



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: W. KARANJA, OKWENGU & GATEMBU, J.J.A)**

**CIVIL APPEAL NO. 145 OF 2017**

**BETWEEN**

**EGERTON UNIVERSITY.....APPELLANT**

**AND**

**PROFESSOR JAMES TUITOEK.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment of the Employment and Labour Relations Court at Nakuru (Radido, J.) delivered on 11<sup>th</sup> November 2016 in Nakuru ELRC Judicial Review Application No. 1 of 2016)**

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**JUDGMENT OF THE COURT**

1. This appeal arises from a judgment delivered on 11<sup>th</sup> November 2016 in which the Employment and Labour Relations Court(ELRC) (**Radido, J.**) allowed the 1<sup>st</sup> respondent's application for judicial review and issued an order prohibiting the appellant (the University) and the 2<sup>nd</sup> respondent from amending, varying, vacating or in any way interfering with the 1<sup>st</sup> respondent's terms of an exit package set out in clause 13 of the terms and conditions of service revised and approved by the appellant's University Council on 27<sup>th</sup> February 2008. The court also granted an order of mandamus compelling the appellant and the 2<sup>nd</sup> respondent to effect the 1<sup>st</sup> respondent's remuneration in accordance with clause 13 of the said terms and conditions of service.

2. The factual background, which to a large extent, was not contested in the lower court will provide context to this appeal.

The 1<sup>st</sup> respondent began his career as a lecturer in the University in 1989 and rose to be a professor of animal nutrition of the Department of Animal Science at the University. In 2001, he was appointed Deputy Vice Chancellor, Administration and Finance at the University. On 13<sup>th</sup> January 2006 he was appointed as the Vice Chancellor of the University.

3. On 27th February 2008, the University Council revised and approved its employees' terms and conditions of service. Clause 13 of those terms and conditions, which is what has been referred to as the "exit package" and which is at the center of the dispute, provided as follows:

**“Senior management staff who have successfully served as Vice Chancellor, Deputy Vice chancellor and Principals of a campus College in Egerton University and resume their substantive academic positions at the University will continue to earn their basic salary in house allowance of the previous positions. This will be personal to themselves. The salary and house allowance will remain fixed until the salary and house allowance of their substantive academic appointments equals to which they are earning.”**

4. On 6<sup>th</sup> January 2011, the 1<sup>st</sup> respondent's appointment as Vice Chancellor of the University was renewed for a further period of 5 years. Upon expiry of the 5 years on 12<sup>th</sup> January 2016, the 1<sup>st</sup> respondent resumed his previous "substantive academic position" as a professor of Animal Nutrition in the Department of Animal Science at the University.

5. Prior to expiry of his renewed term as Vice Chancellor, the University wrote a letter to the 1<sup>st</sup> respondent dated 16<sup>th</sup> September 2015, informing him that at the end of his term as Vice Chancellor, he would revert to his substantive appointment as Professor and that the

exit package would not be available to him as it had been “set aside” in a circular issued by the 2<sup>nd</sup> respondent on 14<sup>th</sup> May 2015. That circular directed that staff in research institutions and public universities who retire as chief executive officers but opt to revert to their research or teaching positions should be required to adopt to the perks attached to those positions.

6. On receiving the letter of 16<sup>th</sup> September 2015, the 1<sup>st</sup> respondent protested and informed the University by his letter dated 15<sup>th</sup> October 2015 that he expected to get the exit package. The University was adamant that on resuming his substantive position as professor, he would be paid a basic salary and house allowance of a professor.

7. Aggrieved, the 1<sup>st</sup> respondent lodged a claim for judicial review before the ELRC contending that the actions of the University and the 2<sup>nd</sup> respondent of revising his terms and conditions to his detriment were illegal and irrational because: it was tantamount to changing his terms and conditions of employment to his detriment; it was discriminatory as other members of staff who had served as Deputy Vice Chancellor, and other public officers, were enjoying the exit package; it violated his right to fair labour practice in breach of Article 47 of the Constitution; that the circular was in breach of his express terms of employment and was wrongly being applied retrospectively; and that it was contrary to the Employment Act, No. 11 of 2007. In addition to the prayers for orders of prohibition and mandamus already mentioned, the 1<sup>st</sup> respondent also prayed for an order of certiorari to quash the circular which was however declined by the learned Judge.

