

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

JUDICIAL REVIEW APPLICATION NO. E004 OF 2025

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

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF: ARTICLE 41 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE EMPLOYMENT ACT (CAP 22)

BETWEEN

REPUBLICAPPLICANT

-VERSUS-

SOUTH EASTERN KENYA UNIVERSITY (SEKU).....1ST RESPONDENT
THE UNIVERSITY GOVERNING COUNCIL.....2ND RESPONDENT
VICE CHANCELLOR, PROFESSOR
ENG. DOUGLAS SHITANDA.....3RD RESPONDENT
ACTING DEPUTY VICE-CHANCELLOR,
CORPORATE SERVICES, PROFESSOR HARRISON MAITHYA.....4TH RESPONDENT
EX-PARTE: PROFESSOR REUBEN MUASYA

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

Introduction

1. The Ex-Parte Applicant commenced this suit vide a Notice of Motion dated 8th May 2025 seeking:-
 - a) This Honourable Court be pleased to issue an order of CERTIORARI to bring into this Court and quash the decisions communicated in the letters dated 11th December 2024 and 20th January 2025 issued by the 3rd and 4th Respondents revising the Applicant's contractual terms and entitlements, specifically in relation to the exit package.
 - b) This Honourable Court be pleased to issue an order of MANDAMUS compelling the 1st and 2nd Respondents to uphold the terms and conditions of service as outlined in the University Governing Council resolutions dated 17th October 2013 and 27th November 2018, thereby affirming the Applicant's exit package entitlements.
 - c) This Honourable Court be pleased to issue an order of PROHIBITION prohibiting the Respondents from amending, varying, vacating or in any manner interfering with the Applicant's exit package set out in paragraph 13 of the Terms and conditions of service of the Deputy Vice- Chancellor of South Eastern Kenya University as agreed between the Applicant and the 1st Respondent and dated 17th October 2013 and 27th November 2018.
 - d) This Honourable Court be pleased to issue a DECLARATION that the Applicant is entitled to receive his salary, which shall remain payable personally to him and shall not be reviewed downwards, beyond 28th February, 2025.

- e) This Honourable Court be pleased to issue a DECLARATION that the Respondents' actions contravene the Fair Administrative Action Act, 2015, Article 41 of the Constitution of Kenya, and the Employment Act (CAP 22), thus rendering the impugned decisions unlawful, unfair, and procedurally improper.
- f) The costs of this application be provided for.

2. The Petition was filed alongside the Supporting Affidavit of the Ex-Parte Applicant, sworn on 8th May 2025, with the bundle of documents in support of the Motion attached.

3. In response to the said Motion for Judicial Review Orders, the 1st to 4th Respondents filed a Replying affidavit sworn on 16th June 2025 by Prof. Douglas Shitanda as follows-

'1. I am the 3rd Respondent herein, and the Vice-Chancellor of the 1st, 2nd and 4th Respondents, with the overall responsibility for the management and administration of the University. I swear this Affidavit on behalf of the 1st, 2nd, 3rd and 4th Respondents.

2. I have read and understood the Applicant's Notice of Motion Application and its Supporting Affidavit all dated 8th May, 2025.

3. The Applicant's Notice of Motion Application violates the provisions of Order 53 Rule 1 of the Civil Procedure Rules which categorically provides that applications for Mandamus, Prohibition and Certiorari must be made with leave of court. The current Application does not seek leave to file Judicial Review proceedings, but rather seeks the grant of substantive orders that can only be granted at the hearing and determination of the main suit.

