IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 120 OF 2019

BETWEEN

DR. WILFRIDA ARNODAH ITOLONDO.....APPELLANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY, MINISTRYOF EDUCATION....2ND RESPONDENT

TECHINICAL UNIVERSITY OF KENYA COUNCIL.....3RD RESPONDENT

JARAMOGI OGINGA ODINGA

UNIVERSITY COUNCIL.....4TH RESPONDENT

UNIVERSITY OF KABIAGA COUNCIL.....5TH RESPONDENT

MAASAI MARA UNIVERSITY COUNCIL.....6TH RESPONDENT

PROF. FRANCIS ADUOL.....7TH RESPONDENT

PROF. STEPHEN AGONG.....8TH RESPONDENT

PROF. WILSON KIPNG'ENO.....9TH RESPONDENT

PROF. MARY WALINGO.....10TH RESPONDENT

(Being an Appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.,) dated 15th February, 2019

in

ELRC Petition No. 66 of 2018)

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JUDGMENT OF THE COURT

[1] As the heading suggests, this is an appeal against the judgment of the **Employment and Labour Relations Court** (ELRC) delivered on 15th February, 2019 in **ELRC Petition No. 66 of 2018** (M. Onyango, J.). The brief background of the matter is that, ***Dr. Wilfrida Arnodah Itolondo*** (the appellant) filed a Petition before ELRC on or about June, 2018 seeking several declaratory and mandatory orders of injunction to the effect that the respondents violated several Articles of the Constitution in the re-appointment of the Vice Chancellors (VCs) of four Public Universities namely; ***Technical University of Kenya***, (the 3rd respondent), ***Jaramongi Oginga Odinga University Council***

(the 4th respondent), ***University of Kabianga*** (the 5th respondent) and ***Maasai Mara University*** (the 6th respondent).

[2] The appellant described herself as a public spirited individual and a defender of the Constitution. In justifying her ***locus standi*** to institute the Petition, she cited the provisions of ***Articles 3 (1), 22, 50*** and ***258*** of the Constitution, to bolster her argument that she was pursuing a public interest matter, also as provided under Articles 22(1) and 258(1) of the Constitution which may be instituted by—

> ***a. a person acting on behalf of another person who cannot act in their own name;***
>
> ***b. a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***c. a person acting in the public interest; or***
>
> ***d. an association acting in the interest of one or more of its members".***

The appellant's prayers were that the re-appointment to office of the Vice Chancellors of the 3rd to the 6th respondents whom she claimed were appointed in office contrary to the provisions of the Constitution be nullified, and the Court to declare that the provisions of Section 39 (3) of Universities Act, the respective rules and regulations contained in the Charter and the governance code of State corporations (Mwongozo) unconstitutional for failing to provide for a competitive re-appointment for the office of the VC of public universities.

[3] In support of these substantive reliefs, the appellant narrated how she encountered from the media on 20th May, 2018 a statement indicating that the 2nd respondent had re-appointed the 6th to the 10th respondents, which in her view was done contrary to the provisions of the Constitution. The appellant also pointed out that she had on several occasions made efforts to raise concerns with respondent regarding the re-appointment of the VCs of Public Universities. Further, on 27th October, 2016, the appellant wrote to the 2nd respondent protesting a clause in the Draft Regulations under the **Universities Act, 2012** concerning the re-appointment of the VCs of Public Universities that had been issued by the Ministry of Education which stated that **"one will be eligible to a 2nd term following a positive appraisal by the council"** be amended as it was contrary to the values provided for in the Constitution.

[4] In summary, the gravamen of the appellant's complaints is that the re-appointment of the aforementioned VCs of public universities was done contrary to the national values and principles of governance that are enshrined in the Constitution. The appellant contended that those values and principles bind all state officers, state organs and public officers; that the re-appointments of the VCs undermined the principles of public participation of the people, social justice, equity, nondiscrimination, inclusiveness and transparency among others; that the process of re-appointment was not competitive as there was no advertisement, shortlisting of applicants and invitation of the public to present memoranda. Moreover, no audit was carried out in the Universities before the reappraisals were done and the whole process was carried out in secrecy without public scrutiny.

