IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 29 OF 2012

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW (ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS)

AND

IN THE MATTER OF PUBLIC SERVICE COMMISSION OF KENYA AND THE MINISTRY OF MEDICAL SERVICES DECISION OF 7TH JUNE, 2012 DISMISSING THE EX-PARTE APPLICANT FROM SERVICE

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 AND SECTIONS 8 AND 9 OF THE LAW REFORMS ACT (CAP 26), THE SERVICE COMMISSION ACT AND THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

BETWEEN

REPUBLIC …..... APPLICANT

VERSUS

THE PUBLIC SERVICE COMMISSION OF KENYA .... 1ST RESPONDENT

THE MINISTRY OF MEDICAL SERVICES ..... 2ND RESPONDENT

THE PROVINCIAL DIRECTOR OF MEDICAL

SERVICES NYANZA – KISUMU …..... 3RD RESPONDENT

THE MEDICAL SUPERINTENDENT NYANZA

PROVINCIAL GENERAL HOSPITAL – KISUMU …... 4TH RESPONDENT

DR. JULIANA OTIENO NYON'GO …..... 5TH RESPONDENT

JUDGMENT

The Notice of Motion for determination is the one dated 20th December, 2012 brought under Order 53 Rule 3 (1) of the Civil Procedure Rules (2010). The Applicant Doctor Mary Kerubo Onyinkwa prays for orders that an order for certiorari does issue to remove into this Honourable Court to quash the decision made by the Public Service Commissioner and communicated to the

Ex-Parte Applicant vide their letter dated 12th October, 2012 dismissing the Ex-Parte Applicant from service, that an order of mandamus issues compelling the 1st, 2nd, 3rd, 4th and 5th Respondents to reinstate the Ex-Parte Applicant to service and that costs be in the cause.

The said Application is based on the following grounds:-

(a) The Ex-Parte Applicant wishes to seek orders for Certiorari and Prohibition against the decision of the Public Service Commission of Kenya communicated to the Ex-Parte Applicant by the Permanent Secretary Ministry of Medical Services vide their letter dated 12th October, 2012.

(b The Permanent Secretary the Ministry of Medical Services decision dismissing the Ex-Parte Applicant from service was biased, orchestrated with malice and made in bad faith.

(c) The decision complained of and/or action undertaken by the Respondents thereof was arbitrary and without giving any or any adequate hearing of the Ex-Parte Applicant and ultra vires therefore null and void.

(d) That the decision of 12th October, 2012 went against the rules of Natural Justice and infringes the fundamental rights of the Ex-parte Applicant.

(e) The decision complained of contravenes the spirit of the Constitution of Kenya 2010 and is based on false allegations.

(f) The court has power to entertain, hear and grant the orders sought in the best interest of justice.

In a supporting affidavit sworn by the Ex-Parte Applicant on 20th December, 2012, she expounds on the grounds upon which the application is premised. She further depones that she applied for government sponsorship and study leave to pursue a Masters in Medicine (Radiology) vide a letter dated 14th July, 2010 to the Permanent Sectretary Ministry of Medical Services Nairobi, through the office of the Provincial Director of Medical Services Nyanza Province – Kisumu and that of the Chief Administration Office Nyanza Provincial General Hospital – Kisumu.

She states that the above letter was received and acknowledged by the various offices that forwarded it for recommendation accordingly. She further depones that by another letter also dated 14th June, 2010 she applied for a paid study leave through the same channel. That in the meantime she was admitted to Moi University, School of Medicine to pursue the above degree. Her case is that she did not receive any response from the Respondent to the applications. She then travelled to Nairobi to the 2nd Respondent's offices, wherein she was advised by Senior officials that she did not qualify for a government sponsored study course and that she could apply for leave of absence and if the same were granted, she would do her Masters degree during the unpaid leave. The request for leave of absence and course approval were approved by the parent Ministry and Director of Medical Services, Nyanza Province respectively.

The Applicant thereafter enrolled for the course (Masters Degree) but to her shock, she received a letter dated 14th February, 2011 suspending her from duty on account of absence from duty. She was later, by letter dated 7th June, 2012 dismissed from employment.

According to the Ex-parte Applicant the decision by the 2nd Respondent to dismiss her from employment was unwarranted and orchestrated by bad faith and malice bearing in mind that her study leave was approved. It is also her contention that she is not entitled to refund any money to the Respondents as she took her annual leave from 23rd August, 2010 and any pay that was made to her was her leave pay to which she was entitled.

The Respondents were duly served with the application as well as the Hearing Notice. They neither entered appearance nor filed a response to the application. The court directed that the

hearing proceeds by way of written submissions, which counsel for the Ex-parte Applicant filed.

