V (a) (iii) of the said Regulations to take measures necessary for proper operation of disciplinary procedure. The Respondent relied on the case of **Cusack vs Harrow London Borough Council, (2013) 4 All ER 97** for the proposition that the interpretation of any document ultimately, involves identifying the intention of parliament the drafter or the parties.

12. Finally, the Respondent submitted that the charge sheet which they annexed showed that the Applicant was charged with having contravened Part IV (b) (ii) (f), and in the alternative of the Part IV (b) (ii) (h) of the Regulations Governing the Organisation, Conduct and Discipline of Students, and the said charges as outlined were not unreasonable as they were in line with the Applicant's conduct as described in the reports made to the Vice Chancellor which they annexed. That in any case, the Applicant willingly submitted himself to the Regulations when he joined the Respondent University, and the court ought not to interfere lest it dilutes the Respondent's authority to govern its student affairs. The Respondent urged the court to be guided by the decisions in **Republic vs Pharmacy & Poisons Board & 4 Others ex parte Kenya National Union of Civil Servants & 2 Others (2015) e KLR** and **Oluoch Dan Owino & 3 Others vs Kenyatta University, (2014) e KLR** that disciplinary proceedings should not be conducted by the Courts.

The Determination

13. Three issues have been raised in this application that require determination. These are firstly, whether the Respondent's Deputy Vice

Chancellor (Student Affairs) decision to suspend the Applicant was illegal and *ultra vires*; secondly, whether the said decision to suspend the Applicant from was unreasonable; and lastly, whether the Applicant is entitled to the reliefs he seeks.

On the Legality of the Respondent's Decision

14. It is not in dispute that the Respondent has suspended the Applicant by way of a letter by the Respondent's Deputy Vice Chancellor (Student Affairs) dated 19th December 2018. In order to establish that the Respondent acted illegally, the Applicant is required to show that the Respondents failed to correctly understand, interpret and/or apply the law that was used in making its decision. It is not in contention that the applicable rules in this regard are the Respondent's Regulations Governing the Organisation, Conduct and Discipline of Students, which were extensively cited by both the Applicant and Respondent. The said Rules and Regulations are made by the Respondent's Senate and Council in accordance with the provisions of the Respondent's Charter.

15. 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 governance of a university is set out in section 35 of the Universities Act and includes a Council, Senate, and Management Board. The Vice Chancellor of a University is an *ex officio* member of a University Council, and his or her duties and powers are set out in section 39 of the Universities Act and section 14 of the Charter s as follows:

“The Vice-Chancellor shall be the Chief Executive of the University and shall—

(a) be the academic and administrative head of the University;

(b) have overall responsibility for the direction, organization, administration and programmes of the University; and

(c) have such responsibilities and duties as may be provided for in Charter.

16. In addition, section 15 of the Charter specifically provides for the duties and powers of Deputy Vice Chancellors as follows:

“The Council shall, in consultation with the Chancellor, appoint from among the professors of the University, two or more Deputy Vice-Chancellors, who shall, under the general authority of the Vice-Chancellor, exercise such powers and perform such duties as may be provided for by the statutes.”

It is thus evident that the Vice Chancellor and Deputy Vice Chancellor can only exercise such powers and duties of as are provided by the Charter or University Statutes.

17. The University of Nairobi Charter was granted to the 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. Part IV A of the Regulations Governing the Organisation, Conduct and Discipline of Students in this regard provides as follows with respect to disciplinary actions against students:

“(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.”

18. It is evident from the said regulations that the Vice Chancellor in exercising disciplinary authority over students acts as a delegate of the Council. While a person to whom a statutory power or duty is conferred is required to personally perform such a power and duty, and should not delegate it, sometimes there may be an express power to delegate, or an implied power to delegate may be construed from the terms of a statute. The Respondent has in this regard argued that it is implied from the fact that the disciplinary powers granted to the Vice Chancellor are not couched in mandatory terms, and there no express prohibition to delegate placed on the Vice Chancellor. The Respondent therefore relied on a letter of delegation by the Vice Chancellor dated 1st March 2018 which read as follows:

“March 1, 2018

PROF. Isaac M. Mbeche

Deputy Vice Chancellor

(Student Affairs)

Dear Prof. Mbeche,

RE: DELEGATED AUTHORITY ON STUDENT DISCIPLINARY CASES AND CONNECTED PURPOSES

The above refers.

