



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NUMBER 135 OF 2019**

**IN THE MATTER OF THE UNIVERSITIES ACT**

**AND**

**IN THE MATTER OF TERMINATION OF THE TERM OF OFFICE OF THE CHAIRPERSON OF COUNCIL OF MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY AND PWANI UNIVERSITY**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF *CERTIORARI***

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE CABINET SECRETARY FOR EDUCATION.....1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

**AND**

**DR. JEREMY BUNDI.....1ST INTERESTED PARTY**

**DR. JANE MUSANGI MUTUA.....2ND INTERESTED PARTY**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY....3RD INTERESTED PARTY**

**PWANI UNIVERSITY.....4TH INTERESTED PARTY**

**AND**

**KENYA UNIVERSITIES STAFF UNION.....*EX PARTE* APPLICANT**

**JUDGMENT**

**Introduction**

1. Article 4(2) of the Constitution provides that the Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10. One of the founding values in Article 10 is the Rule of Law. The Rule of Law has been defined as a principle of governance in which all persons, institutions and entities, public, and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standard.[1] It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[2]

2. In *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another* ***[3]*** I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[4] Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline.

3. Law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change.[5]

**The Parties**

4. The *ex parte* applicant, the Kenya Universities Staff Union, is a Trade Union within the meaning of the Labour Relations Act.[6] It states that it has a direct interest in the management of the affairs of Public Universities since it has a direct impact on the welfare of their staff.

5. The first Respondent is the Cabinet Secretary responsible for education appointed under Article 152(2) of the Constitution.

6. The second Respondent is the Hon. Attorney General. Under Article **156(4)** of the Constitution, the Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President.

7. The first and second Interested Parties are Kenyan adults of sound minds. They were joined in these proceedings because the impugned Gazette Notices directly affects them as discussed later in this judgment.

8. The third Interested Party, Masinde Muliro University of Science and Technology (herein after referred to as MMUST) and the fourth Interested Party, Pwani University, are Public Universities within thin meaning assigned to Public Universities under the definition in section 2 of the Universities Act[7] (herein after referred to as the Act).

**Factual matrix**

9. It is common ground that on 10th March 2017, vide Gazette Notice Number 2348, the then Cabinet Secretary for Education Dr. Fred O. Matiangi appointed the first Interested Party, Dr. Jeremy Bundi to be the Chairperson of the Council of MMUST. In the same Gazette Notice, he appointed Samson Muchelule, Don Remmy Ogallo Riaro, Joyce Mugure Nderitu, Vayonda J. Sirma-Koros and Kosiom Frank Ole Kimbelekenya to be Members of the Council of MMUST. The said appointments were for a period of three years with effect from 10th March 2017.

10. It is also common ground that vide Gazette Notice number 2349 dated 10th March 2017, the then Cabinet Secretary for Education Dr. Fred O. Matiangi appointed the second Interested Party, Dr. Jane Musangi Mutua as the Chairperson of the Council for Pwani University. In the same Gazette Notice, he appointed Gift Kimonge Dzombo, Jack Sijeny Nyabundi, Moni Wekesa, Joel Yego and Samuel M. Nyachae as Members of the Council for Pwani University. The said appointments were for a period of three years with effect from 10th March 2017.

11. The *ex parte* applicants states that to date the first and second Interested Parties have never vacated or been vacated from office of chairpersons of council for MMUST and Pwani University respectively within the meaning of section 36 of the Act as read with section 8 of the Act.

12. In addition, the *ex parte* applicant states that on 24th April 2019, in total spite of the law, the Cabinet Secretary made two manifestly unlawful decisions namely:-

> a. Gazette Notice Number 3763 of 24th April 2019 appointing the second Interested Party to be the Chairperson of the Council of MMUST up to 9th March 2020 with effect from the 24th April 2019 and revoking the appointment of the first Interested Party as Chairperson of the Council of the same University with immediate effect.

b. Gazette Notice No. 3769 dated 24thApril 2019 appointing the first Interested Party to be the Chairperson of the Council of Pwani University up to 9thMarch 2010 with effect from 24th April 2019 and revoking the appointment of the second Interested Party with immediate effect.

13. Additionally, the *ex parte* applicant states that in or around 20th December 2018, it came across the following three draft Gazette Notices:-

a. A draft Gazette Notice purporting to appoint a one Ahmed Mohammed Diriye to be a member of the Council for MMUST for a period of three years with effect from 12thDecember 2018 and to revoke the appointment of Mr. Kosiom Frank Ole Kimbelekenya as a member of the council for MMUST with immediate effect.

b. A draft Gazette Notice purporting to appoint the second Interested Party to be Chairperson of Council for MMUST for a period of one (1) year and three (3) months and to revoke appointment of the first Interested Party as Chairperson of Council for MMUST with immediate effect.

c. A draft Gazette Notice purporting to appoint the first Interested Party as chairperson of the Council for Pwani University for a period of one year and three months with effect from 21stDecember 2018 and to revoke the appointment of the second Interested Party as Chairperson of the Council for Pwani University with immediate effect.

14. The *ex parte* applicant states that the above actions attracted immediate protests from the applicant and culminated in a strongly worded resignation letter by Mr. Kosiom Fank Ole Kimbelekenya as a member of the council for MMUST.

**Legal foundation of the application**

15. The *ex parte* applicant states that the Universities Act[8] (the Act) and the State Corporations Act[9] regulate the affairs of the third and fourth Interested Parties. It also states that one of the structures established under the law to govern the affairs of Universities is the Council established under section 35 of the Act which section stipulates its functions.[10]

16. The *ex parte* applicant anchored his application on the provisions of section 36 of the Act as read with section 8 of the Act. I will discuss these two provisions later in this judgment.