SUBMISSIONS

Counsel for the Ex-parte Applicant submitted that the Applicant did not abscond duty. He stated that the Applicant proceeded on duty after the 3rd Respondent duly signed and stamped the course approval detail form and after her leave application was approved.

It is also the contention of the Applicant that the 2nd Respondent in dismissing her, did not follow the rules of natural justice. That is to say, she was not given a fair hearing and an opportunity to present her case. This led to an unfair decision orchestrated by malice and bad faith on the part of the 2nd Respondent. Counsel in this respect cited the case of **MUNICIPAL COUNCIL OF MOMBASA AND UMOJA CONSULTANTS LTD CA 185/01 (2001) KLR 4816 CAK** in which Court of Appeal observed:-

"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 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."

It was the counsel's further submissions that all the courts are entitled to do is to ensure that the process of conducting the disciplinary proceedings is in accordance with the law and that the rules of natural justice are complied with. He cited the case of **REPUBLIC -VS- COMMISSIONER OF INCOME TAX EX-PARTE SDV TRANSAMI (K) LTD (2005) 1 EA, 346** in which the Court of Appeal said:-

"The purpose of judicial review is to uplift the quality of public decision making and thereby ensure for the citizen and individuals civilized governance by holding the public authority to the limit defined by law and exercise justice and fairness."

The Ex-Parte Applicant added that the 3rd, 4th and 5th Respondents were biased. She contended that all the communications/correspondences regarding the issue of leave were done through the 3rd and 4th Respondent' offices. That the 5th Respondent was her immediate supervisor who approved her leave of absence and granted her permission to proceed on study leave. That therefore, none of these parties could now back-track on their commitments and to have the Applicant dismissed from employment was the most unfair thing to do.

Having said the above, I narrow down the issues for determination as follows:-

(a) Whether the Ex-Parte Applicant (hereafter the Applicant) was granted a fair hearing before her suspension (whether she was condemned unheard contrary to the rules of natural justice).

(b) Whether her dismissal was unfair/unlawful and or without due process.

Was the Applicant accorded a fair hearing?

In addressing this question, two salient issues must be addressed.

(i) Did the Applicant abscond duties?

(ii) Was her leave of absence approved?

May I first point out that judicial review remedies are discretionary in nature. They are prerogative remedies in the form of quashing (certiorari) compelling (mandamus) or prohibition. They are filed pursuant to Order 53 of the Civil Procedure Rules and part VII of the Law Reform Act Cap 26, Laws of Kenya. The remedies in judicial review are also neither civil nor criminal in

nature – See **WELAMONDI -VS- CHAIRMAN, ELECTORAL COMMISSION OF KENYA (2002) 1 KLR, 487** that ***"…. in exercising powers under Order 53, the court in exercising neither civil nor criminal jurisdiction in strict sense of the work. It is exercising sui generis ….."***

Therefore, having framed the issues for determination, I pause to grapple with the question as to whether these proceedings raise administrative or employment labour relation issues. This is so because the first order sought is to quash the decision dismissing the Ex-Parte Applicant from employment.

The prayer is premised on the ground that the Applicant was not given a fair hearing before her dismissal. And this prayer of course lies within the ambit of a judicial review – which is to check the excesses of administrative power.

If the above were to be ordered, the end result would be to quash the decision dismissing the Applicant and thereby ordering that she be reinstated back to employment as envisaged in the second prayer of the application. Whereas the prayer is shelved in the nature of mandamus, my very considered view is that it falls under an employment remedy. I say so because, the two questions needed to be answered under the first issue for determination may only be adequately addressed by a labour court. That is to say, it is only the labour court that will endevour to address the question as to whether the Applicant absconded duty and whether her leave of absence was approved.

Again, if the court were to order that the Applicant be reinstated it would in effect be imposing the employee on the employer, which trend the courts have more often than not declined to follow.

In the case of **JOSEPH MUJIBI OUMA VS NATIONAL CEREALS & PRODUCE BOARD & 2 OTHERS [2006] e KLR**, the learned Judge Sergon J. while adopting the reasoning by the Court of Appeal in **DALMAS B. OGOYE =VS= KNTC CA NO. 125 OF 1995**, delivered himself as follows:-

"The fourth issue, is whether or not the Plaintiff is entitled to reinstatement. The evidence on record shows that the Plaintiff was dismissed for gross misconduct. The 1st and 2nd Defendants had expressed the view that they had lost faith and confidence on him. In our legal system, it is a well established fact that courts have been reluctant to make orders for reinstatement because such relationships are purely contractual hence if an order is made in that direction it would be like imposing a contract on another which is not the function of courts of law. The court of appeal settled the legal position over this matter in the case of DALMAS B OGOYE=VS= KNTC CA NO. 125 OF 1995 (unreported) in which the Court of Appeal said:-

"that courts do not order reinstatement in such cases because such an order would be difficult to enforce besides it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer."