I hereby delegate my authority to you on matter of students disciplinary cases and connected purposes in line with Section 14(2) the University of Nairobi Charter 2013 and Part 1V (a) of the Rules and Regulations Governing Conduct and Discipline of Students.

Thank you.

PETER M. F. MBITHI, PhD, EBS

VICE-CHANCELLOR

AND

PROFESSOR OF VETERINARY SURGERY”

19. In the present case no such express power to delegate is given to the Vice Chancellor by section 14 of the Charter or Part 1V (a) of the Regulations which are reproduced in the foregoing. It is also notable that an implied power to delegate will not be construed in certain circumstances. One of these circumstances is where the importance of the function is such that it will have a considerable effect on an individual or public at large or other interest. This is particularly so where the function is of a judicial nature as in disciplinary proceedings. This has been held to be so in various decisions including General Council of Medical Education and Registration of the United Kingdom vs Dental Board of the United Kingdom, (1936) Ch 41, Bernard vs National Dock Labour Board, (1953) 2 QB 18 and Vine vs National Dock Labour Board, (1957) AC 488.

20. Moreover, it is also the general position in law that a person to whom powers or duties are delegated cannot delegate their performance to someone else under the principle expressed by the maxim *delegatus non potest delegare* (a delegate has no powers to delegate). A power to delegate further can only arise where it is within the scope of the primary delegate’s authority. The High Court (Aburili J.) has applied the above principles in the case of Republic vs Chuka University ex parte Kennedy Omondi Waringa & 16 others (2018) eKLR where it was held as follows:

“162. There is no provision in the Rules and Regulations permitting that the Chairman could delegate the power of signing the impugned letters to any other person. As was held by Lord Somervel in Vine vs. National Doc Labour Board [1956] 3 All ER 939, at page 951:

“The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated...There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorize someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether “judicial” or not, cannot be delegated.”...

164. Similarly in Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271, the Court expressed itself as follows:

“What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer’s evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director’s powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”

165. The above position is restated in section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act, 2015* where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.”

21. I am in agreement with the positions set out in the various judicial decisions cited hereinabove. 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, which include illegal exercise and delegation of powers 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.”

22. It is thus the finding of this Court that as the Respondent's Vice Chancellor exercises disciplinary powers over students on behalf of the Council of the Respondent, he could not purport to delegate those powers to the Respondent's Deputy Vice Chancellor (Student Affairs), as neither section 14 of the Charter nor Part 1V (a) of the Regulations Governing the Organisation, Conduct and Discipline of Students conferred on him any such powers to delegate, and also for reasons that the Respondent's Charter expressly provides that the Deputy Vice Chancellor can only exercise such powers and duties as are conferred by statute. The Respondent's Deputy Vice Chancellor (Student Affairs) therefore acted illegally in purporting to suspend the Applicant.

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 someone 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. No evidence was availed by the Respondent that this procedure was followed, or that the Applicant was afforded any hearing before being suspended. The report that was attached by the Respondent as regards what transpired before the suspension was "Annexure B" to its replying affidavit, which was an Internal Memo from the Principal CHSS dated December 18, 2018 on the report he received by Director of Security Services which indicated that a group of students including the Applicant went to campuses of the Respondents wearing red berets. The said Internal Memo concluded as follows: "Accordingly I recommend immediate suspension of the nine students pending the meeting of the College Disciplinary Committee to deal with their cases".