17. In addition, the *ex parte* applicant states under section 8 of the Act, if the office of the Chairperson and Member of the Commission becomes vacant, the Cabinet Secretary may, subject to the provisions of the Act, appoint another person to fill the vacancy for the remainder of the term of such member. Further, the *ex parte* applicant states that a reading of section 36 of the Act as read with section 8 reveals that there is no procedure for vacation of the office of Chairperson or Member of council of a public university by way of ministerial revocation.

18. The *ex parte* applicant challenges the legality of the impugned decisions stating that it purports to revoke the appointments of the first and second Interested Parties on grounds other than those provided in section 36 of the Act as read with section 8 of the Act. The *ex parte* applicant also states that the impugned decision is illegal, *ultra vires* and a violation of the right to legitimate expectation of the stakeholders of the two Universities and the applicant.

19. Lastly, the *ex parte* applicant states that the said Gazette Notices purport to appoint the first and second Interested Parties to serve for periods of one year (1) and one (1) month contrary to section 36 (5) of the Act which provides for periods of between 3 years and 4 years.

**The reliefs sought**

20. As a consequence of the foregoing, the *ex parte* applicant prays for the following orders:-

a. An Order of Certiorari to quash the decision of the Cabinet Secretary for Education contained in Gazette Notice Number 3763 of 24th April 2019 appointing Dr. Jane Musangi Mutua as the Chairperson of the Council of Masinde Muliro University of Science and Technology from the 24th April 2019 to 9th March 2020 and revoking the appointment of Dr. Jeremy Bundi as Chairperson of the council of the same University with immediate effect.

b. An order of certiorari to quash the decision of the Cabinet Secretary for Education contained in Gazette Notice No. 3769 dated appointing Dr. Jeremy Bundi to be the Chairperson of the Council of Pwani University with effect from 24th April 2019 to 9thMarch 2010 and revoking the appointment of Dr. Jane Musangi Mutua with immediate effect.

c. That the costs of this application be provided for.

**The Respondent's Replying Affidavit**

21. Prof. George A. O. Magoha, CBS, the Cabinet Secretary, Ministry of Education, in opposition to the application swore the Replying Affidavit dated 13thMay 2019. He averred that he is the Cabinet Secretary responsible for providing policy direction in the Ministry responsible for National Policies for Education and Academic Research. He further deposed that he is responsible for making appointments for members of Board of State Corporations under the Ministry and Chairpersons of Councils of Public Universities.

22. Prof. Magoha deposed that the applicant's application has no basis because the procedure for appointing Chairpersons of the Councils of

Public Universities and Constituent Colleges is provided in section 36(1) of the Act, which provides that the council of a Public University or constituent college shall consist of nine members appointed by the Cabinet Secretary. He further deposed that as the Cabinet Secretary responsible for University Education, he deemed it necessary to effect changes at MMUST and Pwani University to improve management and service delivery.

23. He averred that he changed the management of the two Universities by revoking the appointment of the first Interested Party as the Chairperson of the Council of MMUST vide Gazette Notice No. 2348 of 10th March 2017 which had appointed him to serve for a period of three years. He stated that he appointed him to serve as Chairperson of the Council for Pwani University for the remainder of his term expiring on 9thMarch 2020.

24. He further averred that he revoked the appointment of the second Interested Party who had been appointed as the Chairperson of Pwani University vide Gazette Notice Number 2349 of 10thMarch 2017 and appointed her to serve as the Chairperson of the Council of MMUST for the remainder of her term expiring on 9thMarch 2020.

25. In addition, Prof. Magoha averred that his decision is founded on section 51 of the Interpretation and General Provisions Act[11] which stipulates *inter alia* that the power to appoint includes power to suspend, dismiss, etc., and to reappoint, etc. He also averred that the services of the first and second interested parties were not terminated, as they will continue to serve in the same capacity for the remainder of their term. He added that the *ex parte* applicant's application is misconceived and that the grounds for removal of the members of the council from office do not apply in the circumstances of this case since he intended to improve the management at the two Universities. He stated that he did not terminate their terms and that the decision was in public interest.

26. Lastly, he deposed that he did not act *ultra vires* but he acted within the powers conferred upon him by the law.

**First Interested Party's Replying Affidavit**

27. Dr. Jeremy Bundi swore the Replying Affidavit dated 17thMay 2019. He deposed that the law establishes the University Council and spells out its functions and composition. He also averred that under the law, the Vice-Chancellor of a public University is an *ex-officio* member of the councils of the constituent colleges of the University.

28. Dr. Bundi deposed that under section 7 of the Act, the qualifications of the chairperson and members of the Commission, apply with necessary modification to the chairperson and members appointed under subsection (1) (d) of section 36 of the Act. He averred that section 8 which relates to the vacancy of office of the chairperson and members of the Commission for University Education apply with necessary modifications to the chairperson and members appointed under section 36 (1) (a) and (d).

29. He averred that under the Act, council members appointed under section 36(1) are required at their first meeting after appointment to determine by lot two of their number shall vacate office after a period of three and four years respectively to ensure continuity in the activities of the Council. In addition, he referred to the provisions of section 8 of the Act, which provides for vacancies in the office of the chairperson and members of the Commission for University Education and which by virtue of section 36 of the act applies to vacancies in the office of the chairperson and members of the council.

30. He further averred that on 10thMarch 2017, vide Gazette Notice Number 2348, the then Cabinet Secretary for Education Dr. Fred O. Matiangi appointed him as the Chairperson of the Council of MMUST and also appointed members of the Council. He deposed that they were to serve for a period of three years with effect from 10thMarch 2017. He averred that he has never vacated or been vacated from office of Chairperson of Council for MMUST as provided under the Act.