4. *The Applicant is seeking for substantive reliefs at an interlocutory stage, which is unprocedural, as a Notice of Motion Application is not an originating process for a suit, for such orders to issue.*

5. *Further, the Applicant has delved into substantive issues which can only be addressed by the Court at the hearing and determination of the main suit, and not through an application.*

6. *In the circumstances, the Applicant's Notice of Motion Application and Supporting Affidavit all dated 8th May, 2025 are defective.*

7. *The Respondents therefore, humbly request this Court, to find the Application defective and dismiss the same with costs to the 1st, 2nd, 3rd and 4th Respondents.’’*

The Ex -Parte Applicant’s case in summary

4. The Ex-Parte Applicant avers that he has been engaged by the 1st Respondent since 2011 holding the position of Deputy Vice-Chancellor, Finance, Planning, and Development, for ten years.
5. The Applicant's terms and conditions of service as provided by the University Governing Council resolutions dated 17th October 2013 and 27th November 2018 entitled the Applicant to an eighteen (18) month sabbatical leave upon the completion of two full terms in office. Further, the same terms of service provided that the salary and house allowance at exit shall be frozen to self.

6. In line with the aforesaid terms of service, the Ex-Parte Applicant submitted an application for sabbatical leave on 7th July 2023, which was approved on 5th September 2023. Vide letters dated 11th December 2024 and 20th January 2025, the Respondents altered the Ex-Parte Applicant's contractual benefits without legal justification, violating fair administrative action and employment laws.
7. In particular, the Ex-Parte Applicant decries the violation of the provisions of the Fair Administrative Action Act (Act No. 4 of 2015) which guarantees the right to fair and reasonable administrative actions that affect an individual; Article 41 of the Constitution of Kenya which protects fair labour practices, including adherence to terms of employment and procedural fairness; and the Employment Act (CAP 22) which provides for contractual rights and obligations in employment relationships.
8. He further objects to the actions of the Respondents for the reason that they set a dangerous precedent that undermines the integrity of contractual agreements, the principle of legitimate expectation, and the fair administration of employment rights. The court is called upon to restore order, following the exhaustion of all internal dispute resolution mechanisms.

Respondent's case in brief

9. The Respondents challenge the present Motion on the premise that the same was filed without leave of court contrary to Order 53 Rule 1 of the Civil Procedure Rules. They argue that the Motion does not seek leave to file judicial review proceedings, but rather seeks the grant of

substantive orders, which can only be granted after the hearing and determination of the main suit, not at this interlocutory stage.

10. In addition to the foregoing, it is argued by the Respondents that a Notice of Motion, such as the present one, cannot originate a suit for the orders sought. The Applicant has delved into substantive issues in his application, which can only be addressed by the court at the hearing and determination of the main suit.

11. The Respondents are adamant that the Ex-Parte Applicant's Notice of Motion is defective and should be dismissed with costs.

DETERMINATION

12. Following directions by the court that the application should be canvassed through written submissions, both parties filed their respective submissions.

Issues for determination

13. The Ex-Parte Applicant outlined the following issues for determination in the Judicial review application-

- a) Whether the impugned decisions contained in the letters dated 11th December 2024 and 20th January 2025 are unlawful, irrational, and procedurally unfair.
- b) Whether the Applicant's legitimate expectation and contractual rights were violated.
- c) Whether the Applicant is entitled to the judicial review remedies sought

14. The Respondents identified one issue for determination in their submissions dated 27th August 2025 namely:-
- i. Whether the orders sought are available to the Applicant.
15. The court was of the opinion that the issue for determination were –
- a. Whether the application was proper
 - b. Whether if proper the application was merited

Whether the application was proper

16. The response to the ex parte application was to effect that the application was improper for failure of the ex-parte applicant to obtain leave of the court before filing the Notice Motion citing Order 53 of the Civil Procedure Act to wit - ‘1)No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.(2)An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —(a)a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and(b)affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

(3)When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed,

be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

Rule 4 (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

Any person who wishes to institute judicial review proceedings shall do so in accordance with sections 8 and 9 of the Law Reform Act (Cap. 26) and Order 53 of the Civil Procedure Rules''

1. It is true there is no evidence of leave having been granted. The Exparte Applicant approached the court under the Fair Administrative Action Act and Article 41 of the Constitution. Article 159(2) of the Constitution obliges the court to pursue substantive justice. The exparte applicant raised issues of fair administrative action and of unilaterally varying the terms of the contract by the respondent, reducing his exit package, thereby bringing himself under FAAA and Articles 41 and 47 of the constitution. The applicant, coming under the Constitution and FAAA for judicial review orders and alleging violation of Article 47 of the Constitution, need not seek leave of the court by way of a chamber summons as required under Order 53 of the Civil Procedure Rules. The Court adopted the position of the Supreme Court in **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)** where it held- ' When a party approached a court

under the provisions of the Constitution then the court ought to carry out a merit review of the case . However, if a party filed a suit under the provisions of Order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of the Constitution, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision *per se*.