[5] The matter was heard by ***M. Onyango, J.***, who identified a singular issue for determination and that was; whether the re-appointments of the 7th to the 10th respondents as Vice Chancellors of the 3rd to the 6th universities violated ***Articles 2, 3, 10, 35, 232*** and ***section 7*** of the 6th Schedule of the Constitution and ***section 39 (1) (a)*** of the **Universities Act, 2012**. After considering the matter, the Judge was satisfied that the 7th to the 10th respondents were eligible candidates for re-appointment as per the **Universities Act**. The Judge also found the issues had been determined by the Court of Appeal in **Civil Appeal No. 120 of 2014** which was filed by the same appellant and which was binding on the trial court. Also, the Judge held that the process of re-appointments as VCs of the respective Universities was properly carried out by the Councils and therefore did not contravene the **Universities Act** or statutes. The Petition was dismissed and each party was ordered to bear their own costs.

[6] The aforesaid judgment is what provoked the appellant to file the instant appeal. The appellant has cited some fifteen (15) grounds of appeal which are prolix and repetitive. Nonetheless in her written submissions, the appellant summarised the grounds into some four thematic areas. Those grounds are; whether the learned trial Judge erred in law by holding that there was no proof of violation of Articles 3, 10, 27, 35, 73 and 232 of the Constitution by the 2nd respondent in the re-appointment of the 7th to the 10th respondents in office as Vice Chancellors; whether the re-appointment contravene the Universities Act, 2012 and or statutes; whether the court was bound by the Court of Appeal decision in the **Wilfreda Itolondo & 4 Others vs. President and 7 Others [2015] eKLR,** and finally, whether the Judge erred by failing to pronounce herself as to whether the provisions of a Circular by the Permanent Secretary/Secretary to the Cabinet and Head of Civil Service dated 23rd November, 2010 on the Procedure for re-appointment of the Chief Executive Officers (CEOs) in State Corporations at the expiry of the first term was null and void for being inconsistent with the provisions of the Constitution and the Universities Act, 2012 on the procedure of appointment of Vice Chancellors of public Universities.

[7] The plenary hearing of this appeal took place virtually in line with the Court of Appeal Practice Directions due to the prevailing extreme conditions brought about by the COVID -19 Pandemic. The appellant who was acting in person relied on her written submissions and very ably made some oral highlights. She was categorical that there was blatant violation of the Constitution in the appointment of the 7th to the 10th Vice Chancellors who are public officers as the recruitment to office for a second term was not done competitively as required by law; that there was no advertisement inviting qualified persons to apply and all that goes with recruitment in public offices, therefore there was no transparency, participation or accountability which was a violation of the provisions ***Articles 10, 35*** and ***232*** of the Constitution as well as ***sections 35*** and ***39*** of the **Universities Act.**

[8] The appellant went on to urge that the 7th to 10th respondents were re-appointed based on merit and performance which was not openly evaluated, thereby undermining the values provided in the Constitution. The appellant dismissed a justification put forward by the respondents that in the re-appointment of the Vice Chancellors, they were guided by the ***Mwongozo Code of Governance for State Corporations; Public Service Commission (PSC) Guidelines for implementation of Performance Rewards and Sanctions in Public***

Service. According to the appellant, appointment to public office, like the one of the VC of a public university must be done through a fair competition based on merit and these high values cannot be overturned by an Act of Parliament, let alone a policy directive by the Minister. To bolster this preposition, the appellant cited the case of **Hassan Joho & Another vs. Suleiman Said Shahbal & 2 Others [2014] eKLR** para 85. Thus, the Judge erred by elevating a policy instrument above the Statutes and the Constitution.