31. He urged the court to interpret section 8 of the Act, and the revocation of his appointment and the meaning of the provisions, which anticipate members of the Council to serve for periods of between three and four years, and, his appointment to serve as the Chairperson of Pwani University for a period of one year.

**Second Interested Party's Replying Affidavit**

32. Dr. Jane Musangi Mutua in her Replying Affidavit dated 21stMay 2019 averred that vide Gazette Notice number 2349 dated 10th March 2017, she was appointed the Chairperson of Pwani University with effect from 10th March 2017 by the then Cabinet Secretary for Education Dr. Fred Matiangi. She averred that her contract of service was for three years expiring on 10thMarch 2020.

33. She further averred that on 24thApril 2019, vide Gazette Notice No. 3763, she was appointed the Chairperson of MMUST with effect from 24thApril 2019 to 9thMarch 2020 by the Cabinet Secretary for Education Prof. George Magoha.

34. She further averred that on the same day vide gazette Notice No. 3769, the first interested party was appointed the Chairperson of Pwani University with effect from 24thApril 2019 by the Education Cabinet Secretary Prof. George Magoha and that her contract as Chairperson of Pwani University was revoked with immediate effect.

35. She deposed that the subsequent appointment was a transfer and not a termination from her previous office. She added that the effect of the transfer was that her terms of service remained the same; hence, the Ministerial directive has not infringed her rights. She averred that the applicant has not demonstrated how he will be prejudiced by the impugned decision and that granting the orders sought would result in judicial interference with the executive arm of the government.

**The Third Interested Party's Replying Affidavit**

36. Linda Omenya, the Assistant Legal Officer of MMUST swore the Replying Affidavit dated 21st May 2019. She averred that on 10th March 2017, vide Gazette Notice Number 2348, the first Interested Party was appointed the Chairperson of MMUST with effect from 10th March 2017 by the then Cabinet Secretary for Education Dr. Fred Matiangi, and, that, his contract of service was for three years expiring on 10th March 2020.

37. She deposed that on 24th April 2019, vide Gazette Notice number 3769, the first Interested Party was appointed the Chairperson of Pwani University with effect from 24th April 2019 by the Cabinet Secretary for Education Prof. George Magoha. She averred that his contract of service runs from 24th April 2019 to March 2020, and, that, the second Interested Party's appointment as Chairperson at Pwani University Council was revoked with immediate effect.

38. She further averred that on 24th April 2019, vide Gazette Notice Number 3763, the second Interested Party was appointed the Chairperson of MMUST with effect from 24th April 2019 by the Education Cabinet Secretary Prof. George Magoha, and, that, the contract of service was from 24th April 2019 to 9th March 2020. She averred that the first Interested Party's appointment as chairperson of MMUST was revoked with immediate effect.

39. She also averred that the effect of the appointment was that the second Interested Party replaced the first Interested Party as the MMUST Council Chairperson for the remainder of his term, and, that, the subsequent appointment was a transfer and not a termination of the previous offices, and, that, the terms of service remained the same.

40. She further averred that the Cabinet Secretary reserves the right to re-deploy Council Chair person, and, that the applicant has not demonstrated it would be prejudiced by the decision. In addition, she averred that the *ex parte* applicant has no *locus standi* because it is a representative of Kenya Universities non-teaching Staff as defined in Article 3 of the KUSU Constitution in which the first Interested Party is not represented.

**The Fourth Interested Party's Replying Affidavit**

41. Prof. Mohammed S. Rajab, the Vice Chancellor of Pwani University swore the Replying Affidavit dated 22nd May 2019. The substance of his affidavit is that currently, the fourth Interested Party has a properly established council with nine members appointed by the Cabinet Secretary in accordance with section 36 of the Act.

**Courts directions**

42. Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner. Parties are obliged to comply with court directions and to assist the court in its duty to administer expeditious disposal of cases.

43. This case came up for hearing on 12th June 2019. However, the court had a lengthy hearing and this case could not be reached and at 1 pm, the court in the presence of all the parties directed that hearing would proceed the following day, that is, on 13th June 2019 at 9.00am.

44. However, on 13th June 2019, the Respondents' counsel Miss Chimau did not attend court. The court first heard an application by an intended Interested Party seeking to be joined in these proceedings. Mr. Ayieko, appearing for the Intended Interested Party held brief for Miss Chimau for the purposes of the said application. The court heard the application and ruled that it did not meet the tests for the applicant to be joined as an Interested Party and dismissed it. Mr. Ayieko informed the court that his instructions to hold brief for Miss Chimau were limited only to the said application and not the hearing.

45. Mr. Ogoya, counsel for the *ex parte* applicant pointed out that the date was fixed the previous day in the presence of the Respondents' counsel. He urged the court to proceed with the hearing. The court recalled that the date was fixed in the presence of all the parties and directed the hearing to proceed.

46. At the conclusion of the hearing, Mr. Ogoya, counsel for the *ex parte* applicant applied for conservatory orders pending the delivery of the judgment on grounds that the impugned decision had been implemented, and, that, in the event the case succeeds, there was a real risk of the judgment being rendered useless. The court agreed with this submission, and, stayed the impugned Gazette Notices pending delivery of the judgment which was reserved for 7th October 2019.

47. However, on 2nd July 2019, the Respondents' counsel filed an application seeking to *inter alia* set aside the stay order. However, at the *inter partes* hearing of the application on 10th July 2019, Miss Chimau withdrew the application after the court pointed out that it would delay delivery of the judgment as scheduled.