As noted above by the Court of Appeal in the case of **DALMAS B OGOYE =VS= KNTC CA NO. 125 OF 1995**, *supra*, enforcing a reinstatement order herein would be very difficult. In his book entitled 'Judicial Remedies in Public Law (2004), Clive Lewis observes as follows:-

"There are a variety of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy." (See Clive Lewis, (2004), "Judicial Remedies in Public Law", (3rd Edition), Thompson, Sweet and Maxwell, London, at page 391. See also the English case **R.**

VS.MONOPOLIES AND MERGERS COMMISSION EX P. ARGYLL GROUP[1986] 1 W.L.R 786, where the Master of Rolls refused to quash a decision of the monopolies and Mergers Commission, even though the decision was legally flawed.

While in the case of **KENYA NATIONAL EXAMINATION COUNSEL VS. REPUBLIC EX PARTE GEOFFREY GATHENJI NJOROGE & OTHERS CIVIL APPEAL NO. 266 OF 1996 (CAK) [1997] e KLR** the Court of Appeal made an observation with respect to the order of mandamus sought, and held that the Court in granting such order does not do so where what is being sought is to compel the Respondent to exercise discretion or where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way (***See also Odunga J. in PERIS WAMBOGO NYAGA -V- KENYATTA UNIVERSITY [2014] e KLR) (unreported)***.

In the case of **PERIS WAMBOGO NYAGA -V- KENYATTA UNIVERSITY [2014] e KLR**, ibid, the learned Judge Odunga J., on citing the decision in **REPUBLIC -VS- JUDICIAL SERVICE COMMISSION** ex parte **PARENO [2004] 1 KLR 203-209**, reiterated as follows:-

"In REPUBLIC VS. JUDICIAL SERVICE COMMISSION EXPARTE PARENO [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and 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 and 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. 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 a public body has done all that it can be expected to do to fulfill 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."

In light of the foregoing holdings it is apparently clear that the issues raised by the Ex-Parte Applicant can be adequately and competently dealt, handled and determined by the Industrial Court and not the Judicial Review Court. According to the provisions of the Industrial Court Act, No. 20 of 2011, the Industrial Court is a superior court of record which has jurisdiction with respect to employment and labour relations and for connected purposes (***See the Preamble of The Act).*** Section 12 of the Act establishes the jurisdiction of the Court. It states as follows:-

"12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including -

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employer's organization and a trade union organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organization and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organization or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose." (*See section 12 subsection (1), paras (a) – (j) and subsection 2, emphasis given****)***

In view of the above provisions of the law it is needless to emphasize that the Industrial Court is far much better placed to handle this matter than the High Court. This is so because according to the dispute herein, as much as it camouflages and appears to be an administrative issue, the genesis of the same is purely centered on the employment relations. Be that as it may, according to the provisions of Section 12 (3), of the Industrial Court Act, the Industrial Court has jurisdiction to order for the reinstatement of any employee as it deems fit. The section stipulates as follows:-

"(3) In exercise of this jurisdiction under the Act, the Court shall have power to make any of the following orders-

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just."

Having observed the above, I would like to address the question as to whether the rules of natural justice were followed by the Respondents in dismissing the Applicant. By extension, and as an ***Obiter Dictum***, I will also address the issue as to whether the Applicant was accorded a fair hearing.

According to the **HALSBURY'S LAWS OF ENGLAND (ADMINISTRATIVE LAW) FOURTH EDITION, 2001 REISSUE, AT PAGE 218, PARAGRAPH 95**, natural justice is

defined as follows:-

"***Natural justice comprises two basic rules; first that no man is to be a Judge in his own cause (nemo judex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct. The rules of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or necessary implication, or by reason of other special circumstances."***

The above definition implies that the applicability of the rules of natural justice is not the preserve for judicial review courts but for all courts of law. Rules of natural justice are the bed rock of justice and since the matters raised herein heavily lean towards employment issues, I would say that the labour court is more advantaged to deal with them in a robust, competent, exclusive and conclusive manner.