25. The subsequent letter of suspension dated December 19, 2018 that sent to the Applicant also read as follows:

"Our Ref: G34/3297/2014

December 19, 2018

Magawi Maxwell Odhiambo

P.O. Box 1973-40100

Tel: 0702-34632

Email: maxwellmagawi@gmail.com

KISUMU.

Dear Mr. Magawi

SUSPENSION FROM THE UNIVERSITY, ITS PRECINCTS, LECTURES AND UNIVERSITY ACTIVITIES PENDING YOUR APPEARANCE BEFORE DISCIPLINARY COMMITTEE

It has been reported that on Friday December 7, 2018, at around 1430 hours you were among a group of 20 students who went to SWA Main Halls of Residence outside Hall 9 wearing red berets. The group had alleged to have given notice to management on a peaceful orderly procession across all campuses. It is further reported that the group also went to Lower Kabete Campus on Saturday December 8, 2018 and also forced themselves into Kikuyu Campus by jumping over the gate on Sunday December 9, 2018.

This conduct is in contravention of Part IV (b) (ii) (i) of the Regulations Governing the Organization, Conduct and Discipline of Students.

You are well aware of the said regulations having signed and declared to abide by the same upon being admitted to and joining the university.

NOTE: that by delegated authority to the Vice Chancellor in accordance with Part IV a) (ii) of the Regulations, I hereby suspend you from the University with immediate effect pending your appearance before appropriate disciplinary committee to face the above charges.

You will be invited to appear before the disciplinary committee at a date and venue to be communicated to you when your attendance shall be required without fail.

In the meantime, you are required and strongly advised to keep off from University precincts including lecture halls and activities of the University unless expressly authorized in writing by the Vice Chancellor or until such a time as the investigations/disciplinary process shall be finalized.

You are further advised that this administrative suspension does not bar relevant state agencies and the university from instituting appropriate criminal charges against yourself.

Yours sincerely,

ISAAC M. MBECHE

DEPUTY VICE CHANCELLOR (STUDENT AFFAIRS)

AND

PROFESSOR OF MANAGEMENT SCIENCE “

26. It is noteworthy that it is specifically provided for in the said 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 the present case, as shown by the above cited internal memo and letter of suspension, the Applicant was suspended with immediate effect without being accorded a chance to state his case and/or defend himself as regards the accusations made against him. In addition, it is now a core requirement of the Bill of Rights in the Constitution that every person who is to be affected by a decision must be accorded fair administrative action under Article 47 of and also by the Fair Administrative Act of 2015. The core aspect of the duty to act fairly under these provisions 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.

27. 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.**

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.

28. The Respondent not only therefore breached the aforesaid Constitutional and statutory duties to act fairly, but also failed to comply with its own applicable disciplinary set by its own statutes. This Court therefore finds that the Respondent's Deputy Vice Chancellor (Student Affairs) not only acted in excess of his powers and duties in suspending the Applicant, but was also procedurally *ultra vires* and was procedurally unfair. It is also important to emphasize at this juncture that while this Court in normal circumstances will not interfere with the Respondent's disciplinary powers over students, it is a necessary pre-condition that the Respondent complies with the provisions of the Constitution, applicable laws and its own statutes in discharging the said powers. Any allegation of non-compliance in this regard will rightly attract judicial review of the Respondent's actions by this Court's as provided by Article 165 of the Constitution and section 7 of the Fair Administrative Action Act.

Whether the Respondent's Decision was Unreasonable

29. 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. This position was denied by the Respondent who in turn pointed out that a charge sheet specifying the charges against the Respondent under the relevant regulations had since been prepared, a copy which was attached.

30. Unreasonableness is an established ground for judicial review, and was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** as follows:

“...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...”

31. The reason given by the Respondent for its decision was explained in the letter of suspension dated 19th December 2019, and 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 decision patently unreasonable. The arguments by the Applicant in effect are that the Respondent erred in citing the wrong provisions, which is an issue that goes to the merits of its decision, and therefore not one that is amenable for judicial review.