[9] Commenting on the **Universities Act**, the appellant readily agreed that it was silent on the question of procedure of appointment of a VC of the public university at the expiry of the first term. Nonetheless, she faulted the Attorney General for failing to initiate a Bill in Parliament to address the lacuna even after the appellant gave an alert by filing the aforesaid petition. On the question of the court being bound by its own decision, the appellant was of the view that the decision of this Court in **Civil Appeal No 120 of 2014** was erroneous and was not supported by the law. Moreover, the appellant argued that she had sought an order of mandamus and prohibition in the said suit whereas the petition before the ELRC on this matter was different as she sought declaratory and mandatory injunctive orders; and that no decision is cast in stone as a court of law can always depart from an earlier decision depending on the prevailing circumstances. To this end the appellant cited the case of **National Bank Limited vs. Anaj Warehousing Limited [2015] eKLR** where it was stated as follows:

> **" …Even as stare decisis assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up"**

To sum up on this issue of stare decisis, the appellant cited several cases by the ELRC where the Judges have set aside their own orders.

[10] The appellant was emphatic that in a public appointment, the values enshrined in the Constitution are critical as they guarantee an open process where a candidate is subjected to an audit on merit and integrity. This process allows the public to scrutinize a candidate; that it came to pass that the 10th respondent was found to have integrity issues in what has come to be known as the "*Maasai Mara Heist of 2019*". Therefore, her skepticism and apprehension that an open process in re-appointment has merit had been vindicated. Although the appellant stated that she did not personally know the four VCs, she stated that she was pursuing a public interest matter that affects a cross section of the public. Finally, it was the appellant's plea that her prayer was that all public institutions should engender the values of an open and democratic society that uphold integrity as a hallmark for one to serve in public office which should not be compromised at the altar of prudence use of public resources.

[11] The appeal was opposed by several counsel on record for the respondents. ***Ms Wangechi Gichunge*** for the 1st and 2nd respondents did not file written submissions but associated herself with the submissions made by the other respondents. ***Mr. Okinyo*** appeared for the 3rdand 7th respondents; ***Ms Nyamita*** for the 4th and 8th respondents; ***Mr. Otury*** for the 5th and 9th respondents and ***Ms Awour*** for the 6th and 10th respondents.

[12] Addressing us on the submissions on behalf of the 3rd and 7th respondents, ***Mr. Okinyo*** argued that the appointment of the 7th respondent did not offend any law. He cited the provisions of ***Article 232 (1) (g)*** of the Constitution which provides the values and principles of public service and provides for a fair competition and merit as the basis of appointments and promotions. As regards the appointment of vice chancellors, Mr. Okinyo cited ***section 39 (1)*** and ***(3)*** of the **Universities Act** which provides:

> **" (1) The Vice- Chancellor of a university shall be appointed-**
>
> **(2)…**
>
> **(3) The Vice- Chancellor of a public university shall hold office for a term of five years and shall be eligible for a further term of five years."**

Counsel submitted that the meaning of the word "eligible" according to the Concise Oxford Dictionary, 12th Edition is "satisfying the appropriate conditions."

He added that the 7th respondent's contract contained a renewal clause and therefore he had a legitimate expectation that once the conditions laid down in the law were met, he would be re-appointed for a further term of five (5) years which was done and therefore the suit herein is overtaken by events.

[13] Counsel further submitted that the 7th respondent's performance was satisfactory, which was backed by empirical feedback; that he had expressed his willingness to continue serving six months before the contract came to an end, and for that matter the 3rd respondent had not given him notice that his contract was not going to be renewed. The appellant did not challenge the appointment of the 7th respondent on 16th May, 2013 when he was first appointed, which means his appointment was in compliance with the Constitution. This issue was litigated by the appellant before when she challenged the re-appointment of the 7th respondent and this Court held that the respondent was not being recruited but was being re-appointed and that it is fresh recruitment that would have necessitated a competitive process. According to counsel for the 7th respondent, the appellant is litigating over the same subject matter while hypothesizing a public interest angle which is a mere vile for publicity seeking and vested interest.

