REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 611 OF 2016

IN THE MATTER OF APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF APPLICATION FOR AN ORDER OF CERTIORARI

IN THE MATTER OF ARTICLES 40(1), 47, 165(6) & (7); 157(1), (4), (6) (A), (9), & 11 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 & 9 (CHAPTER 26 LAWS OF KENYA)

AND

IN THE MATTER OF THE UNIVERSITIES ACT

AND

IN THE MATTE OF THE TECHNICAL UNIVERSITY OF KENYA CHARTER

BETWEEN

REPUBLIC…………………………………..…………..……..….APPLICANT

VERSUS

VICE CHANCELLOR,

TECHNICAL UNIVERSITY OF KENYA……........………1ST RESPONDENT

THE UNIVERSITY SENATE

TECHNICAL UNIVERSITY OF KENYA...……............…..2ND RESPONDENT

THE DIRECTOR OF THE SCHOOL FOR MECHANICAL AND PROCESS ENGINEERING DEPARTMENT…3RD RESPONDENT

THE ACADEMIC REGISTRAR

TECHNICAL UNIVERSITY OF KENYA……...............…..4TH RESPONDENT

EX-PARTE: APPLICANTS

JOSPHAT KOILEGE

GIDEON MUTUNGA

FREDRICK KIPNG'OK & 31 OTHERS

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th December, 2016, the applicants herein, who aver that they are bona fide 4th year students of Bachelor of Science in Mechanical Engineering Class, EEMI/2013PSC of the **Technical University of Kenya** (hereinafter referred to as "the University" or "TUK"), seek the following orders:

> **1. An order of CERTIORARI be granted by this Honourable Court to bring into this court the decision of the senate of the Technical University of Kenya's failure to administer a graduation of the 34 students in the Bachelor of Science in Mechanical and Process Engineering class for want of a course unit otherwise known as Computer Aided Design and Manufacturing.**
>
> **2. An order of MANDAMUS be granted by this Honourable Court to compel the Vice Chancellor in conjunction with Senate of Technical University of Kenya to enlist the names of 34 students in the graduation list for the graduation coming up on 20/12/2016.**
>
> **3. In the alternative, an order of MANDAMUS be granted by this Honourable Court to compel the Vice – Chancellor to graduate the 34 students enrolled in the class of 2013/2014, Bachelor of Science in mechanical and Process Engineering in a special graduation upon the completion of the necessary course known as "Compute Aided Design and Manufacturing".**
>
> **4. Costs of an incidental to the Application be in the cause.**

***Ex Parte* Applicant's Case**

2. According to the applicants, they successfully completed all the requisite units for their said programme having successfully met all Academic and financial obligations as required by ***Universities Act*** and even proceeded for industrial based learning (IBL) from September, 2015 to December, 2015. The class, they averred, was due for graduation in the graduation ceremony scheduled for 20th December, 2016.

3. However to their astonishment and utter consternation, on 7th November, 2016 they informally received information from **Mr. Kirui**, Ag. Chairman Mechanical Engineering Department that their class was not going to graduate that year as the University failed to administer/offer a unit called **'Computer Aided Design and manufacturing"** in their 3rd year of study. The said information, they averred **c**ommunicated to them one (1) year after they finished their studies at the University and just one (1) month to their scheduled graduation on 20th December, 2016. According to the applicants, the said unit was introduced after they had successfully completed their programme upon the introduction of the recently launched facility at the University to their detriment.

4. It was therefore their case that this is against the backdrop of glaring Constitutional and Statutory provisions as the Institution is neither apologetic nor remorseful. They averred that the public confidence stands eroded and has left them perplexed at such atrocious and irresponsible incorrigible conduct of the Respondents. They asserted that this kind of anomalies by the Respondents institution is unbecoming of the University, which is supposed to adhere to the set rules and laws of Kenya and not to serve as havens for frustration and subverting the legitimate expectations of students who deserve to reap where they sow.