The Applicant contended that she was not accorded a fair hearing prior to her suspension and ultimate dismissal from employment. By a letter dated 14th February, 2011 she received a communication from the Ministry of Medical Services that she had been suspended from duty on account of being absent from duty and was asked to show cause why disciplinary action should not be taken against her. The letter in part read:-

"RE: <u>SUSPENSION FROM DUTY ON ACCOUNT OF ABSENCEFROM DUTY</u>

You are hereby called upon to show cause why the contemplated disciplinary action should not be instituted against you.

Your representative(s) if any, should be channeled to this office through your immediate supervisor within twenty-one (21) days from the date of this letter, failure to which the contemplated action will be taken without further reference to you ….."

In response, the Application wrote the letter dated 28th February, 2011 in which she elaborately explained in defence all the accusations against her. The letter (Annexture 'MKO 11') read in part:-

"RE: <u>RESPONSE TO YOUR LETTER REF: 20082015 203/40</u> <u>DATED 14TH FEBRUARY, 2011</u>

"..... My leave of absence letter was forwarded and I have been awaiting a response ever since. No written communication was given accepting or declining my application for government sponsorship or paid study leave.

…..... All along I assumed that my salary had been stopped because my leave of absence had been approved though the written communication had been delayed ….....

Kindly consider my case bearing in mind that my actions were motivated by a yearning to pursue further education and improve myself."

By letter dated 7th June, 2012 from the office of the Permanent Secretary of the 2nd Respondent, the Applicant was dismissed from employment with effect from 1st August, 2010.

The final straw befell the Applicant after her request for review for dismissal was declined as per the 2nd Respondent's letter dated 12th October, 2012 (Annexture MKO 2). The same read:-

"This is to convey to you the decision of the Public Service Commission of Kenya that they considered but disallowed an application for review regarding dismissal from the service on account of absence from duty without lawful authority and decided that your case be

closed."

My view is that, by the 2nd Respondent asking the Applicant to show cause why disciplinary action should not be taken against her, was an express opportunity accorded to her to be heard. She in turn explained herself in detail (Annexture MKO 11). Unfortunately her application for review of the 2nd Respondent's decision to dismiss her from service was ***"considered but disallowed".***

The questions that then flow are; what kind of fair hearing did the Applicant expect? What constitutes a fair hearing? Or what is a fair hearing? What entails being condemned unheard?

As I have earlier noted in this Judgment, the principle of not being condemned unheard is coined in the maxim ***'audi alteram partem'*** – **HALSBURY'S LAWS OF ENGLAND, ADMINISTRATIVE LAW) FOURTH EDITION, 2001 REISSUE, AT PAGE 141, PARAGRAPH 95 (SUPRA)**.

The Black's Law Dictionary, Seventh Edition at 725 defines ***"hearing"*** in relation to administrative law as:-

"Any setting in which an affected person presents arguments to an agency decision-maker."

While ***"Fair Hearing"*** is defined as:-

"A judicial or administrative hearing conducted in accordance with the due process."

As ***"audi alteram partem"*** rule is concerned with the manner a decision is taken as opposed to whether the decision is correct, it cannot be underrated that whoever is accused of an illegality must be given an opportunity to defend himself/herself before a final decision is taken.

But another question arise; what is the threshold of ***audi alteram partem*** rule?

In **SIMON GAKUO -VS- KENYATTA UNIVERSITY AND 2 OTHERS MISC. CIVIL APPLICATION NO. 34 OF 2009 (UR)**, the court said:-

"The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per Section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc." (*See also Odunga J. in **PERIS WAMBOGO NYAGA V. KENYATTA UNIVERSITY [2014] e KLR)***

In **KENYA REVENUE AUTHORITY VS. MENGINYA SALIM MURGANI CIVIL APPEAL NO. 108 OF 2009, (2010) e KLR** the learned Judges of the Court of Appeal, R.S.C Omolo, P. N. Waki and J. G. Nyamu JJA. delivered themselves as follows:-

"The thrust of Dr. Kuria's submissions was that the internal disciplinary procedures of the Appellant should have involved an oral hearing of the Respondent either by the Staff Committee or the Board being the appellate body or both. However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. In the case of LOCAL GOVERNMENT BOARD VS. ARLIDGE [1915] A.C. 120, 132-133, SELVARAJAN VS. RACE RELATIONS BOARD [1975] 1 WLR 1668, 1694, and in R VS. IMMIGRATION APPEALTRIBUNAL ex-parte JONES [1988] 1 WLR 477, 481 it was

held:-

'the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."

….....

Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made …...'