[14] On the part of Ms ***Nyamita*** for the 4th and 8th respondents, she pointed out that the letter of appointment of ***Prof. Agong*** of Jaramongi Oginga Odinga University was dated 10th July, 2013. It stated, among others, that the employment was for five (5) years with effect from 20th June, 2013 and he was eligible for re-appointment based on performance, and he was required to indicate his interest six (6) months before the expiry of the contract. The 8th respondent duly applied for renewal of the contract; and was evaluated by the Council scoring 87%

thereby meeting the criteria for re-appointment. Counsel was of the view that the Constitution did not envisage anybody eligible for re-appointment to a public office being taken through a fresh competitive process because the values that a candidate had satisfied in the initial appointment were still the same as they were involving the same appellant. Thus, counsel agreed with the submissions made on behalf of the 3rd and 7th respondent that the appellant has been litigating on the same issue that was determined by this Court in **Civil Appeal No 120 of 2014** (supra) and thereby abusing the court process. Counsel therefore urged us to dismiss the appeal.

[15] Next to address us on behalf of the 5th and 9th respondent was ***Mr. Otura***. He submitted that the 5th respondent went into a detailed process of appointment of the 9th respondent. That the **Universities Act** and the **Kabianga University Charter** allowed the 9th respondent to apply for re-appointment, which issue was extensively determined in this Court's decision in **Civil Appeal No 120 of 2014.** According to counsel, this Court is being asked to sit on a matter requiring legislation and craft a law on re-appointments on behalf of public universities. He added that the 9th respondent was an eligible candidate for re-appointment as he had only served one term. Further, the process of re-appointment was in consonance with the ***section 39 (1) (a)***, and the University Charter that prescribe a detailed procedure of evaluation before the re-appointment. We were urged to dismiss the appeal as lacking in merit, and the same issues having been determined in the earlier judgment of this Court.

[16] ***Ms Awour*** made submissions on behalf of the 6th and 10th respondents. She echoed what was said by the other respondents as regards the provisions of the Universities Act and the Government policy on re-appointment known as **Mwongozo;** that the 10th respondent was duly re-appraised by the Council and was properly re-appointed for a further term of five (5) years. Commenting on the allegations that her client the 10th respondent was involved in *"Maasai Mara University Heist"*, counsel submitted that apart from this being a new matter that the appellant was introducing in the appeal for the first time, the said allegations are subject of criminal proceedings that are ongoing. The 10th respondent has not been found culpable and it will be premature to introduce that matter in this appeal which was not before the High Court. Counsel also urged that this appeal be dismissed as the issues were determined in Civil Appeal No. 120 of 2014.

[17] In a brief rejoinder, the appellant acknowledged that although a detailed and competitive process of re-appointment of VCs is not provided for in the Universities Act, the respondents should always follow the values stated in the Constitution. She faulted the 1st and 2nd respondents for sleeping on their jobs while impunity reigns in the appointment of senior public officers who are not vetted and scrutinized publicly on integrity and use of public resources as it happened with the 10th respondent. Had the VCs been subjected to public hiring, what happened with the 6th respondent could have been unearthed to save the public colossal sums of money that were misappropriated. The appellant urged us to allow the appeal.

[18] We have considered the record, submissions by counsel and the law. We recognize that in this matter no oral evidence was adduced. That notwithstanding, our duty remains constant in a first appeal. It is to re-assess and re-evaluate the entire evidence and material tendered before the trial court and reach our own conclusions, while giving due reverence to the Judge's exercise of discretion on findings of fact and law, unless there is no evidence in support of the said findings, or the findings are plainly not founded in law. This much was restated by this Court in **Musera vs. Mwechelesi & Another ([2007]) KLR 159:**

> **"We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."**

Also, in **Mbogo & another vs.Shah [1968] EA 93 at 96,** this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

[19] That said, we will proceed to determine whether the re-appointment of the VCs violated the Constitution and other laws. We appreciate that the appellant readily admitted that the **Universities Act, 2012** did not provide that there be a competitive procedure for the re-appointment of VCs to the Public Universities.

Further, the University Charters for the 3rd to the 6th respondents provided a procedure of re-appointment that gave the serving VCs an option to re-apply six months before expiry of the first term. The appellant however contended that the procedure ran afoul with the Constitution; that she notified the 1st respondent to amend the Act and it was due to the failure by the 1st respondent to move the necessary amendments to the Universities Act to align it with the Constitution that has perpetuated unfairness in re- hiring of VCs of public universities.