8. The Attorney General in Grounds of Opposition contended that the engagement of the 1<sup>st</sup> respondent as Vice Chancellor was an independent contract which ended after which he could not continue to reap the benefits of a Vice Chancellor; that under Section 5(5) of the Employment Act, there was an obligation on employers to pay all employees equal remuneration for work of equal value; that salaries and allowances of officers of state corporations are determined with guidance of the State Corporations Advisory Committee with advice from the Salaries and Remuneration Commission; that the circular of 14<sup>th</sup> May 2015 was issued in good faith in compliance with the law; that the application was devoid of merit as the 1<sup>st</sup> respondent had not demonstrated any breach by the appellant and the 2<sup>nd</sup> respondent; and that public interest in the matter outweighed the 1<sup>st</sup> respondent’s personal interest.

9. On behalf of the University, the Chairman of the University Council, Dr. Reardon Olubayo in his replying affidavit deposed that being a permanent and pensionable employee of the University, the 1<sup>st</sup> respondent was appointed under a contract as Vice Chancellor on 13<sup>th</sup> January 2006 for an initial period of 5 years which was renewed for another 5 years and his duties in that regard entailed implementation of University Council decisions as the overall administrative head and accounting of the University; that due to the unique responsibilities as Vice Chancellor, his remuneration was set to be commensurate with the office; and that upon successful completion of the contract term, he would qualify for a one off gratuity calculated at a rate of 31% of his annual basic salary.

10. It was deposed further that the revised terms and conditions of service approved by the University Council on 27<sup>th</sup> February 2008 provided under clause 29 that an offer of appointment under those terms and conditions would be made by a letter of appointment and that the acceptance of such offer “shall be deemed to include acceptance of the terms and conditions of service such acceptance being signified by the signature of the acceptance of one copy of the letter”; that the 1<sup>st</sup> respondent never signed any offer of appointment under those terms and conditions and “cannot therefore claim benefit of the said terms and they do not form part of his contract of employment as Vice Chancellor first entered on 13<sup>th</sup> January 2006”.

11. Dr. Olubayo deposed further that in July 2015, through its parent Ministry under the State Corporations Act the University was required, through a letter dated 14<sup>th</sup> May 2015 from the Chief of Staff Executive Office of the President and Head of Public Service, to ensure that staff in their employment only enjoy remuneration and privileges that fall within the regular terms and conditions of service commensurate to their substantive appointment and that staff who retire as chief executive officers and opt to revert to teaching roles should be required to adopt the perks attached to such position; that even though the 1<sup>st</sup> respondent had never entered into a contract under the revised terms and conditions of service approved by the University Council on 27<sup>th</sup> February 2008, the University “in abundant caution” wrote to him informing him that the proposed package had been set aside by the University Council at its 100<sup>th</sup> meeting and offered him, upon the end of his tour as a Vice Chancellor, to revert to his substantive appointment as a full professor “to be paid remuneration appertaining to that appointment and that the basic salary will be at the bar of the substantive position”;

12. He went on to say that the remuneration offered to him starting 13<sup>th</sup> January 2016 when he ceased to be the Vice Chancellor is in compliance with Article 41 of the Constitution and Section 5(5) of the Employment Act being equal remuneration for work of equal value; that under his contract of 13<sup>th</sup> January 2006, the 1<sup>st</sup> respondent is entitled to an exit package by way of sendoff gratuity in the gross amount of Kshs.3,766,177.50 and it would be unconscionable and an attempt at unjust enrichment for the 1<sup>st</sup> respondent to seek to be remunerated the basic salary and house allowance of a Vice Chancellor when he is discharging the responsibilities of the “smaller” office of full professor; that the 1<sup>st</sup> respondent was in effect seeking to entrench discrimination within the rank of full professors at the University by seeking to be paid basic pay and house allowance of a Vice Chancellor while he is holding the office and discharging the duties of a full professor.

13. It was contended that to the extent that the 1<sup>st</sup> respondent was seeking to quash the circular dated 14<sup>th</sup> May 2015, his application was barred by limitation as his action should have been initiated within 6 months of the date of the circular.

14. Upon considering the application, the affidavits and further and supplementary affidavits and the submissions and authorities cited before him, the learned Judge was satisfied that the application for judicial review was properly before him as there were no disputed facts that would have rendered the dispute incapable of determination through judicial review; that the 2008 terms and conditions of service were incorporated into the 1<sup>st</sup> respondent’s contract; that the effect of the University’s letter of 16<sup>th</sup> September 2015, which formed the substratum of the judicial review proceedings, had the effect of taking away an employment entitlement which had accrued to the 1<sup>st</sup> respondent; and that the University was thereby varying a contractual provision unilaterally without consulting the 1<sup>st</sup> respondent.