According to the evidence adduced, it cannot be said that the Respondent did not receive adequate notice of the charges leveled against him and allowed to present his case in writing. The Appellant as an employer in finally making the decision to dismiss the Respondent was not exercising its statutory power under the Act creating it but rather exercising disciplinary power under a contract of service. As mentioned above and with respect, the superior court's findings that the Appellant was exercising statutory power was a serious misdirection in law which in turn led to the court's erroneous findings that in the circumstances, the tort of misfeasance in public office had been committed by the Appellant. As far as we can see, those findings had no factual or evidential foundation at all and consequently, the Respondent could not in law opt to pursue what the court referred to as *"advantageous remedy based on the tort of misfeasance in public office"* ***instead of a remedy based on breach of contract."***

In **RUSSEL VS. DUKE OF NORFORK [1949] 1 ALL ER at 118**, the

Court expressed itself as hereunder:-

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

In the case of **PERIS WAMBOGO NYAGA V. KENYATTA UNIVERSITY [2014] e KLR,** ibid, the learned Judge Odunga J., while relying on **UNION INSURANCE CO. OF KENYA LIMITED V. RAMZAN ABDUL DHANJI CIVIL APPLICATION NO. NAI. 179 OF 1998;** delivered himself as follows:-

"45. That the Applicant was heard is not in doubt. The Applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the Applicant was entitled to a fair administrative action which in my view would connote inter alia that the Applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so. As was held in UNION INSURANCE CO. OF KENYA LIMITED VS. RAMZAN ABDUL DHANJI CIVIL APPLICATION NO. NAI. 179 OF 1998:-

"whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicants were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the Applicant was given a chance to be heard and the court is not

convinced that the issue of failure by the High Court to hear the Applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

The learned Judge Odunga J., ibid further cited Michael fordham in ***Judicial Review Handbook; 4th Edition at Page 1007*** and noted as follows:-

"46. The Applicant further contended that the case that she was to face ought to have been disclosed to her to enable her prepare for the case. Again from the records there is no evidence that the Applicant did seek that she be supplied with the materials which was to be used against her.

47. Further as is stated by Michael Fordham in Judicial Review Handbook; 4th Edition at page 1007:

"Procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case." ***(See Odunga J. in PERIS WAMBOGO NYAGA V. KENYATTA UNIVERSITY [2014] e KLR, Supra).***

In **R VS. AGA KHAN EDUCATION SERVICES** *ex parte* **ALI SELE & 20 OTHERS HIGH COURT MISC. APPLICATION NO. 12 OF 2002**, (unreported), it was held *inter alia* as follows:-

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance." *(See Odunga J., in* ***PERIS WAMBOGO NYAGA V. KENYATTA UNIVERSITY [2014] e KLR, ibid)***

Taking into account the foregoing and circumstances of this case it is not convincing enough that the Respondent's action was tainted with illegality, irrationality or procedural impropriety to entitle the court to issue the orders being sought, as it was held by Njamu J., as he then was, in **REPUBLIC VS. THE COMMISSIONER OF LANDS** *Ex parte* **LAKE FLOWERS LIMITED NAIROBI HCMISC. APPLICATION NO. 1235 OF 1998**:-

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief …. The High court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket …. Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality … The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account irrelevant considerations or act contrary to legitimate expectations.... Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situationsof standing and look at the nature of the matter before them …. Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a

case-to-case basis … The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society." (*See also Odunga J. in* ***REPUBLIC V. JUDICIAL SERVICE COMMISSION & ANOTHER [2013] e KLR****.*

May I add that judicial review remedies being discretionary in nature dictate that the court grants them only in deserving cases. One other consideration I must point out is that, given my above observations, I would not consider the application in favour of the Applicant as there are other available remedies for her. The alternative remedy is well captured in this Judgment. It is at the point that that remedy is sought that the labour court will address itself to the two issues which I had framed but deliberately omitted to determine them for obvious reasons – not to pre-empt the outcome of the decision of any other court. These questions are; ***did the Applicant abscond duty? And was her leave of absence approved?*** The court may have to probably dig into the fact as to whether a forwarded letter with a ***"recommended'*** note by the person forwarding amounted to an approval of the request made therein. And whether, without the express written authority for the addressee, the Applicant absconded duty.

May I also emphasize that I have belaboured to address the question of 'fair hearing' because it is the basis on which this application was brought. I have coined it as an ***orbiter dictum*** and must not be used to pre-empt the decision of any other court. But for the reasons that the labour court should address the employment relationship disputes, I decline to find in favour of the Applicant.

In the result, this judicial review application is dismissed with no orders as to costs.

DATED and **DELIVERED** at **ELDORET** this 15th day of May, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Kagunza holding brief for Onyinkwa for Ex-parte Applicant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the 4th Respondent

No appearance for the 5th Respondent