2. The appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under article 47 of the Constitution were violated, and applied for judicial review orders under article 23 of the Constitution. The appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, that required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided.
-
17. A court could not issue judicial review orders under the Constitution if it limited itself to the traditional review known to common law and codified in Order 53 of the Civil Procedure Rules. The dual approach to judicial review existed but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings.’’ In the instant case, a violation of Article 47 of the Constitution was alleged, and the provisions of Articles 27, 41, and 47 were invoked and FAAA in the Notice of Motion application for judicial review orders. The court was thus not approached under the process prescribed under Order 53 of the Civil Procedure Rules, which requires prior leave of the court.

WHETHER THE APPLICATION WAS MERITED

The Applicant Submissions

18. Whether the impugned decisions contained in the letters dated 11th December 2024 and 20th January 2025 are unlawful, irrational, and procedurally unfair- The Applicant was entitled to an eighteen (18) month sabbatical leave and an exit package under the resolutions of the Governing Council. These entitlements were part of the terms and conditions of service and were duly approved. The unilateral revision of the Applicant's remuneration and benefits by the 3rd and 4th Respondents through the impugned letters was done without notice, consultation, or hearing. The actions of the 3rd and 4th Respondents contravene Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015, which demand lawful, reasonable, and procedurally fair administrative action. In *Republic v. Kenya Revenue Authority ex parte Yaya Towers Ltd* [2008] eKLR, the Court held that judicial review is available to ensure that administrative bodies exercise their powers fairly and within the law. Similarly, in *Suchan Investment Ltd v. Ministry of National Heritage & Culture* [2016] eKLR, the Supreme Court affirmed that procedural fairness is a core component of fair administrative action. By revising the Applicant's contractual benefits without due process, the Respondents acted ultra vires their mandate and in violation of both statutory and constitutional safeguards.
19. Whether the Applicant's legitimate expectation and contractual rights were violated.- The doctrine of legitimate expectation is well established in Kenyan jurisprudence. In *Keroche Industries Ltd v. Kenya Revenue Authority & 5 Others* [2007] KLR 240, the Court held that a public body cannot frustrate a legitimate expectation created by express undertakings. The Applicant had a legitimate expectation, arising from the binding resolutions of 2013

and 2018 and his approved sabbatical leave, that his exit package would be honoured without arbitrary revision. Further, Section 10(5) of the Employment Act (Cap 22) prohibits employers from altering employment terms without consultation and consent of the employee. The Respondents' conduct amounted to breach of contract and unfair labour practice contrary to Article 41 of the Constitution.

20. Whether the Applicant is entitled to the judicial review remedies sought- Judicial review remedies are discretionary but are granted where illegality, irrationality or procedural impropriety is established.
21. Whether the Applicant's legitimate expectation and contractual rights were violated- The doctrine of legitimate expectation is well established in Kenyan jurisprudence. In *Keroche Industries Ltd v. Kenya Revenue Authority & 5 Others* [2007] KLR 240, the Court held that a public body cannot frustrate a legitimate expectation created by express undertakings. The Applicant had a legitimate expectation, arising from the binding resolutions of 2013 and 2018 and his approved sabbatical leave, that his exit package would be honoured without arbitrary revision. Further, Section 10(5) of the Employment Act (Cap 22) prohibits employers from altering employment terms without consultation and consent of the employee. The Respondents' conduct amounted to breach of contract and unfair labour practice contrary to Article 41 of the Constitution.
22. Whether the Applicant is entitled to the judicial review remedies sought- In the case of *Pastoli v Kabale District Local Government Council & Others*, (2008) 2 EA 300, held that:-
'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 the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. The Applicant has demonstrated all the three requirements for issuance of a judicial review as shown herein below:

a) Illegality: The Respondents acted outside the law and contrary to binding resolutions.

b) Irrationality: The decisions lacked justification, logic, or fairness.

c) Procedural impropriety: The Applicant was not accorded the right to be heard.