15. It was held that the exit package in the terms and conditions of service of 2008 accrued to and applied to the 1<sup>st</sup> respondent when the same came into effect in 2008 and also from 10<sup>th</sup> January 2011 when he signified acceptance of the renewed contract; that the action by the University “*predicated on the circular*” issued by the 2<sup>nd</sup> respondent “was tainted with procedural impropriety because *the 1<sup>st</sup> respondent was not granted an opportunity to make representations or argue his case, in a case where an accrued entitlement was being removed through a variation of the terms of engagement*” to the disadvantage of the 1<sup>st</sup> respondent.

16. With that, the learned Judge concluded that the orders of prohibition and mandamus as prayed would vindicate the 1<sup>st</sup> respondent’s rights and restore whatever entitlements were taken away by the decision of the University and the 2<sup>nd</sup> respondent. The Judge however declined to grant the prayer for certiorari on the basis that “*the circular of 14<sup>th</sup> May 2015 is one of general application*” and that “it would not be appropriate for the Court to disturb it or issue an order of certiorari. Such an order would be overboard.”

17. The University has challenged that decision on twenty grounds of appeal set out in the memorandum of appeal which may be condensed into three main grounds. Firstly, that the Judge erred in failing to hold that the matter before him was a matter of private employment contract outside the scope of judicial review; secondly that the Judge erred in concluding that the terms and conditions of service 2008 providing the exit package in clause 13 were applicable to the 1<sup>st</sup> respondent; and thirdly, that the Judge erred in granting judicial review remedies.

18. Counsel for the appellant submitted that the basis of the 1<sup>st</sup> respondent’s contractual relationship with the University was the letter of appointment dated 13<sup>th</sup> January 2006 and the subsequent re-appointment letter dated 6<sup>th</sup> January 2011 which did not incorporate or refer to the terms and conditions of service 2008; that on the strength of the case of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another [2001] eKLR*, parties are bound by the terms of their contract and the trial court was duty bound to give effect to the intentions of the parties as expressed in the contract of employment; that by incorporating the terms and conditions of service 2008 into the contract the Judge was thereby re-writing the contract between the parties. In support, counsel cited *Mirugi Kariuki vs. Attorney General, Civil Appeal No. 70 of 1991 [1990-1994] EA 156*; and *Republic vs. Public Procurement Administrative Review Board, Ex parte Lordship Africa Limited & 2 others [2017] eKLR*.

19. Furthermore, it was urged, as the 1<sup>st</sup> respondent did not sign the terms and conditions of service 2008 as part of his contract as Vice Chancellor, he cannot benefit from them. It was submitted that by concluding that the terms and conditions of service 2008 were incorporated into the 1<sup>st</sup> respondent’s contract, the learned Judge erred; that the provision in the 1<sup>st</sup> respondent’s letter of appointment that his employment was subject to “*University Staff Rules and Regulations*” as issued and or amended from time to time could not be construed to extend the terms and conditions of service 2008 as those terms and conditions could not be equated to “*University Staff Rules and Regulations*”.

20. It was further submitted for the University that the 1<sup>st</sup> respondent’s suit was founded on a private contract of employment and being a matter of interpretation of a private employment contract, it was not a matter of judicial review which is concerned with public law and orders of judicial review could not be justified. In that regard, reference was made to the case of *Maseno University & 2 others vs. Prof. Ochong’ Okello [2012] eKLR*; *Kadamas & another vs. Municipality of Kisumu [1985] eKLR* as well as the case of *Republic vs. Mwangi S. Kimenyi Ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR*. Moreover, it was submitted, judicial review orders cannot be granted in a case such as this where the facts are contested. The case of *Biren Amrital Shah & another vs. Republic [2013] eKLR*, was cited.

21. It was submitted further that the application for judicial review was incompetent as it was barred by limitation; that under Section 9 of the Law Reform Act, the application by way of judicial review should have been made within 6 months of the impugned decision; that in any event having declined to grant the order of certiorari, the orders of prohibition and mandamus could not be issued. Reference was made to the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001* as well as the case of *Kenya National Examination Council vs. Republic, Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR*.

22. It was also submitted that the 1<sup>st</sup> respondent did not demonstrate the decision of the University was tainted with illegality, irrationality or procedural impropriety; that there were no grounds or basis therefore for the court to grant judicial review remedies; that the 1<sup>st</sup> respondent was indeed granted an opportunity to make representations and was heard before the decision was made; that the Judge erred in extending benefits accruing to the office of Vice Chancellor to the 1<sup>st</sup> respondent when he no longer held that position; that the principle of equal pay for work of equal value as captured in Section 5 of the Employment Act was violated; that the judgment is therefore discriminatory amongst employees of the University working in the same capacity as the 1<sup>st</sup> respondent and will lead to unjust enrichment.

23. Opposing the appeal, the 1<sup>st</sup> respondent through Miller & Company Advocates submitted that the decision by the University to vary the remuneration the 1<sup>st</sup> respondent was to earn after the lapse of his contract as Vice Chancellor was illegal and irrational as the circular by the 2<sup>nd</sup> respondent on which that decision was based was a violation of the terms and conditions of service under which he was appointed; that the decision was also discriminatory as other members of staff who had previously held administrative positions and then reverted to their substantive positions had maintained the remuneration they earned as administrators; that the 1<sup>st</sup> respondent had a legitimate expectation therefore that he would retain the remuneration he earned as Vice Chancellor.

24. It was submitted that contrary to the contention by the University that the 1<sup>st</sup> respondent had no justiciable legal rights capable of enforcement by way of judicial review, the action of the University based on the circular by the 2<sup>nd</sup> respondent on the basis of which the University sought to deprive the 1<sup>st</sup> respondent the exit package was illegal and unfair; that the University and the 2<sup>nd</sup> respondent thereby violated the 1<sup>st</sup> respondent’s right to fair labour practice under Article 41 of the Constitution; right to fair administrative action under Article 47 of the Constitution; and right not to be discriminated under Section 5(3)(b) of the Employment Act.

25. It was submitted that the 1<sup>st</sup> respondent did not receive notice from either the University or the 2<sup>nd</sup> respondent before that circular was issued, which in any event was a directive with the effect of a unilateral amendment of conditions of employment in violation of Article 47(2) of the Constitution and Sections 10(5) and 26(2) of the Employment Act. Judicial review remedies were therefore available, it was submitted, on the basis of illegality of the actions by the University and the 2<sup>nd</sup> respondent. Making reference to Section 7(2) of the Fair Administrative Action Act, 2015 and the decision of this Court in the case of **Republic vs. Mwangi S. Kimenyi Ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)** it was submitted that judicial review remedies are indeed available in contracts of employment where, as here, the contract has statutory underpinning and there is violation of rights. The case of **Republic vs. Chief of Staff & Head of the Public Service & 2 others, Ex parte George A. O. Magoha [2018] eKLR** was cited for the proposition that taking away rights which had accrued to the applicant without consultation and without giving him an opportunity to be heard was procedurally unfair, an impropriety and unlawful.

26. It was submitted further that there are other members of staff who had served as Deputy Vice Chancellors of the University before reverting to their substantive positions but continued to enjoy the exit package; that therefore, the 1<sup>st</sup> respondent had a legitimate expectation that he would continue with the remuneration and benefits he earned as Vice Chancellor and that the University and the 2<sup>nd</sup> respondent violated that expectation. To support the contention that a legitimate expectation had arisen on the basis of clause 13 of the terms and conditions of service, 2008, the Supreme Court decision in **Communication Commission of Kenya & 5 others vs. Royal Media Services & 5 others, SC Petition No's. 14, 14A, 14B & 14C of 2014** was cited.

27. We have considered the appeal and the submissions. This being a first appeal, we have reappraised the material that was before the lower court in accordance with our mandate under Rule 29(1) of the Court of Appeal Rules and expounded in **Selle vs. Associated Motorboat Company Limited [1968] EA 123** with a view to drawing our own conclusions. There are, as already indicated, three main issues in this appeal. First is whether the Judge erred in failing to hold that the matter before him was a matter of private employment contract outside the scope of judicial review. Secondly, whether the Judge erred in concluding that the terms and conditions of service 2008 providing the exit package in clause 13 were applicable to the 1<sup>st</sup> respondent. Thirdly, whether the Judge erred in granting the judicial review remedies of prohibition and mandamus.