**Issues for determination**

48. Upon considering the detailed descriptions of the Parties' positions and submissions, I find that the following issues distil themselves for determination:-

a. Whether the first Respondent's decision is ultra vires his statutory mandate.

b. Whether the ex parte applicant has the locus standi to institute these proceedings.

c. Whether the impugned decision violates the right to legitimate expectation of the stakeholders of the two Universities and the ex parte applicant.

**a. Whether the first Respondent's decision is ultra vires its statutory mandate.**

49. Mr. Ogoya, counsel for the *ex parte* applicant submitted that the narrow question before the court was the interpretation of the law relating to the power of the Cabinet Secretary for Education concerning appointment and terms of office of members of Councils of Public Universities. He submitted that the theoretical foundation of Judicial Review of administrative action has two principles, namely, constitutionalism and the Rule of Law.

50. To advance his argument, he submitted that the underlying principle of constitutionalism is one simple logic, that is, an individual citizen has authority to do anything under the sun unless limited by law. To him, the government is prohibited from doing anything unless authorized by the law. He argued that a Chairman of the University Council must serve for a minimum of three years and must be appointed as prescribed by the law. He pointed out that the first interested party had only served for one year as opposed to the minimum of three years, yet the Gazettee Notice purported to revoke his appointment. He further argued that the first interested party was appointed as Chairperson of Pwani University to serve for a period of less than one year from 24th April 2019 to 9th March 2010. He reiterated that by law, the Chairperson must serve for three years. He urged that the appointment of the second Interested Party who was appointed on 10th March 2017 was revoked in a similar manner.

51. He referred to section 36 of the Act, which provides for circumstances under which the office of a Member of the University Council becomes vacant. It was his submission that there was no vacancy to warrant the appointments. He submitted that the impugned Gazette Notices revoked the appointment of the serving Chairpersons. He invited the court to consider whether section 36 of the Act, which must be read together with section 8 of the Act, empowers the Cabinet Secretary to create the vacancy by Ministerial revocation. It was his submission that the answer to this question must be in the negative. He added that the same argument applies to the creation and filing the vacancies at a Pwani University. He maintained that when a person is appointed a Chairperson of a University Council, unless a vacancy arises, he must serve three years. He argued that the Minister has no power to shorten the period outside the grounds provided in section 36 as read with section 8 of the Act.

52. Mr. Ogoya pointed out the word "revocation" appears in the impugned Gazette Notices, hence, defeating the argument that the appointments were not terminated. He also submitted that the Minister has no power to transfer as was alleged by the Respondent and the second Interested Party. It was his submission that the Minister cannot purport to interfere with the appointments without following the law, hence, he acted illegally.

53. As stated earlier, the Respondents counsel did not attend the hearing on 13th June 2019 despite the fact that the hearing date was taken in her presence the previous day. Nevertheless, the Respondents filed the Replying Affidavit Prof. George A. O. Magoha, CBS, the Cabinet Secretary, Ministry of Education the crux of which I summarized earlier.

54. I have carefully considered the Prof. Magoha's Affidavit. At the risk of repeating what I distilled from his Affidavit as enumerated earlier, the Cabinet Secretary deposed that he is responsible for making appointments for members of Board of State Corporations under the Ministry and Chairpersons of Councils of Public Universities under section 36(1) of the Act. He further deposed that he deemed it necessary to effect changes at MMUST and Pwani University to improve management and service delivery.

55. Prof. Magoha averred that he changed the management of the Universities by revoking the appointment of the first Interested Party who had been appointed as the Chairperson of the Council of MMUST vide Gazette Notice No. 2348 of 10th March 2017 for a period of three years. He averred that he instead appointed him to serve as Chairman of the Council for Pwani University for the remainder of his term, which expires on 9th March 2020.

56. He further averred that he revoked the appointment of the second Interested Party who had been appointed as the Chairperson of Pwani University vide Gazette Notice Number 2349 of 10th March 2017 and appointed her to serve as the Chairperson of the Council of MMUST for the remainder of his term which expires on 9th March 2020.

57. Prof. Magoha supported his actions by citing section 51 of the Interpretation and General Provisions Act,[12] which he deposed confers upon him power to appoint including power to suspend, dismiss, etc., and to reappoint, etc.

58. In addition, he maintained that the services of the first and second interested parties were not terminated because they will continue to serve in the same capacity for the remainder of their term. He argued that the grounds for removal of the members of the council from office do not apply in the circumstances of this case since he intended to improve the management at the two Universities. He stated that the decision was in public interest, and, that, he did not act *ultra vires*, because he acted within the powers conferred upon him by the law.

59. The first Interested Party relied on his Affidavit. He averred that he had no personal interest in the matter. He however pointed out that each University has its own Charter and must operate within the Charter and that once appointed the Chairperson of the council must serve for three years.

60. Miss Omenya, counsel for the second and third Interested Parties relied on the Affidavit sworn by the second Interested Party dated

21st May 2019 and her own Affidavit dated the same day. She argued that the *ex parte* applicant has not demonstrated that it will suffer loss and added that an employee can be deployed anywhere in the Republic. It was her argument that the transfer has no effect on the University.

61. Mr. Kabuthi, counsel for the fourth interested party relied on the Affidavit of Prof. Mohammed S. Rajab, the Vice –Chancellor and added that the fourth Interested Party has a properly constituted council.

62. It is trite law that government officers and public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. Inevitably, for the impugned Gazette Notices to stand, it must be demonstrated that the decision(s) contained in the Gazette Notices is grounded on law. As such, the first Respondents' decision/actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. This position was best explained *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* as follows:-

> **"…**the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[13]**

63. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.[14] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the first Respondent is constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law.