5. The applicants averred that as a class, they took the informal information seriously and on 8th November, 2016 held a class meeting to discuss the issue which said meeting was attended by all the class members (the Applicants herein), **Mr. Kirui**, Ag. Chairman Mechanical Engineering Department and **Prof. Marwanga**, the Director of the School of Mechanical and Process Engineering. According to the applicants, during the meeting, **Prof. Marwanga**, the Director of the School of mechanical and Process Engineering admitted that this was a great failure within the Department and promised to discuss the issue with the Academic Registrar and the DVC Academic Research and the students and the applicants were informed there would be a solution to the problem by 11th day of November, 2016. However no communication was received from the University.

6. The applicants averred that on 16th November, 2016 thy wrote an official complaint to the University addressed to the Vice Chancellor, Academic Research and Students which letter was received on the same date but was not responded to. Similarly, despite the fact that they were due to graduate in 2016, they were yet to receive their provisional results for 4th year exams done in April and August, 2015.

7. It was averred that the advanced Engineering lab where the teaching of the alleged Unit should have taken place in their 3rd year of study (between May to December 2014) was not operational then and the CNC Machines were still under installation by then hence the Lab was still not operational by the time they finished their studies in late 2015. Similarly, the fact that the preceding classes that graduated in 2014 and 2015 did not take the said unit went further to show that the alleged Unit was never a Unit at the Institution. They applicants therefore averred that they should not be victimized for alleged failures of the University and in any event there were students who had graduated before them in the year 2014 and 2015 without taking the alleged course. The applicants averred that they had waited for a whole year to graduate without being informed that there was a Unit they did not attend to and some were employed on condition that they avail their Degree Certificates upon graduation this. The applicant relied on section 3(2) of the ***Universities Act, 2012***, Laws of Kenya which mandates the Institution to uphold the national values and principles and declares in verbatim:

> ***"In the discharge of is functions and the exercise of its powers under this Act, a university shall be guided by the national values and principles of governance set out under Article 10 of the Constitution, and shall in that regard –***
>
> ***a. Promote quality and relevance of its programmes;***
>
> ***b. Enhance equity and accessibility of its services;***
>
> ***c. Promote inclusive, efficient, effective and transparent governance systems and practices and maintenance of public trust;***
>
> ***d. Ensure sustainability and adoption of best practices in management and institutionalization of system of checks and balances.***
>
> ***e. Promote private-public partnership in university education and development; and***
>
> ***f. Institutionalize non-discriminatory practices.***

8. The applicants contended that they were perturbed at the University Management's incredible lack of transparency, wild tactics and delaying antics in frustrating them yet the University is regulated by the

Universities Act which has well defined code of ethics that outlines the parameters of engagement. They therefore urged this Court not to allow Universities standards to plummet, neither give room for any undertones or display of negligence or unruly conduct such as what is exhibited by the Respondents.

9. It was averred that on 28th November, 2016 the applicants' advocates on record herein wrote to the University's Vice Chancellor a demand letter which letter was copied to various officers of the University and the Ministry of Education as indicated therein and the letter was received on 30th November, 2016 but the letter went unanswered. In the premises the Court was urged to exercise its powers to order the University management to exercise their authority under the Technical University of Kenya Charter and the ***Universities Act***, 2012, Laws of Kenya to ensure the applicants were included in the graduation list and upcoming graduation and further given full transcripts and completion letters pending graduation as per their performance and achievements in order to ensure that the ends of Justice are met.

10. With respect to the omission to join the Technical University of Kenya as a Respondent, the applicants we responded that they acted on the premise that all the Respondents are agents and/or employees of the University and are all involved in the day to day running of the Technical University of Kenya and thus the ones whose decision is under judicial review and that the ***Universities Act, 2012*** places the said roles on the Respondents specifically the Vice-Chancellor and the Council.