On the Relief Sought

32. I am on this issue guided by the parameters for the grant of judicial review orders, as set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, Civil Appeal No. 266 of 1996** thus:

“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.”

33. This Court has found that the Applicant has established that the Respondent acted illegally and its decision was *ultra vires* and procedurally unfair, and therefore merits judicial review orders. The Applicant however did not seek the order of *certiorari* in its substantive Notice of Motion dated 23rd January 2019, which would normally lie in the circumstances. The Respondent also argues that in the circumstances, the order of prohibition sought in the said Notice of Motion would be ineffective and would serve no useful purpose. To this extent, the Respondent has a valid argument since unless the Respondent's decision to suspend the Applicant dated 19th December 2019 is

nullified, the Respondent is *ex functus officio* and will be regarded as having validly discharged its powers, and cannot therefore be restrained from taking any further action on the said decision.

34. This Court is thus faced with two options; - to either grant the orders of judicial review that are merited, or deny the prayer sought of prohibition, as the granting of the said order in the absence of a prayer for an order of certiorari would result in a situation where this Court acts in vain, and the remedy would largely be academic. In order to resolve this dilemma, this Court is guided by the following considerations, Firstly, the Applicant was granted leave to commence judicial review proceedings for both certiorari and prohibition orders by this Court on 16th January 2019, pursuant to his Chamber Summons application dated 8th January 2019. Therefore he had contemplated and shown an arguable case for the order of certiorari.

35. Secondly, the source of this Court's powers to grant remedies in judicial review derives from Article 23 of the Constitution, section 8 of the Law Reform Act, section 11 the Fair Administrative Action Act, and Order 53 of the Civil Procedure Rules. Therefore the source of the court's powers is both Constitutional and statutory. In particular, under Article 23 of the Constitution and section 11 of the Fair Administrative Action Act, this Court is granted power to grant appropriate relief to remedy the infringement of a constitutional right and any order that is just and equitable in cases of judicial review. Section 11 (e) and (h) of the Fair and Administrative Action Act in particular empowers this Court to grant an order setting aside an administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions. It is in this respect also noteworthy that this Court has inherent jurisdiction under section 3A of the Civil Procedure Act to make such orders as are necessary for the ends of justice.

36. Lastly, this Courts powers to grant relief in judicial review are 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, and 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.

37. In the present case, the only mistake made by the Applicant was the failure to include the prayer for certiorari in the substantive Notice of Motion. As he had been granted leave to seek certiorari, I find that this failure was not prejudicial, and in any event this Court is still empowered to grant the said order by statute in appropriate circumstances. In addition, the Respondent's decision dated 19th December 2018 has been shown to have been manifestly illegal and it would not be in the interests of justice that the said decision is allowed to stand. These findings notwithstanding, I also note that the Respondent cannot be restrained from exercising the powers it is granted under statute, and the orders of prohibition therefore cannot be granted on the terms sought.

38. In the premises, I find that the Applicant's Notice of Motion dated 23rd January 2019 is largely merited, and I accordingly order as follows:

I. The decision by the Respondent's Deputy Vice Chancellor (Student Affairs), Prof Isaac. M Mbeche suspending the Applicant from the Respondent University, and advising the Applicant to keep off from the said University's precincts contained in the letter dated December 19, 2018 is hereby set aside forthwith.

II. The Respondent be and is hereby prohibited from undertaking any disciplinary proceedings against the Applicant based on the said decision by the Respondent's Deputy Vice Chancellor (Student Affairs), Prof Isaac. M Mbeche in the letter dated December 19, 2018.

III. The matter of the Applicant's conduct be and is hereby remitted back to the Respondent's Vice Chancellor for reconsideration in accordance with the provisions of the Constitution, Fair Administrative Action Act and the Respondent's Statutes.

IV. The Respondent shall meet the Applicant's costs of the Notice of Motion dated 23rd January 2019.

39. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF MAY 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2019

J. MATIVO

JUDGE