64. The first respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law governing appointment and removal of persons appointed as Chairpersons and Members of University Councils. It would in general be wrong to whittle away the obligation of the first Respondent as a Cabinet Secretary to uphold the law. A lenient approach could be an open invitation to the first Respondent to act against his legal mandate and pose a real danger of compromising both the process of appointment and removal of persons appointed to the said positions.

65. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies and public officers to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[15]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

66. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality."

67. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

68. Statutes do not exist in a vacuum.[16] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[17] The courts should therefore strive to interpret powers in accordance with these principles.

69. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators or government functionaries with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

70. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators or government functionaries comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by statutory bodies can be judicially challenged on grounds that the administrative decision does not comply with the above-mentioned basic requirements of legality.

71. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

72. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative

body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general, terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it.

73. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. Consequently, the legality of an administrative decision or a decision of a government functionary can be challenged because discretion is abused or improperly exercised. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

74. When legislation, policy, decision or an act or omission of a government official is challenged, the court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"[18] the impugned legislation, policy, decision, act or omission is capable of being read in a manner that complies with the constitution or the enabling statute. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[19] or the relevant statutory provisions.

75. The court is obliged to avoid an interpretation that clashes with the constitutional values, purposes and principles. It must seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and an interpretation that permits development of the law and contributes to good governance.

76. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[20]Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[21] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others*[22] citing Lord Denning:-[23]

> "The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach." In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say,"There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."(Emphasis added).

77. Now, it is convenient to examine the two provisions upon which this contest revolves. Section 36 of the Act stipulates as follows:-

> **36. Council of a public university**
>
> 1. The council of a public university or constituent college of such a university shall consist of nine persons appointed by the Cabinet Secretary as follows—
>
> a. chairperson;
>
> b. the Principal Secretary in the Ministry for the time being responsible for the university education;
>
> c. the Principal Secretary in the Ministry for the time being responsible for Finance;
>
> d. five members appointed by the Cabinet Secretary through an open process in such a manner as may be prescribed in guidelines issued by the Cabinet Secretary; and
>
> e. the Vice-Chancellor or, in the case of a constituent college, the Principal of such college who shall be an ex officio member of the Council.
>
> 1A) Notwithstanding subsection (1) the Vice-Chancellor of a public university shall be an ex-officio member of the councils of the constituent colleges of that university.
>
> 2. The provisions relating to the qualifications of the chairperson and members of the Commission in section 7 shall apply, with necessary modifications, to the chairperson and members appointed under subsection (1) (d).
>
> 3. In making appointments under this section the appointing authority shall have regard to the objectives of the development of university education, ensuring that there are balanced competencies, gender equity, and the inclusion of stakeholders, persons with disabilities, the marginalized and other minority groups.
>
> 4. The provisions of section (8) relating to the vacancy of office of the chairperson and members of the Commission shall apply with necessary modifications to the chairperson and members appointed under subsection (1) (a) and (d).
>
> 5. The members of the Council appointed under section 36(1) shall at their first meeting after appointment determine by lot which two of their number shall vacate office after a period of three and four years respectively to ensure continuity in the activities of the

Council.

78. Section 8 of the Act relates to the vacancy of office of the chairperson and members of the Commission for University of Education and which by virtue of section 36(4) of the Act applies to vacancy of office of chairperson and members of council. The section provides that the office of member of a university council becomes vacant if the member:-

**8. Vacancy of office**

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

a. resigns by notice in writing addressed to the Cabinet Secretary;

aa. is absent from three consecutive meetings of the Commission without the permission of the Chairperson, or, in the case of the Chairperson, the permission of the Cabinet Secretary;

b. is unable to perform the functions of office by reason of prolonged physical or mental incapacity;

c. is adjudged bankrupt by a court of competent jurisdiction or enters into a composition or scheme of arrangement for the benefit of creditors;

d. is guilty of gross misconduct;

e. fails to meet the requirements of Chapter Six of the Constitution; or

f. is convicted of an offence and sentenced to imprisonment for a period of six months or more.

79. The act section has salient features geared to shield the Chairperson and Members of the Council from improper interference, or, removal from office on any other grounds other than those stipulated in section 8 of the Act. This section is of some significance. It must be read in the context of the constitutional guarantee to academic freedom and freedom of scientific research[24] and the purposes of the enabling statutes. The section guarantees that the Chairperson and the Members of the University Council remain independent once appointed while performing their duties. Any act or conduct that purports to force a Chairman or Member of the Council to vacate his office other than in the manner prescribed under section 8 compromises or has the potential to compromise the independence of the Council. Such an act would be invalid since it cannot be read in a manner that is consistent with section 8 of the Act or the constitutional guarantee of academic freedom.

80. Academic freedom is the conviction that the freedom of inquiry by faculty members is essential to the mission of the academy as well as the principles of academia. Scholars should have freedom to teach or communicate ideas or facts (including those that are inconvenient to external political groups or to authorities) without being targeted for repression, job loss, or imprisonment.

81. Academic freedom is characterized by a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom. Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar. To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to qualify either even by the immediate impact of his professional endeavors upon the economic well-being or good will of the very institution that employs him, is to abridge his academic freedom.

82. Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials in the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics

83. As the definition in the Act states, the University Council is the governing body of a University. Its functions as stipulated in section 35 of the Act leave no doubt that the council plays a central role in the management of the University and approving and implementing its policies. In order for the Council to effectively perform its functions, Parliament deemed it fit to confer it members with security of tenure. The security of tenure conferred by section 8 is not for cosmetic purposes. It is carefully designed to serve a salutary purpose which is closely intertwined with the constitutionally guaranteed academic freedom and freedom of research.