11. The applicants reiterated that they were recognized as duly registered students of the institution under the Faculty of Engineering Sciences & Technology and that when they joined the institution, they were given the academic programs and all the units/courses that they were required to undertake at the University and at no time were they ever informed that they needed to undertake a course unit otherwise known as **"Computer Aided Engineering".**

12. According to them, they completed all requisite coursework by August 2015 and awaited graduation way before the ***Engineering Technology Act*** enacted on 19th August, 2016 which does not even compel the students to cover the unit claimed to be core now i.e Computer Aided Engineering. It was there view that laws should not be applied retrospectively thus the application of the ***Engineering Technology Act*** enacted on 19th August, 2016 cannot affect students that completed their studies almost a year before the said Act was enacted. They however averred that the Respondents having known that the new Act had come into force and would allegedly affect them did not inform them of the same and they only came to learn of the same through unverified sources a few weeks to graduation.

Respondents' Case

13. In response to the application, the Respondents averred that on preliminary perusal of all the pleadings filed herein it noted that TUK had not been joined in these proceedings, an affirmation of the lack of any cause of action against TUK and despite being a necessary party to these proceedings.

14. According to the Respondents, the applicants herein are not bona-fide students of the TUK. They further averred that the suit herein as drawn and filed is fatally defective as it purports to have been filed on behalf of others who have not given their authority in the present suit.

15. It was however contended that even if at all the applicants were at the material time, bona fide students of TUK, they did not complete the requisite course to allow them obtain the approval of the University Senate to proceed and graduate. Further, a perusal of the annexed documents does not disclose when each of the purported applicants was admitted to TUK and also the progress (if any) they have made over the years to enable them claim (albeit wrongfully) that they have now completed the requisite course work to enable them graduate and receive their degrees. It was averred that indeed those students, excluding the applicants herein, who have successfully completed their course, were scheduled to graduate on the 20th December, 2016 and these are 3154 students whose particulars were disclosed.

16. It was therefore averred that from the averments and documents contained in the applicant's pleadings it is evident that they are from the Faculty of Engineering Sciences and Technology (FEST) which has a

huge number of graduates who, having successfully completed their course work, are poised to graduate on the 20th December, 2016. Accordingly, it was misleading for the applicants to purport that there are only 34 or 36 (the applicants aren't even sure how many) students in the faculty while it is evident that there are many more who will receive their degree certificates on the forthcoming graduation date.

17. It was however contended that the correct name of the degree course which the applicants ought to be pursuing is called Bachelor of Technology (Mechanical Engineering) and which is governed by the provisions of the ***Engineering Technology Act, 2016*** which came into force on 19th August, 2016 under which there was established the Kenya Engineering Technology Registration Board whose mandate is *inter alia* to:

> a. Participate, as a stakeholder in formulating engineering technology programmes in public and private universities and other tertiary level educational institutions offering education in engineering technology for the purposes of registration of engineering technologists;
>
> b. Plan, arrange, co-ordinate and oversee professional training and facilitate internship of engineering technologists;
>
> c. Collaborate with engineering technology training institutions and organisations, professional associations and other relevant bodies in matters relating to training and professional development of engineering technologists;
>
> d. Determine disciplines of engineering technology under the Act.

18. I was disclosed that the said Act at section 41 thereof further provides as follows:

> ***A person who operates a training institution which is not recognized and accredited by the relevant Government body as an institution for training persons seeking registration under this Act or, being in charge of such institution:-***
>
> ***a. Admits to the institution under his or her charge any person for purposes of training in the engineering technology profession;***
>
> ***b. Purports to conduct a programme of training or examining persons seeking registration under this Act;***
>
> ***c. Issues any document, statement, certificate or seal implying that:***
>
> ***i. The holder thereof has undergone a course of instruction or has passed an examination recognized by the Board; or***
>
> ***ii. The institution under his or her charge is recognized by the relevant government body as an institution for training of person seeking registration,***
>
> ***Commits an offence and is liable on conviction to a fine of five million shillings or to imprisonment for a tem not exceeding five years, or both.***