28. We first address the complaint that the matter before the learned Judge was outside the scope of judicial review. In **Pastoli v Kabala District Local Government Council & Others [2008] 2E.A. 300** it was stated 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 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.”**

29. The breadth of judicial review in Kenya was expanded considerably beyond the strictures of common law upon the promulgation of the Constitution of Kenya, 2010 and on enactment of the Fair Administrative Actions Act, 2015. Article 23 of the Constitution empowers the High Court to grant orders of judicial review where a person complains of any threat, violation, or infringement of any right or fundamental freedom in the Bill of Rights. Article 47(1) of the Constitution provides that

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” Section 3(1) of The Fair Administrative Actions Act, 2015, a statute enacted pursuant to Article 47 of the Constitution stipulates that:

**“This Act applies to all state and non-state agencies, including any person-**

**a. exercising administrative authority;**

**b. performing a judicial or quasi-judicial function under the Constitution or any written law; or**

**c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.** [Emphasis added]

30. Under Section 7 of the Act any person who is aggrieved by an administrative action or decision has the right to apply for review of the same while Section 7(2) sets out the instances when a court may review an administrative action or decision, with caution in Section 10(1) that, “an application for judicial review shall be heard and determined without undue regard to procedural technicalities.” Consequently, and as pronounced by the Supreme Court of Kenya in **Communications Commission of Kenya vs. Royal Media Services & 5 Others [2014] eKLR**, “the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law.” Furthermore, as held by this Court in the case of **Suchan Investment Ltd vs. Ministry of National Heritage & Culture & 3 Others [2016] eKLR** there is some limited scope now in judicial review proceedings for merit review of a decision.

31. There is no doubt that the relationship between the University and the 1<sup>st</sup> respondent is founded on a contract of employment. However, from the material presented before the lower court, the 1<sup>st</sup> respondent’s cause of action on the basis of which judicial review proceedings were initiated was grounded on a resolution of the University Council passed on 7<sup>th</sup> August 2015 to implement a directive issued by the 2<sup>nd</sup> respondent in its circular letter dated 14<sup>th</sup> May 2015. That circular directed that staff in research institutions and public universities who retire as chief executive officers but opt to revert to their substantive roles in research and teaching should be required to adopt the perks attached to the substantive positions. Based on that circular and the resolution, the University wrote a letter to the 2<sup>nd</sup> respondent on 18<sup>th</sup> January 2016 informing him that upon his exit as Vice Chancellor, he would cease earning the pay and allowances he was earning in that capacity. The 1<sup>st</sup>

respondent asserted that the actions by the University and the 2<sup>nd</sup> respondent, which had the effect of depriving him of his entitlement to the exit package, were in violation of the law and illegal.

32. In the case of ***Republic vs. Mwangi S. Kimenyi Ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)*** this Court held that judicial review is exceptionally available in a “contractual relationship of master and servant” where for instance the employment contract has statutory underpinning. The Court expressed that:

**“This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of CHIEF CONSTABLE OF NORTH WALES POLICE – V-EVANS (1982) 1 WLR 1155, Lord Hailsham pronounced himself thus:**

**“the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court” (See also Commissioner of LANDS – V- KUNSTE HOTEL LIMITED 1995-1998 1E.A. 1 (CAK)**

18. In the case of ***ERIC MAKOKHA & OTHERS – V- LAWRENCE SAGINI & OTHERS*** CA No. 20 of 1994 at NRB, this court defined statutory underpinning. It was stated:

**“the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words “statutory underpinning”. The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination. Examples are constitutional office holders such as judges and the Attorney General”.**

33. The emerging culture of resorting to constitutional petitions and judicial review proceedings in ordinary employment contractual disputes is to be deprecated. Those procedures are not designed or well suited for resolution of disputes with contested facts. In this case however, the inquiry involved the question whether the action or decision of the University and the 2<sup>nd</sup> respondent was tainted with procedural impropriety. The University and the 2<sup>nd</sup> respondent are public entities. We are satisfied that recourse by way of judicial review was open to the 1<sup>st</sup> respondent and that the matter was within the scope of judicial review.