84. The question that follows is whether the manner in which the Cabinet Secretary purported to revoke the appointments of the first and the second Interested Part offends section 8 of the Act. Crucially, at the hearing before me, the Respondents' counsel argued that the impugned decision was not a "revocation" of the appointments but a "transfer or re-deployment." This argument is legally frail and flawed. It contradicts the language of the Gazette Notices, which clearly used the word "revocation." In addition, the argument flies on the face of the enabling statute, which provides the period of service once appointed and grounds for removal.

85. The arguments by the second Interested Party, third and fourth Interested Parties who supported the position taken by the Respondents are equally unsustainable and offend the above provisions.

86. Judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[25] In *Council of Civil Service Unions v. Minister for the Civil Service*[26] Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision *ultra vires*. These grounds are; *illegality, irrationality* and

*procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*. [27]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as*"unreasonableness"* in *Wednesbury* Case.[28] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

87. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

88. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

89. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

90. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.

91. It is axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself, which governs the exercise of all public power, as opposed to the narrow realm of administrative action only.[29] The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful.[30]A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational.[31]

92. Decision-makers should not pursue ends which are outside the ''objects and purposes of the statute.'' It is said that power should not be ''exceeded'' or that the purposes pursued by the decision-maker should not be ''improper,'' ''ulterior'', or ''extraneous'' to those required by the statute in question. It is also said that ''irrelevant considerations'' should not be taken into account in reaching at a decision.

93. In order to give meaning to section **36** of the Act as read with section 8 of the Act, regard must be had to its wording, read in context, and having regard to the purpose of the entire statute as discerned from the preamble to the Act and the dictates of the Rule of Law. Read against this backdrop, the following key principles can be discerned from the plain wording of sections 36 and 8 of the Act.

*94. First*, the provisions are carefully crafted to ensure protection of tenure of office for the persons appointed as Chairperson and Members of a University Council to serve for the periods of between three and four years, unless, their appointment is terminated on any of the grounds stipulated in section 8 of the Act.

95. Second, the statutory security of tenure of office conferred upon the persons appointed to serve in the said offices serves a salutary purpose of guaranteeing their independence in the performance of their functions.

*96. Third*, the statutory guaranteed security of tenure to persons appointed to serve in the University Council has a constitutional underpinning. As pointed out earlier, the Constitution guarantees academic freedom and freedom of research.

97. In general, it is possible to identify three types of claims that can be made under academic freedom. *Firstly*, academic freedom can be claimed by individual scholars, as a freedom to determine how they do their work free from direction, especially how they teach and conduct their research.

98. Secondly, universities and higher education institutions can make institutional claims to academic freedom. In this regard, a University Senate or Council can claim this institutional aspect of academic freedom. Of particular relevance is the well-known statement in the separate concurring judgment of Justice Frankfurter in the US Supreme Court case of *Sweezy v New Hampshire*.[32] In that case, the Attorney General attempted to have a left-wing Harvard professor answer questions about the content of a lecture he gave at a state university in New Hampshire. Formulating academic freedom as an institutional right, Frankfurter stated that universities could determine for themselves what they teach, how they do it or who may be admitted to study. Following this decision, US courts have developed the constitutional protection of institutional claims to academic freedom, within the guarantees of the First Amendment. In the same vein, the Act contemplates an independent Council with a guaranteed tenure of office to secure its independence in the performance of its duties.

99. *Thirdly*, claims can be made by individual academics to ensure their participation in university governance, which is an important aspect of academic freedom.

100. Regarding the rationale behind academic freedom, the traditional arguments made in favour of its protection offer a sound justification. They revolve around the distinctive role played by universities in conducting research and being at the centre of discovery and the search for new truths and scientific methods. Moreover, alongside the utilitarian role of universities to advance social progress, it is equally important that they encourage in young people a sense of intellectual and cultural independence.

101. My reading of sections 36 and 8 of the Act leave me with no doubt that it precludes removal of office of persons appointed to serve in a University Council except on the grounds stated in section 8 of the Act. Consistent with these clear statutory provisions, it is my finding that the purported revocation of the appointment of the first and second Interested Parties by the Cabinet Secretary does not fall within any of the grounds enumerated under section 8 of the Act. It follows that the impugned decision contained in the Gazette Notices under challenge offend the said provision and is therefore invalid.

102. The attempt to baptize the revocation as a "transfer" or "re-deployment" does not change the illegal character of the decision. The said words do not appear in the relevant provisions of the law. It follows that the Cabinet Secretary misconstrued the law. The decision offends the principle of legality discussed earlier.

**b. Whether the ex parte applicant has the locus standi to institute these proceedings.**

103. Miss Omenya, counsel for the third and fourth Respondent argued that the *ex parte* applicant has no *locus standi* in this matter. She submitted that the issue before the court is an employment matter which ought to be defended by the affected parties.

104. Mr. ogoya, counsel for the applicant did not address this ground of assault.

105. Miss Omenya's argument is legally frail and unsustainable. This is because the Constitution of Kenya 2010 fundamentally altered the legal landscape in this country. It firmly entrenched public interest litigation and liberalized the rule of standing in public interest litigation. What a litigant needs to show is that he has no personal gains in the matter and that the matter is solely in public interest. The interpretation of what constitutes public interest is left solely to the court. It is for the courts to determine the constitutional bounds within which public interest cases can be entertained. In *John Wekesa Khaoya v Attornry General*,[33] the court set out the boundaries within which public interest cases can be entertained as follows:-

a. Be public interest;

b. Be brought to advance legitimate public interest;

c. Not aimed at giving the applicant a personal gain.