23. Accordingly, the remedies of certiorari, mandamus, prohibition and declaratory reliefs are all merited. The Respondents' actions are unlawful, unfair, and unconstitutional. They undermine contractual integrity, fair labour practices, and the Applicant's accrued entitlements. The respondent did not respond to merit of the application or in submissions.

Decision

24. The application is deemed unopposed as the response was only on whether the application was proper. The court found evidence of agreement between the parties on the exit package. The exparte applicant had served two terms as Deputy Vice Chancellor. In the first term, the service was governed by terms and conditions of service dated 17th October 2023(**RM1**), and in the 2nd term by an agreement dated 13th February 2019. The exparte applicant proceeded on sabbatical leave approved by the respondent vide letter of 5th September 2023 as follows- '*Dear Prof. Muasya,*

RE: REQUEST FOR SABBATICAL LEAVE

Reference is made to your request dated 7th July 2023 on the above subject.

I am pleased to inform you that the University Council during its 84th Meeting held on 31st August 2023 in the University Boardroom considered your request and approved the following:

- 1. That you proceed on eighteen (18) months sabbatical leave with effect from 28th August 2023.*
- 2. That you retain all benefits you enjoyed as Deputy Vice Chancellor (FPD) for the period that you will be on sabbatical leave.*
- 3. That the sabbatical leave is approved as long as you remain an employee of, South Eastern Kenya University as Professor. In case of engagement in any other capacity in the public service where you will be entitled to regular remuneration, the sabbatical leave will be withdrawn.*

The purpose of this letter is therefore, to communicate the Council decision.

Thank you.

PROF. FRANCIS N. WACHIRA, Ph.D

AG. VICE CHANCELLOR..’’

25. The respondent vide letter dated 11th December 2024 of Prof Shitanda, its Vice Chancellor, informed the Exparte Applicant that the exit package had been terminated. The termination was implemented vide letter dated 11th December 2024 with reason stated as follows-‘The Council, during its 95th (Special) meeting held on Wednesday, 30th October, 2024 resolved that the exit package and benefits given to you by the Council during the 81 (Special) meeting held on Monday, 3rd April, 2023, were in contravention of prevailing government circulars and directives, specifically, SRC letters Ref. No: SRC/TS/10 (167) dated 17th May, 2022 and Ref. No: SRC/TS/UG/3/7 Vol. III (57) dated 7th August, 2020 and Chief of Staff and Head of Public Service letter Ref. No. OP/SCAC.1/12 (11) dated 14th May, 2015 and Public Service Commission letter Ref. No. PSC/ADM/14/V 9 (107) - dated 25th October, 2016. The Council therefore vacated the earlier decision that granted you the exit package and benefits thereunder and resolved that upon resumption from sabbatical leave, you be engaged as a Full Professor of the University, on Terms and Conditions of Service applicable to serving Professors. The purpose of this letter is to therefore to inform you the exit package has been vacated and that upon resumption from sabbatical leave with effect from is March, 2025, you will be engaged by the University as a Full Professor, on Terms and Conditions of Service applicable to Full Professors. ‘ The exparte applicant was issued with a further letter dated 20th January 2025 which stated the University Council(2nd Respondent) affirmed the decision to terminate the exparte applicant’s exit package. The exparte applicant unsuccessfully appealed against the unilateral decision, as communicated vide letter dated 17th April 2025.