19. It was averred that TUK only recently received an interim letter of accreditation from the Kenya Engineering Technology Registration Board which letter, is not retrospective in operation. Notwithstanding the above, the said course known as "Computer Aided Design and Manufacturing" is a fundamental course and any student who undertakes the degree course of the Bachelor of Technology (Mechanical Engineering) and does not undertake the said course is technically unqualified and ought not to be allowed to join the profession as his/her abilities and qualifications are a risk to the general public who are the consumers of the services rendered by such graduates. Notwithstanding the above, in light of the provisions of the said ***Engineering Technology Act, 2016*** such a graduate will never get licenced by the Board and will be compelled to return to college and undertake the said unit which is fundamental for

the competence of the graduates and safety of the general public.

20. The Respondents disclosed that previously the relevant accreditation for Engineering Technologists was sought under the Engineers Registration Board which had difficulties understanding and/or appreciating the nature of Engineering Technology and which informed the enactment of specific legislation to address the unique concern of this cadre of professional. Being a nascent profession in the Country it was imperative for high professional standards to be established, maintained and met if the general public are to receive quality services from those who have undertaken the said course.

21. It was disclosed that at TUK the said "Computer Aided Design and Manufacturing" Course which is a core subject leading to the issuance of Bachelor of Technology (Mechanical Engineering) degree was previously undertaken by **Professor Wilson Ogola** who passed away some time ago. However, by its very nature, the said course is highly specialised, and qualified lecturers to teach the said course are few and far in between in Kenya leading to a shortage of qualified personnel capable of imparting the requisite skills and knowledge to students of the said course. Upon his unfortunate death, TUK embarked on a world-wide search for a suitable replacement lecturer and identified one, who would be available to take up his duties in January, 2017. It was however averred that since for one to competently cover the said unit and undertake the requisite exams it takes at least four months of continuous study after which one may attempt the requisite exams, it was evident that the earliest the students undertaking the said unit would complete their course work was in April/May 2017. Subsequent thereto the said students would be required to sit for exams which fall within the usual annual cycle for exams for TUK and only after they pass their exams would they be eligible, subject to approval by the senate, to receive their degrees.

22. The Respondents took the view that the applicants herein were not eligible to graduate and receive degrees in their chosen field for the simple reason that they had not completed the relevant academic studies to warrant their graduation. It was therefore the Respondent's case that in the event that this Honourable Court grants the applicants prayers it would be in contravention of the law (Engineering Technology Act, 2016) and it would set a bad precedent with students seeking to circumvent the acquisition and grounding in specialised disciplines of study through advancing dubious arguments in Court.

23. The Respondents took the view that the interests of the General public and notably the Right to Goods and Services of Reasonable Quality as envisaged under Article 46(1)(a) of the Constitution, 2010 cannot be sacrificed at the altar of expediency and speed and it is imperative that the applicants meet the basic standards of qualification as regulated by their professional law.

24. It was averred that assuming that the applicants were legitimate and bona fide students of TUK, by virtue thereof they are members of and subject to the provisos of the Students Association of Technical University of Kenya (SATUK) which provides for mechanisms to resolve all issues that the students may have. Notwithstanding the foregoing, the applicants herein are prematurely before this Honourable Court as they have not exhausted the established mechanisms of dispute resolution subsisting within TUK and which include:-

> a. The office of the Deputy Vice-Chancellor, Academics, Research and Students (ARS). No complain was made to the said office by any of the applicants herein and it is only fair and just that the said office resolves the issue which is squarely within its mandate.
>
> b. The office of the Public Complaints (TUK) under the University Secretary – No complaint was made to the said office by any of the applicants herein and it is only fair and just that the said office resolves the issue which is within its mandate, and;
>
> c. The Academic Secretary, Students Association of Technical University of Kenya (SATUK) - No complaint has been made to the said office by any of the applicants herein and it is only fair and just that the said office resolves the issue which is within its mandate.