34. The next question is whether the Judge erred in concluding that the terms and conditions of service 2008 providing the exit package in clause 13 were applicable to the 1<sup>st</sup> respondent. It is common ground that the 2<sup>nd</sup> respondent began his career with the University as a Lecturer. His appointment letter stipulated that his “terms of service will be permanent and pensionable in accordance with the University terms of service for the academic, Senior Library and Administrative staff...”. He then rose to the position of a professor. He was first appointed as Vice Chancellor on 13<sup>th</sup> January 2006 for an initial term of 5 years which was renewed for a further 5-year term from 6<sup>th</sup> January 2011. His letter of appointment dated 13<sup>th</sup> January 2006 spelt out his duties and responsibilities as Vice Chancellor as well as the remuneration. It also provided that his employment would be subject to the provisions of the Employment Act, the Egerton University Act, University Statutes and University Staff Rules and Regulations as issued and or amended from time to time and that the acceptance of the offer of appointment as Vice Chancellor constituted a binding contract with the University superseding “all other agreements and/or arrangements hitherto entered into”.

35. During the tenure of the 1<sup>st</sup> respondent’s service as Vice Chancellor, on 27<sup>th</sup> February 2008, the University Council revised and approved the terms and conditions of service of all its employees. Clause 13 of Annex D relating to terms and conditions of service for vice chancellor, which is what has been referred to as “the exit package”, provided as follows:

**“Senior management staff who have successfully served as Vice Chancellor Deputy Vice Chancellor and Principals of a campus College in Egerton University and resume their substantive academic positions at the University will continue to earn their basic salary and house allowance of the previous positions. This will be personal to themselves. The salary and house allowance will remain fixed until the salary and house allowance of their substantive academic appointments equal to which they are earning.”**

36. It is evident that the 2<sup>nd</sup> respondent, as Vice Chancellor, fell within the cadre of senior management staff within that clause. It was not until 16<sup>th</sup> September 2015, just over three months before the 2<sup>nd</sup> respondent’s term as Vice Chancellor was to come to an end, that he received a letter from Deputy Vice Chancellor, Administration and Finance, of the University informing him that the exit package had been “set aside” and it would not be available to him upon reverting to his substantive position as full professor. That letter, addressed to the 1<sup>st</sup> respondent under the subject reference “Proposed Exit Package For the Vice Chancellor” stated:

**“The University Council in its 100<sup>th</sup> Meeting held on Friday, 7<sup>th</sup> August, 2015 resolved that the proposed exit package for the Vice-Chancellor and Senior Management Staff be set aside as advised by the Chief of Staff and Head of the Public Service in a circular... dated 14<sup>th</sup> May, 2015. This is therefore to inform you that upon the end of your tour as the Vice-Chancellor, you**

**will revert to your substantive appointment as a Full Professor in the Department of Animal Sciences and thus will be paid in remuneration appertaining to that appointment. The basic salary will be at the bar of the substantive position.”**

37. Although there is mention of “*the proposed exit package*” in that letter, as though to suggest that it had not been implemented, the reference to „*setting aside?*” of the exit package is an implicit acknowledgment that the University was thereby reversing, vacating or annulling that which was already in place. The argument by the University that the exit package did not form part of the terms and conditions of the employment of the 1<sup>st</sup> respondent because he did not sign the revised terms and conditions 2008 is not persuasive. It was not suggested that all members of staff who were already in the employment of the University when those revised terms and conditions 2008 were adopted were required to sign fresh letters of appointment or to otherwise signify, in writing, their acceptance of those terms and conditions. We are therefore in full agreement with the learned trial Judge when he concluded in his judgment that:

**“The exit package in the Terms and Conditions of Service (2008) accrued to and applied to the applicant when the same came into effect in 2008 and also from 10 January 2011, when he signified acceptance of the renewed contract.”**

38. The last issue is whether the Judge erred in granting the judicial review remedies that he did. As already noted, an applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety in order to succeed in an application for judicial review. In the present case, the orders of prohibition and mandamus were granted on the basis, firstly, that there was procedural impropriety on the part of the University in failing to grant the 1<sup>st</sup> respondent an opportunity to make representations or argue his case, and secondly that the unilateral variation of his terms and conditions would have been unlawful. It was, in our view, a proper case for the grant of those remedies.

39. As to the complaint that the action was statute barred, Section 9(3) of the Law Reform Act as read with Order 53 Rule 2 of the Civil Procedure Rules, 2010 to which reference was made prescribed a time limit of six months within which to apply for leave for orders of certiorari. In the present case, apart from the fact that the prayer for an order of certiorari was declined, the 1<sup>st</sup> respondent’s action was founded on constitutional provisions under which the court is empowered to grant orders of judicial review. We are also not persuaded, as suggested by counsel for the University that the remedies of prohibition and mandamus could not issue independently of an order for certiorari.

40. All in all, we find no merit in this appeal. It is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE, 2021**

**W. KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

Deputy Registrar