26. Section 10(1) of the Employment Act provides for contract agreement as follows-‘10 (1)A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection(3) be given in instalments and shall be given not later than two months after the beginning of the employment.’’ Section 10(5) of the Employment Act states-‘Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing’’. Courts have interpreted consultation to mean genuinely seeking the employee's views and opinions, providing clear information about the proposed change, and giving the employee an opportunity to respond. The agreement between the exparte applicant and the respondents is held as valid and binding as there was no consultation to make any changes on the exit package which was already in effect as the exparte applicant had been on sabbatical leave from 28th August 2023 and the termination was over a year later, vide letter of 11th December 2024. One can safely say the termination of the exit package had been overtaken by events.

27. The respondent relied on the mandate of the Salaries Remuneration Commission(SRC) and circulars of 17th May 2022, 7th August 2020, and letters of the Public Service Commission in its letter communicating the termination of the exit package. It is true that the SRC has a constitutional mandate to advise on salaries in public office. The court, however, holds that the agreement on the exit package is binding between the employee and the employer, and that SRC is a third party. The SRC makes circulars which the employer ought to comply with at time of issuing contract terms to employees. The employer cannot invoke past circulars by third parties like SRC and PSC to unilaterally terminate the contract terms of

an employee. The employee's salary cannot be reduced under any basis on unilateral basis without compliance with section 10 of the Employment Act. The employer ought to have complied with section 10 (5) of the Employment Act to effect the changes through consultation. The court further found that the exit package was terminated while the ex-parte applicant was already on sabbatical leave approved by the employer. That means he had performed the contract. The act of the University Council and the Vice Chancellor was held to be in violation of fair labour rights and section 10 (5) of the Employment Act and is not acceptable in an open and democratic society governed by the Constitution like Kenya. The Exparte Applicant relied on the decision in Pastoli v Kabale District Local Government Council & Others, (2008) 2 EA 300, where it was held that:- '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.' The respondent made an offer to the exparte applicant twice and he performed under those terms. He was offered an exit package which was approved as he proceeded on sabbatical leave. The exit package was canceled while he was on sabbatical leave. By the foregoing actions, the exparte applicant had a legitimate expectation of receiving the exit package, and the unilateral decision was thus a breach of that expectation. I uphold the decision in Keroche Industries Ltd v. Kenya Revenue Authority & 5 Others [2007] KLR 240, where the Court held that a public body cannot frustrate a legitimate expectation created by express undertakings. I find that the Exparte Applicant has proved on a balance of probabilities that the act of the respondents to terminate his exit package under a performed agreement without consultation was tainted with illegality, irrationality and procedural impropriety. The application is held as merited.

Conclusion

28. The application is held to have merit and is allowed as follows.-

- a) That this Honourable Court is pleased to issue an order of CERTIORARI to bring into this Court and quash the decisions communicated in the letters dated 11th December 2024 and 20th January 2025 issued by the 3rd and 4th Respondents revising the Applicant's contractual terms and entitlements, specifically in relation to the exit package.
- b) This Honourable Court is pleased to issue an order of MANDAMUS compelling the 1st and 2nd Respondents to uphold the terms and conditions of service as outlined in the University Governing Council resolutions dated 17th October 2013 and 27 November 2018, thereby affirming the Applicant's exit package entitlements.
- c) This Honourable Court is pleased to issue an order of PROHIBITION prohibiting the Respondents from amending, varying, vacating or in any manner interfering with the Applicant's exit package set out in paragraph 13 of the Terms and conditions of service of the Deputy Vice- Chancellor of South Eastern Kenya University as agreed between the Applicant and the 1st Respondent and dated 17 October 2013 and 27th November 2018.
- d) This Honourable Court is pleased to issue a DECLARATION that the Applicant is entitled to receive his salary, which shall remain payable personally to him and shall not be reviewed downwards, beyond 28th February, 2025.

- e) This Honourable Court is pleased to issue a DECLARATION that the Respondents' actions contravene the Fair Administrative Action Act, 2015, Article 41 of the Constitution of Kenya, thus rendering the impugned decisions unlawful, unfair, and procedurally improper.
- f) The Exparte Applicant is awarded costs.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH
DAY OF DECEMBER, 2025.**

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Ex-Parte Applicant: Itume

Respondents – Mrs. Gachachi