25. It was however averred that the Vice-Chancellor of TUK had taken up the applicants grievances, as

forwarded through their Advocates on record and requested for particulars relevant to resolution of the matter but which particulars have never been supplied or provided by the Applicants who *ipso facto* have now stalled the dispute resolution process.

26. According to the Respondents, since one of the functions of the University senate is to *"…decide which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other award of the University;"*, in the instant case it is clear that the applicants herein by failing, for reasons explained, to undertake the mandatory subject known as "Computer Aided Design and Manufacturing" did not attain the required standard of proficiency, and it is imperative that they undergo the course and sit for the ensuing exams scheduled for 2017.

27. The Respondents reiterated that the course being pursued by the Applicants herein is highly technical and a core component and the pillar of the Engineering Technologists sector in Kenya and consequently it is in the best interest of all potential employers and the country at large to have well-grounded and qualified students.

28. It was disclosed that in preparation for the graduation ceremony which was scheduled for 20th December, 2016 the respondents had entered into various contractual obligations with numerous third parties costing in excess of Kshs.16,000,000/= (Kenya Shillings Sixteen Million).

29. It was further disclosed that prior to being granted its Charter, Technical University of Kenya (TUK) was inspected and appraised by the Commission for University Education (previously the Commission for Higher Education) and it prepared its accreditation report leading to the grant of the Charter. Therefore it is bound to observe and honour, to the letter, the terms and conditions contained in the accreditation report which led to the issuance of its Charter and any disregard for these conditions would expose TUK to the risk of suspension of its charter which would be to the detriment of the University and its entire student population. It was averred that whereas in the said report it was recommended that any degree course undertaken by students at TUK should extend over a period of not less than four years of study, in the said accreditation report the unit designated as *"Computer Aided design and Manufacturing"* is a core unit to be undertaken in Year III, Semester I and it is not in doubt that the applicants herein did not undertake the said unit.

30. According to the Respondents, since the accreditation report is the fundamental document upon which TUK was granted its Charter, failing to follow and/or comply with the accreditation report shall put in jeopardy the Charter of TUK and the institution risks suspension (or even outright revocation) of the Charter if it becomes evident that the applicants herein were awarded degrees having not gone through the approved curriculum and notably having failed/refused and/or declined to undertake the Computer Aided design and Manufacturing Course. In that event, all the other certificates, diploma and degree programmes, with approximately 9,000 students, run by TUK will be in jeopardy as they will halt with immediate effect. It was therefore the Respondents' case that notwithstanding the fact that the applicants have not completed their course work by studying for the subject unit, the interests of the other 9,000 students staying varying programmes on the strength of the TUK Charter take absolute precedence over the interests of the applications herein. It was contended that the integrity and reputation of TUK as the best Technical University in Kenya and among the top 100 in the world would be damaged permanently to the detriment of TUK, the current students and the County as a whole.

31. It was contended that the applicants had not demonstrated what prejudice, if any, they would suffer by completing the mandatory course units and legitimately graduating and being allowed to join the job market and build the Nation. On the other hand, the repercussions on TUK for allowing the applicants to graduate without being so qualified are grave and put the respect, ranking, integrity and very existence of TUK at great risk.

Determination

32. I have considered the foregoing.

33. It was contended by the Respondents that the failure to join the Technical University of Kenya to these proceedings is fatal to the application.

34. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

35. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

36. Therefore judicial review remedy being a public law remedy, it is not necessarily the parties before the Court that determine the success or otherwise of the application. As long as the parties that stand to be adversely affected by the decision are substantially before the Court, misjoinder or non-joinder cannot be held to be fatal to otherwise competent proceedings. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation.

37. In this case, the agents of the University are before the Court and have addressed the substance of the dispute before the Court without any allegation that the University was handicapped in presenting its case.

38. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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...Procedural Impropriety is when there is a failure to act fairly on the part of the**

decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

39. In this case, if I understand the Applicants' case correctly, despite having completed their course, the Respondents denied them the right to graduate based on an enactment which came into force after they had completed their course. According to them, they completed all requisite coursework by August 2015 and awaited graduation way before the ***Engineering Technology Act*** was enacted on 19th August, 2016 which does not even compel the students to cover the unit claimed to be core now i.e. Computer Aided Engineering. It was their view that laws should not be applied retrospectively thus the application of the ***Engineering Technology Act*** enacted on 19th August, 2016 cannot affect students who completed their studies almost a year before the said Act was enacted. They however averred that the Respondents having known that the new Act had come into force and would allegedly affect them did not inform them of the same and they only came to learn of the same through unverified sources a few weeks to graduation.

40. Before dealing with this matter, I must deal with the manner in which the Respondents responded to the application. In my view that response was rather unsatisfactory. Instead of dealing decisively with the allegations made by the applicant, the Respondents chose to address the same in an evasive fashion. When a party choses in an affidavit which ought to contain factual averments to answer the case against him in an argumentative manner as the Respondents did herein, such averments have little if any weight. In **Adam & 6 Others vs. Alexander & 2 Others Meru HCCC No. 81 of 1993 [1993] KLR 446**, **Kuloba, J** expressed himself as hereunder:

"The Court has looked at the affidavits on both sides. In great measure they are seriously faulty. They were in many respects argumentative, expressive of legal conclusions and opinions, surmises and doctrinal assertions; broad accusations and defences; statements of rules and assertions of their breach without supportive factual data. Affidavits must deal only with facts which the deponents can prove of their own knowledge…An affidavit is not a platform for dissemination of philosophical ideals, for the exposition of ideals, the propagation of opinions, dogmatic assertions, heightened counsel and soothsaying prophesy. It is not a medium for testing inter-religious doctrinal animosity. It is not a dissertation on the Constitution, and it is not a discourse on the law. It is to be confined to facts as the deponent is able of his own knowledge to prove, or in interlocutory proceedings, it may further be in the alternative set out statements of information and belief but show the sources and grounds of the information and belief respectively. For these reasons the Court has disregarded all matters in all the affidavits which are not facts and are not statements of information and belief or are such statements of information and belief but the sources of the information and the grounds are not shown."

41. Similar views were propounded by the Court of Appeal in **Pattni vs. Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269**:

"an affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply. Hearsay evidence and legal opinions are for exclusion… Where the portions complained of are fraught with argumentative propositions and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order 17 rule 6 donate the power to strike out scandalous, irrelevant or oppressive matter and as the three categories are to be read disjunctively the said portions are struck out".

42. In my view an affidavit being evidence ought not to be drafted in the alternative as the Respondents did in this case. If that happens the same may well be worthless as the Court may be at a loss as to the real case of the parties especially when the same affidavit contains both admissions and denials of the same facts at the same time. It is therefore my finding that the applicants' contention that they were students of

the University has not been rebutted by lawfully admissible evidence. My view is strengthened by the Respondents' averment that the Vice-Chancellor of TUK had taken up the applicants' grievances, as forwarded through their Advocates on record and requested for particulars relevant to resolution of the matter.

43. It was contended that the Respondents in barring the applicants from graduating applied the provisions of ***Engineering Technology Act, 2016*** retrospectively when such application was improper. The issue of the retrospective application of an enactment was dealt with in **Overseas Private Investment Corporation & 2 Others vs. Attorney General [2013] eKLR** where it was held that:

> ***"retrospective operation is not per se illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR where the Court observed that, "[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden..It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to the product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively. Francis Bennion in his seminal work on Statutory Interpretation, 3rd edition, at page 235 states, "Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted."***

44. This was the position adopted by the Court of Appeal in **Said Hemed Said vs. Emmanuel Karisa Maitha & Another Mombasa HCEP No. 1 of 1998** while citing the cases of **John Mwangi vs. Francis Mwangi Njuguna Civil Application No. 96 of 1997 & Hutchinson Jaunces (1950) 1 KB 574** where it was stated as follows:

> **"The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication."**

45. In my view if ***Engineering Technology Act, 2016*** was enacted and came into force after the applicants had cleared their course, its provisions could not be applied in order to bar the applicants from graduating. Therefore the applicants had legitimate expectation that they would graduate upon completing the requirements of their course as at the time they completed their studies. **De Smith, Woolf & Jowell,** in ***"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell page 609 states:

> **"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."**

46. In order to validly withdraw the expectation the Respondents ought to have adhered to the guidelines in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

> **"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."**

47. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

> **"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."**

48. In this case it was contended which contention was not seriously controverted that the applicant' predecessors graduated despite the fact that they did not undertake the mandatory subject known as "Computer Aided Design and Manufacturing". It has not been shown that the circumstances between the applicants and their predecessors had changed since by the time the applicants completed their course, the Act had not been enacted. To subject the applicants to whom a benefit had been conferred to circumstances whose effect amounted to the deprivation of the already accrued benefit in my view was not only a breach of their legitimate expectation but amounted to discrimination. In **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR,** it was held that:

> **"It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. (James Nyasora Nyarangi and Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi). The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in President of the Republic of South Africa & Another –Vs- John Phillip Hugo 1997 (4) SAICC Para 41 as follows:- "We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context." At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component."**

49. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

"The Blacks Law Dictionary defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." Wikipedia, the free encyclopedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."… The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants".

50. It was the Respondents' case that the said "Computer Aided Design and Manufacturing" Course which is a core subject leading to the issuance of Bachelor of Technology (Mechanical Engineering) degree was previously undertaken by **Professor Wilson Ogola** who passed away some time ago. However, by its very nature, the said course is highly specialised, and qualified lecturers to teach the said course are few and far in between in Kenya leading to a shortage of qualified personnel capable of imparting the requisite skills and knowledge to students of the said course. Upon his unfortunate death, TUK embarked on a world-wide search for a suitable replacement lecturer and identified one, who would be available to take up his duties in January, 2017. In my view, institutions of higher learning ought to ensure that they have adequately provided for both infrastructure and the human resource requirements before embarking on imparting of knowledge especially in highly specialised courses. To offer a course without adequate staff for it amounts to academic recklessness. In this case the Respondents gambled with the future of their students when they commenced a course with only one qualified person to undertake the course. That in my view amounted to intellectual adventurism and that cannot be excused where the applicants' future is concerned.

51. It is therefore clear that the applicants were not treated fairly by the Respondents. That however is not the end of the matter. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment*. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary

decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [Emphasis added].

52.This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

> **"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."**

53. In this case, it is contended that the course being pursued by the Applicants herein is highly technical and a core component and the pillar of the Engineering Technologists sector in Kenya and consequently it is in the best interest of all potential employers and the country at large to have well-grounded and qualified students. If the subject "Computer Aided Design and Manufacturing Course" is such an integral part of the course the applicants are undertaking, then it is my view that it is only beneficial to the applicants but also for the profession and the country at large that the subject be undertaken. In other words, it is in the public interests that the said subject be taken by the applicants as one of the components leading to their graduation from the University.

54. According to **Francis Bennion** in ***Statutory Interpretation*,** 3rd Edition at page 606:

"it is the basic principle of legal policy that law should serve the public interest. The court…should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".

55. In **Re McBride's Application [1999] NI 299** the Court expressed itself as follows:

> **"…it appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group…it seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity."**

56. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

Order

57. It is therefore my view that whereas I find that the Respondents' action was unwarranted, in the exercise of this Court's discretionary powers, I decline to grant the orders sought in Notice of Motion dated 7th December, 2016 which Motion is hereby dismissed but with costs to the Applicants to be borne by the University.

58. It is so ordered

Dated at Nairobi this 12th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muchiri for Mr Gichuru for the Respondent

CA Mwangi