[20] Just like the appellant appreciated, the learned trial Judge was also in agreement that ***section 39*** of the **Universities Act** provides for the appointment of VC, but was silent on whether the university council should carry out a competitive process of re-appointment so long as the candidate is eligible. This is what the section provides:

> **"1. The vice chancellor of a University shall be appointed;**
>
> **(a) In the case of a Public University, by the Cabinet Secretary on recommendation of the Council, after a competitive recruitment process conducted by the council; and**

…

(3) The Vice Chancellor of a public university shall hold office for a term of five years and shall be eligible for a further term of five years."

The above provision of the law was also reinforced by the provisions of the Code of Governance for state corporations (Mwongozo) which provides that a subsequent term of a CEO of a corporation is renewed based on a favourable evaluation as spelt out in the regulations. Unless the re-evaluation was faulty, which was not the case here, we are persuaded, that, to declare the re-appointment a nullity when the 6th to the 10th respondents were taken through the re-appointment process would also undermine the principle and value of good governance, a principle that governs public institutions. We find no merit in this ground of appeal.

[21] The appellant also acknowledged that she has litigated over this same issue of re-appointment of VCs of public universities in this Court in **Civil Appeal No. 120 of 2014** but urged us to depart from the ruling of this Court. In that case, the appellant with others had sued ***Kenyatta University Council*** for re-appointing ***Prof. Olive Mugenda*** for a second term on the same grounds as in this case, contending that the re-appointment was not competitive and that it was a violation of the Constitution. This is what this Court had to say in a pertinent paragraph of the judgment:

"What we glean from the above-quoted part of the submissions is that the appellants are arguing that their application was brought as litigation in the interest of the public to litigate, among others, the need and requirement that public offices be filled by way of competitive recruitment so that merit is upheld in appointments and promotions. The appellants appear to claim that that principle in public service was not upheld when the 6th respondent was reappointed as Vice-Chancellor. From whatever angle one looks at this argument, it raised two points. Firstly, the 6th respondent was not being recruited and therefore appointed into office. Hers was a reappointment as provided for under section 10(3) of the Act. In this context the aspect of "competitive recruitment" did not arise. Secondly, the orders sought through judicial review proceedings could not and did not admit to considering the aspect of merit in the reappointment or appointment, for that matter.

The appellant asserted that the above decision was arrived at through mistake, in other words, it was a judgment that was delivered *per incuriam* and we should depart from it.

[22] This was indeed a profound statement by the appellant when she urged this Court to depart from a timeless treasured doctrine of *stare decisis* or precedent without giving any reason at all. In **Jasbir Singh Rai and Three Others vs. The Estate of Tarlochan Singh Rai and Four Others**, this Court of stated as follows:

"For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum(side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law.

Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at per incuriam, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of per incuriam is a strict one – the relevant decision having not considered some specific applicable instrument, rule or authority.

Subject to that broad principle, certain directions may, on this occasion, be laid down:

(i) where there are conflicting past decisions of the Court, it may opt to sustain and to apply one of them;

(ii) the Court may disregard a previous decision if it is shown that such decision was given per incuriam;

(iii) a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion;

iv) the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness."

[23] It is imperative to point out that the appellant did not make any submissions to demonstrate in what way the earlier decision of this Court was not founded in law and was therefore made *per incuriam*. To us, the Judges aptly interpreted the **Universities Act** and the respective Charter that clearly drew a distinction between when a VC is being recruited in office for the first time, and a re-appointment after the expiry of five (5) years. According to the appellant, both recruitment and re-appointment should be subjected to an open and competitive process. The judgment we are being asked to declare per *incuriam* has no error, the fact that the appellant does not agree with it cannot justify such a finding. The appellant did not point out any errors either on the face of the judgment or any incorrect holding. We therefore dismiss that ground of appeal.