106. Article **22** of the Constitution provides as follows:-

> 1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
>
> 2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
>
> (a) a person acting on behalf of another person who cannot act in their own name;
>
> (b) a person acting as a member of, or in the interest of, a group or class of persons;
>
> (c) a person acting in the public interest; or
>
> (d) an association acting in the interest of one or more of its mem*bers*

107. The word person is defined in Article 260 of the Constitution to include a company, association or other body of persons whether incorporated or unincorporated. I have no doubt that the *ex parte* applicant falls under this definition.

108. Article **258 (1)** of the Constitution provides that every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

109. This relaxed approach to *locus standi* permits litigants to act on behalf of sections of the public whose human rights have been infringed, whether or not the individual victims are aware of these violations or able to approach the court for relief themselves.

110. Public interest standing, specifically provided for in Article 22 of the Constitution, creates the opportunity for any individual or group to approach a court if moved by a desire to benefit any portion of the public.[34] This broadened scope of standing is required for litigation of a public character, where the relief sought is generally forward-looking and general in its application.[35] It also displays elements of the Roman law *actio popularis* (especially the *actiones ordinariae*)[36] insofar as it also recognises each person's interest in the due performance of government activities, and accordingly enables the validity of such actions to be challenged by anyone.[37]

111. Article 22 of the Constitution therefore introduces a "radical departure"[38] from the common-law rules that regulated the issue of standing. This is because the applicant in a public interest action is not the direct bearer of the right concerned and need not have a direct interest in the remedy sought. The public interest standing provision found in the Constitution is a significant departure even from the old *actiones populares* found in Roman law, which only allowed an applicant to act in the public interest in specific instances.[39] The role of courts in a new constitutional democracy, as noted by O'Regan J in *Ferreira v Levin NO ("Ferreira"),**[40]*is to facilitate access to justice, which is not possible without a forward-thinking approach to the ssue of standing.[41]This role is not confined to the Constitutional Court, as was held in *Beukes v Krugersdorp Transitional Local Council and Another*.[42]All courts should now adopt a broad approach to standing when adjudicating constitutional issues.[43] Standing should therefore not be granted only to those with a direct interest in the outcome of the case, especially where remedies may have far-reaching impacts for many people.[44]

112. In order to invoke Article 22 of the Constitution, there must be an infringement or threatened infringement of a right in the Bill of Rights and the applicant must fall within a category listed under Article 22. However, an applicant alleging *locus standi* under Article 22 and purporting to act in the public interest does not have to prove an infringement or threatened infringement of the public's rights.[45] They need only allege that the challenged rule or conduct is objectively in breach of a right enshrined in the Bill of Rights[46] and that the public has a sufficient interest in the relief sought.

113. According to Black's Law Dictionary[47] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. There is no contest that the impugned decision affects public institutions and the public at large. It involves appointment of Chairperson and Members of the University Council, which is a matter of public interest. There is nothing to show that the *ex parte* applicant is not acting in good faith. There is nothing to show that the case was filed to advance personal gain of in bad faith.

114. Dealing with the question of "*bona fides"* of a petitioner, especially in the case of a person approaching the court in the name of Public Interest Litigation, the Indian Supreme Court in the case of *Ashok Kumar Pandey vs. State of West Bengal**[48]* held as hereunder: -

> "Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

115. Relying on the above case, the Supreme Court of India in *Dr. Akhtar Hassan Khan vs. ederation of Pakistan**[49]* stated that the court has to guard against frivolous Petitions brought before the court which are neither of public importance nor relatable to enforcement of a Fundamental Right or public duty.

116. In Kenya in Albert Ruturi, JK Wanywela & Kenya Bankers' Association vs The Minister of Finance & Attorney General and Central Bank of Kenya (the Ruturi case) being the case which ushered in "a new dawn of Public Law," the court stated as follows:-

> "In constitutional questions, human rights cases, public interest litigation and class actions...any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception."(Emphasis added).

117. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public-spirited persons.[50]Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common person. It is the duty of the court to see whether the person who approaches the court has a *bona fide* intention and not a motive for personal gain, private profit or political or other oblique considerations.

118. Considering the facts and circumstances of this case, I find that this Judicial Review application has not been brought for personal gain or in bad faith. I find and hold that this case is properly before the court and that the *ex parte* applicant has the *locus standi.*

**c. Whether the impugned decision violates the right to legitimate expectation of the stakeholders of the two Universities and the ex parte applicant.**

119. One of the grounds cited by the *ex parte* applicant in his application is that the impugned decision violates of the right to legitimate expectation of the stakeholders of the two Universities and the applicant.

120. However, none of the counsels including the *ex parte* applicant's counsel addressed this ground in their submissions. Since, it is one of the grounds cited in the application, I will address it. In any event, even if it had not been raised, the court would perfectly be entitled to address it since it is a point of law so long as it flows from the pleadings.

121. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a

decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First*, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second*, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

122. The first step in the analysis has both an objective and a subjective dimension. *First*, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[51] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

123. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[52] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[53] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> "Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."**[54]**

124. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[55] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires*. That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem*. It is clear that such representations will not be upheld by the court.[56] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.

125. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[57] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

126. The first and second Interested Parties and Members of the Councils for the two Universities were appointed in accordance with the provisions of section 36 of the Act. The law provides that they can be removed only on any of the grounds provided under section 8 of the Act. Having been appointed in accordance with the law, there is a legitimate expectation that they would serve for three or four years as the law provides. In addition, there is a legitimate expectation that they would be removed only on the grounds specified in section 8 of the Act. Similarly, the *ex parte* applicant and all the stakeholders in the two institutions have a legitimate expectation that the law would be followed. It is my finding that the impugned decision violates the doctrine of the right to legitimate expectation as herein above discussed.

**Final orders**

127. In view of analysis and determination of the issues discussed above, it is my finding that the *ex parte* supplicant's application dated 14th May 2019 is merited. Accordingly, I allow the application and grant the following orders:-

> *a. An Order of Certiorari be and is hereby issued quashing the decision of the Cabinet Secretary for Education contained in Gazette Notice Number 3763 of 24th April 2019 appointing Dr. Jane Musangi Mutua as the Chairperson of the Council of Masinde Muliro University of Science and Technology from the 24th April 2019 to 9th March 2020 and revoking the appointment of Dr. Jeremy Bundi as Chairperson of the council of the same University with immediate effect.*
>
> b. An order of certiorari be and is hereby issued quashing the decision of the Cabinet Secretary for Education contained in Gazette Notice No. 3769 dated appointing Dr. Jeremy Bundi to be the Chairperson of the Council of Pwani University with effect from 24 th April 2019 to 9thMarch 2010 and revoking the appointment of Dr. Jane Musangi Mutua with immediate effect.
>
> c. That each party shall bear its costs.

Orders accordingly

**Signed, Delivered and Dated at Nairobi this 18th day of September 2019.**

**John M. Mativo**

**Judge.**

[1] The Rule of Law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, 23rd August 2004.

[2] Ibid.

[3] {2018}eKLR.

[4] Published in Just Law {2004}.

[5] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[6] Act No. 14 of 2007.

[7] Act No. 42 of 2012.

[8] Act No. 42 of 2012.

[9] Cap 446, Laws of Kenya.

[10] Under section 35 of the Act, the functions of the Council are to employ staff, approve the statues of the University and cause them to be published in the Kenya Gazette, approve the policies of the University, approve the budget, and, in the case of public Universities, appoint the Vice Chancellor, Deputy Vice Chancellors and Principals and Deputy Principals of Constituent Colleges in consultation with the Cabinet Secretary, after competitive process conducted by the Public Service Commission and undertake other functions set out under the act and the Charter.

[11] Cap 2, Laws of Kenya.

[12] Cap 2, Laws of Kenya.

[13] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* {2006} ZACC 9; 2007 (1) SA 343 (CC).

[14] *National Director of Public Prosecutions vs Zuma*, Harms DP

[15] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[16] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[17] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

[18] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[19] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[20]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, *"A guide to reading, interpreting and applying statutes"* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[21] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. Supra note 1.

[22] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[23] Lord Denning, *The Discipline of Law* ,1979 London Butterworth, at page 12.

[24] See Article 33 (1) ( c) of the Constitution.

[25] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[26] {1985} AC 374.

[27] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[28] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[29] As Ngcobo CJ said in *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49

[30] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[31] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[32] 354 U.S. 234 (1957).

[33] {2013}e KLR

[34] South African Law Commission Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law R 8/1998 26 at 2.2.1; C Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1987) 104 South African Law Journal 131. 132. The Constitutional Court of South Africa recently confirmed in *Mokone v Tassos Properties CC and Another* 2017 5 SA 456 (CC) at para 17 that issues do not have to be important to all citizens to be deemed to be of general public importance; they need only be of importance to a "sufficiently large section of the public".

[35] V Amar and M V Tushnet, *Global Perspectives on Constitutional Law* (2009) 10. However, the relief may also be retrospective, as would be the case of an interdict for unlawful behaviour, for example.

[36] See part 2 2 2 above for Van der Keessel's categorisation of *actiones populares*.

[37] M Wiechers Administrative Law (1985) 275; G E Devenish "Locus Standi Revisited: Its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution" (2005) 38 De Jure 28 42. See part 2 2 2 above.

[38] See *Kruger v President of the Republic of South Africa and Others* 2009 1 SA 417 (CC) para 22 in which the court interpreted the equivalent provision in the South African Constitution.

[39] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 233. A Berger Encyclopedic Dictionary of Roman Law (1953) defines *actiones populares* as "actions which can be brought by 'any one among the people'. They are of praetorian origin and serve to protect public interest (ius populi)."

[40] 1996 1 SA 984 (CC).

[41] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 230.

[42] 1996 3 SA 467 (W).

[43] See *Beukes v Krugersdorp Transitional Local Council and* Another 1996 3 SA 467 (W) para 474E.

[44] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 230.

[45] See C Loots "Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation" (1987) 104 South African Law Journal 131 132; South African Law Commission Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law R 8/1998 26. Loots notes that a public right is a right enjoyed by all members of the public, and that it is possible for a plaintiff to bring an action based on a public right while seeking relief in his or her own interest. This must be distinguished from an action in the public interest.

[46] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 235.

[47] Sixth Edition.

[48]AIR 2004 SC 280.

[49]{2012} SCMR 455.

**[50]Public Interest Litigation: Use and Abuse, http://lawquestinternational.com/public-interest-litigation-use-and-abuse-0.**

[51] Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

[52] Søren Schønberg, *Legitimate Expectations in Administrative law* 118 (2003); *C.f*. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today

than is the case in EU law, *see*, Administrative Law of the European Union, its Member States And The United States 285 (Rene Seerden & Frits Stroink eds., 2002).

[53] Ibid.

[54] Ibid.

[55] Joined Cases 205-215/82, Deutsche Milchkontor GmbH et al. V Germany, 1983 E.C.R. 2633.

[56] Søren Schønberg, Legitimate Expectations in Administrative Law 118 (2003).

[57] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.