[24] We understood the appellant to be saying that the **Universities Act** and their respective Charters should provide for a competitive and open process for re-appointment of VCs. It is for this reason the appellant adopted the two-pronged approach, by blaming the 1st respondent for not amending the law to harmonize it with the Constitution, and seeking that we find the values in the Constitution were being

undermined by the **Universities Act** and the attendant policies and regulations. The real controversy we are invited to resolve is whether we should declare ***section 39*** **Universities Act** unconstitutional for not providing a competitive process for the re-appointment of the VCs to the Public Universities.

The appellant stated that she wrote a letter to the 1st respondent requesting him to move the necessary amendment to the law. The question we have asked ourselves is whether this is a technical legal question for the court to determine on whether to order the Legislature to amend the law, or declare the said law unconstitutional, or leave the issue for the Legislature. We also need to remind ourselves of the timeless doctrine of separation of powers as aptly stated *In* ***Marbury -vs-Madison– 5 US. 137*** that:

> **"The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion."**

Also, in the words of Chief Justice Marshall of the U.S.A, in ***Cohens vs. Virginia19 US (6 Wheat.) 264 (1821):***

> ***"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty".***

[25] It is common ground that when the 7th to the 10th respondents were first appointed as VCs they were taken through a competitive recruitment process. There is also no challenge that they were all eligible to re-apply and that the respective **University Charters** and the **Mwongozo** policy which is a code of governance for State Corporations enacted in 2015 to engender the principles of good governance and national values provides under ***Article 1.12 (6)*** that re-appointment of a Chief Executive Officer (CEO) for a subsequent term shall be based on a favourable evaluation as spelt out in the evaluation tool. The 7th to the 10th respondent provided detailed information in their responses that their contracts provided a renewal clause; that they were required to apply for re-appointment 6 months before the expiry of the contract which they did, and each was taken through a rigorous process of evaluation before they were finally re- appointed in office. In this regard, we are of the view that if it was the intention of the of the Legislature to provide under the **Universities Act** for a competitive process of re-appointment of VC's the law should have expressly provided for that.

[26] Similarly, on whether the **Universities Act** is a violation of the Constitution, we think this is perhaps a question best left for the Legislature with its majoritarian decision-making voice to discuss and determine whether to amend the Universities Act to include competition in re-appointment of VC's. In the same vein, we decline the invitation to declare the policy known as ***Mwongozo*** a code of governance for State Corporations unconstitutional as we cannot fathom how its provisions aided the violation of the Constitution. To begin with the appointment of the 7th to 10th respondents was done competitively when they were first appointed to serve for a contract term of five (5) years. Having satisfied the criterion under the Constitution when they were appointed in office, we agree with the submissions by counsel that the blood of constitutionalism to which a candidate was subjected to in the initial appointment, was still running through them in the re-appointment. They served for five (5) years and they were eligible for re-appointment, and just as this Court held in **Civil Appeal No 120 of 2014**, the 7th to 10th respondents were not being recruited afresh. If they were strangers who were re-appointed without competition, that would have implied abuse of process that violated the Constitution and called for intervention by this Court, which was not the case here.

[27] We think we have said enough to demonstrate that the issue of re-appointment of VCs to public universities was determined by this Court as aforesaid, the appellant is litigating on the same issues although she changed the prayers to *'declarations'* the substratum of the matter remains the same and fits the description of what constitutes res *judicata. As* aptly discussed by this Court in **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 Others [1996] eKLR** that for the doctrine of *res judicata* to apply the following conditions must be fulfilled:

> ***"(i.) [There must be] a previous suit in which the matter was in issue;***
>
> ***(ii.) the parties were the same or litigating under the same title.***
>
> ***(iii.) a competent Court heard the matter in issue;***
>
> ***(iii.) the issue has been raised once again in a fresh suit."***

The same issues were for determination in the earlier suit that is whether the **Universities Act** violated the values in the Constitution. The Court having ruled on this issue in the earlier suit, which were also against a public university and about the appointment of a VC we find this matter was fully determined by the aforesaid judgment of this Court.

[28] In the result, we find the appeal lacking in merit and dismiss it entirely with costs to the respondents.

Dated and Delivered at Nairobi this 20th day of November, 2020.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR