



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 52 OF 2014

BETWEEN

OINDI ZAIPPELINE & 39 OTHERS.....APPELLANTS

AND

KARATINA UNIVERSITY.....1ST RESPONDENT

MOI UNIVERSITY.....2nd RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga, J.)

dated 5th September, 2014

in

H.C.C.C No. 13 of 2013)

JUDGMENT OF THE COURT

1. The title in this appeal read that the appeal was lodged by Mr. Oindi Zaippeline & 39 others. During the hearing, learned counsel for the appellant, Mr. Karweru, informed Court that there was an error in the title to the extent that his instructions to appeal was from Mr. Oindi Zaippeline and not the 39 others who were parties to the proceedings before the High Court. By consent of the parties, an order was recorded that this appeal is by one appellant, Mr. Oindi Zaippeline; the appeal by the 39 others was marked as withdrawn.

2. In preface, the legal issues in this appeal can be posited as follows: when a student is admitted to study in a specific university, is there a legitimate expectation that upon successfully undertaking the study and passing all examinations the student shall be awarded and conferred a degree of that specific university? Can such a student be conferred a degree of any other university that did not admit, teach or examine him? When a student is admitted by a parent university and placed to study in a constituent college and later the constituent college becomes a full fledged independent university before the student completes his study, to which degree is the student entitled to - a degree from the parent university or a degree from the new full fledged university? Is it public policy that the law can be changed to enable another university to confer a degree to a student that it has neither admitted, taught nor examined?

Relevant Background Facts:

3. To appreciate the relationship between the appellant and each of the respondents and the issues raised in the appeal, the background facts leading to the establishment of Karatina University, the 1st respondent, should be stated.

4. The appellant was admitted as a student of Moi University (2nd respondent) in 2009. At the time of his admission, Karatina University, the 1st respondent, did not exist in fact and in law. Upon his admission to Moi University located in Eldoret Town, the appellant was required to undertake his studies at a physical location known as “Moi University Central Campus” located in a town known as Karatina, part of the then Central Province of the Republic of Kenya.

5. “Moi University Central Campus” at Karatina was a part of “Chepkoilel University College” which was a constituent college of Moi University. “Chepkoilel University College” is now a fully fledged university with its own Charter and has never been a party to these proceedings, both at the High Court and before this Court.

6. In the year 2010, the “Karatina University College Order, 2010” was Gazetted vide Legal Notice No. 163 dated 1st October 2010. Paragraph 3 (1) of the Order established “Karatina University College” as a constituent college of Moi University. By this Order “Karatina Central Campus” which was part of Chepkoilel Campus was transformed into a constituent college of Moi University; i.e. the “Karatina Central Campus” ceased to be legally part of “Chepkoilel University College”.

7. The appellant contends that he was admitted as a student of Moi University in 2009 and when the Legal Notice No. 163 of 2010 was gazetted, his status as a student entitled to the degree of Moi University was not affected; he remained a student of Moi University. In support of this contention Paragraph 5 (1) of the Legal Notice was cited which stipulates:

“The degrees and Postgraduate diplomas to be awarded by the University College shall be the degrees and postgraduate diplomas conferred by Moi University.”

8. The appellant contends that by virtue of his admission as a student of Moi University, his legitimate expectation was to be awarded and conferred a degree of Moi University; that this legitimate expectation was recognized and preserved by paragraph 5 (1) of the Legal Notice No. 163 of 1st October 2010; that the respondents have violated this legitimate expectation by denying him award and conferment of the degree of Moi University and purporting to award and confer him a degree of Karatina University, an institution at which the appellant neither applied for admission nor was taught and; the respondents by attempting and purporting to confer him a degree of Karatina University are perpetrating an academic fraud by the 1st respondent conferring a degree to a student it neither admitted, taught nor examined.

9. The respondents submitted that the relevant background facts are that on 1st March 2013, the 1st respondent was granted a Charter and it was transformed from a constituent college of Moi University to a full fledged university known as Karatina University; that Paragraph 32 of the Charter revoked Legal Notice No. 163 of 2010 which established Karatina University College as a constituent college of Moi University; that Paragraph 33 of the Charter expressly states that ***“the students of former Karatina University College who were pursuing degree, diploma and other certificate programmes...shall be allowed to complete their courses and be awarded degrees, diplomas and certificates of Karatina University”***; that **Section 74** of the **Universities Act** stipulates that constituent colleges of universities existing before the commencement of the Act shall continue to be constituent colleges of those universities and may apply for accreditation.

10. The respondents’ case is that the appellant is not entitled to an award or conferment of the degree of Moi University; that if at all he had any legitimate expectation, the same was taken away by Statute and the Grant of Charter to the 1st respondent to become full fledged Karatina University with powers to award and confer its own degrees and diplomas. The Statute that took away any expectation of the

appellant is the **Universities Act of 2012; Section 71 (1) (d)** of the Act repealed the **Moi University Act, Cap 210A**, upon which the appellant could derive any cause of action; paragraph 32 of the Karatina University Charter revoked Legal Notice No. 163 of 2010 that established Karatina University College; the grant of Charter to Karatina University had the effect of annulling the Legal Notice No. 163 of 2010 and paragraph 5 (1) thereof was not saved as a transitional provision that could confer any right to any student who had been admitted by Moi University.

11. The appellant contends that the **Universities Act** as well as the grant of Charter to Karatina University did not affect his status as a student of Moi University and he has a legitimate expectation and entitlement to award and conferment of degree of Moi University. In support of this contention, the appellant argued that **Section 79** of the **Universities Act** preserved all registrations, notices or information given or thing done under the repealed **Moi University Act**; students were not part of assets and liabilities of the then Karatina University College that could be transferred to the new Karatina University under the provisions of **Section 80** of the **Universities Act**. Paragraph 32 (2) of the Karatina University Charter saved all acts, orders, requirements and other things done under the Karatina University College Order; paragraph 33 of the Karatina University Charter applies to former students of Karatina University College and the appellant was never a student of the former Karatina University College but a student of Moi University. There is no legal instrument that converted the appellant from being a student of Moi University to a student of Karatina University College or Karatina University. The appellant contend that it cannot be urged that the **Universities Act** and the grant of Charter to the 1st respondent annulled, transformed and frustrated the student status of the appellant; that the doctrine of frustration is inapplicable in this case.

Pleadings and submissions before the High Court:

12. By a Plaint filed in the High Court the appellant with 39 Others sought *inter alia*:-

- ***A declaration that they are students of the 2nd defendant (2nd respondent) and are not legally transferable to the 1st defendant (1st respondent).***
- ***A declaration that only the 2nd defendant can administer examinations and issue degree certificates to the plaintiffs (appellants) to the exclusion of the 1st defendant.***
- ***A permanent injunction directed against the 1st defendant from purporting to arrogate to itself, either by itself or in collusion with the 2nd defendant the role of examining and issuing of degree certificates to the plaintiffs without their consent.***

13. The appellant's case is that he applied for university education through the Universities Joint Admission Board and was admitted to Moi University, the 2nd respondent, to undertake a degree course. The 2nd respondent placed him at its Central Kenya Campus in Karatina Town; the 2nd respondent taught and administered examinations to the appellant based on courses and curriculum developed and approved by itself to the exclusion of the 1st respondent; that there is a contractual obligation on the 2nd respondent to award and confer upon the appellant its degree upon successful completion of studies. It is the appellant's contention that the 2nd respondent's obligation cannot be delegated, negotiated or transferred to a third party more particularly the 1st respondent.

14. The appellant avers that after the 1st respondent was granted a Charter on 1st March, 2013 and became a fully-fledged university, the 1st respondent indicated to the appellants that it would henceforth administer examinations. According to the appellants, the above conduct was an illegal abdication, derogation and assumption of obligations by the respondents. It is the appellant's contention that he would be prejudiced in the job market if the 1st respondent awarded him a degree certificate as opposed to the 2nd respondent; that most employers favour old and established universities as opposed to new and recent ones.

15. The respondents filed their respective defences refuting the appellant's case. While admitting that the

appellant had been admitted as a student of the 2nd respondent, the 1st respondent averred that at all material times it was the 1st respondent that managed and administered all courses and examinations undertaken by the appellant; that the 2nd respondent's role was to monitor and oversee the program of study.

16. The 2nd respondent maintained that since the 1st respondent had become a fully-fledged university, the appellant's suit had been overtaken by events. The 2nd respondent averred that pursuant to **Section 5(a)** of the **Moi University Act** (repealed) and vides Legal Notice No. 163 of 1/10/2010, Karatina University College was established as a constituent college of the 2nd respondent; the said College was established as a body corporate with perpetual succession and a common seal; that the only link between the respondents is that they shared a Chancellor and the Senate. As a result of the foregoing the 2nd respondent contends that the appellant and all students as well as staff (employees) were transferred to the 1st respondent which took over all assets, liabilities and responsibilities save for the examinations which were administered under the Senate of the 2nd respondent.

17. The 2nd respondent further averred that when the 1st respondent became a fully-fledged university, it became completely independent from the 2nd respondent by having its own Senate. Consequently, the 1st respondent now has powers to administer its examinations.

18. Before the trial court, the appellant as PW1 Oindi Zaippeline (Oindi), testified that he was admitted to Moi University on 27th July, 2009 and posted to the Central Kenya Campus. While he was in his second year the Central Campus was converted into a constituent college of the 2nd respondent on 1st October, 2010; that the constituent college became a fully-fledged university on 1st March, 2013 when he was in his fourth year second semester of study. He testified that he had a legitimate expectation that upon the successful completion of his course the 2nd respondent would award and confer him with its degree certificate.

19. DW1, Duncan N. Njoroge (Duncan), the 1st respondent's Registrar, testified that he was the Secretary to the 1st respondent's Senate and responsible for admission of students. Prior to working for the 1st respondent he worked for the 2nd respondent between the years 1990 to 2011. He testified that prior to the 1st respondent being granted the Charter; the Principal of the constituent college went round explaining the implication of the same to the students. He informed the appellant among other students that they would be awarded degrees by the 1st respondent. He admitted that at the time the 1st respondent became a fully-fledged university, the appellant was about to sit for his final examinations which was based on a program develop by the 2nd respondent.

20. DW2, John Muguni (John), the Registrar of the 2nd respondent gave evidence that he supervises and coordinates academic activities at Moi University. While admitting that the appellant had been admitted by the 2nd respondent he maintained that awarding of degree certificates was not automatic; students had to fulfill the academic requirements, pass exams and abide by the rules set by Senate. He testified that when the 1st respondent was Central Kenya Campus it was part of the 2nd respondent. As soon as the Central Kenya Campus became a constituent college the students, employees and assets were transferred to Karatina University College which later became the 1st respondent. He testified that the 2nd respondent cannot award degrees to the appellant since the 1st respondent is not affiliated to it.

21. Satisfied that the appellant had failed to prove his case to the required standard, the trial court vides judgment dated 9th May, 2014 dismissed the suit with orders that each party bear its costs. The trial court made a finding that the appellant was a former student of Karatina University College eligible under Paragraph 33 of the Charter to be conferred a degree of Karatina University. The trial court further held that if the appellant had any legitimate expectation to be conferred a degree by the 2nd respondent the same was extinguished by operation of law. It is these findings that has provoked this appeal based on the following grounds: -

- *The learned Judge erred in law and in fact in misconstruing, a charter to be granting any rights and privileges under the law thereby arriving at the wrong conclusion in law thereby occasioning miscarriage of justice.*
- *The learned Judge erred in law in failing to note that education in Kenya, being voluntary at the university level no order or charter could override the express provision of the mother Act and as such, Article 33 in the Karatina University charter was inapplicable to the appellants' herein.*
- *The learned Judge fell into error in law in failing to note that the 1st appellant herein was never a student of Karatina University thereby leading to miscarriage of justice.*
- *The learned Judge erred in granting a judgment whose effect would be to crystalize academic dishonesty and fraud where a university purports to grant degree certificates for students it never taught.*
- *The learned Judge erred in law and in fact in being openly biased in his conclusions without affording the plaintiff's case any consideration.*
- *The learned Judge erred in law and in fact in holding that the plaintiff had sued the wrong parties.*
- *The learned Judge erred in law by granting a judgment against the weight of the evidence.*

Submissions before the Court of Appeal and Re-evaluation of the Evidence on Record and Applicable Law:

22. We remind ourselves that this is a first appeal. As a first appellate court, it is our duty to subject the evidence and material tendered before the High Court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this. (See ***Selle vs. Associated Motor Boat Company (1968) E.A. 123***).

23. At the hearing of this appeal, Mr. Karweru, learned counsel for the 1st appellant, submitted that this was a case of 'shattered dreams'. The appellant applied to get admitted by the 2nd respondent University in the year 2009 in the full knowledge that there were other universities. The appellant's choice University was the 2nd respondent. He argued that the appellant's position as a student of the 2nd respondent did not in any way change when the 1st respondent became a constituent college of the 2nd respondent and thereafter a fully-fledged university. According to Mr. Karweru, a Charter is a legal instrument and not law; it could not derogate rights nor deviate from the original legal order. Under the doctrine of legitimate expectation the appellant was entitled to be awarded a degree certificate by the 2nd respondent.

24. Miss Mumbi, learned counsel for the 1st respondent, submitted that **Section 71** of the **Universities Act 2012** repealed **Moi University Act (Cap 210A)** and all other individual University Acts. The purpose of the said repeal was to bring all universities under one Statute and to grant Charters to all universities. Under **Section 20** of the **Universities Act** once a university is granted a Charter it becomes a body corporate. Miss Mumbi argued that any contractual agreement between the appellant and the 2nd respondent was frustrated when the 1st respondent became a university which was a distinct body corporate from the 2nd respondent. The appellant paid fees and studied at Karatina University hence he was the 1st respondent's student. Miss Mumbi submitted that the doctrine of legitimate expectation was not applicable because the appellant had been put on notice that the constituent college would become a fully-fledged university. She finally submitted that individual rights could not override public interest of the government to enhance higher education through increasing the number of universities by

transforming constituent colleges into full fledged independent universities. She urged us to dismiss the appeal.

25. Mr. Simiyu, learned counsel for the 2nd respondent, in opposing the appeal, submitted that there was a distinction between admission and registration of students; the appellant paid fees and was registered by the 1st respondent; that the 2nd respondent had no control over the process by which the 1st respondent was granted a Charter and is bound by the law. The appellant ought to have challenged the process by which the 1st appellant became a fully-fledged university. He argued that there was need for law reform to address the issue of transiting students of constituent colleges when such colleges become full fledged universities.

26. We have analyzed the judgment of the High Court, considered the grounds of appeal as well as submissions by learned counsel in this matter. We identify the following points of law as pertinent in the determination of this appeal:

- a. What is/was the nature of the relationship between the appellant and each of the respondents' at all material times;***
- b. Does the appellant have an enforceable legitimate expectation to graduate as a student of Moi University?***
- c. Was the appellant's constitutional right to education violated by the respondents?***
- d. Did the grant of a Charter to Karatina University frustrate or annul the relationship between the appellant and the 2nd respondent?***
- e. Save for honorary and posthumous awards, can a university confer a degree to a person it has neither taught nor examined?***

Relationship of the appellant to each of the respondents:

27. One of the issues for our consideration and determination is the relationship between the appellant and each of the respondents. From the background facts, the appellant applied for university education; his application was considered and he was admitted in 2009 to Moi University, the said Moi University placed him to undertake studies at a physical location known as "Central Campus of Moi University" situate at Karatina Town and which was part of the then Chepkoilel Constituent College of Moi University. It is our finding that based on these facts, the relationship between the appellant and the 2nd respondent is a contractual relationship. In so far as the 1st respondent, (Karatina University) is concerned, in 2009 when the appellant was admitted to Moi University the 1st respondent did not exist *de facto* and *de jure*; the appellant never applied to be admitted to a non-existent institution; although there was a physical campus known as "Central Campus" located at Karatina Town, the same was simply a locus of study designated by the 2nd respondent; it is our finding that the 1st respondent did not exist in 2009 and it had no capacity to admit and register any student and to conduct any degree program. On record there is no application by the appellant to be admitted to Karatina University College or Karatina University. On these facts, it is our finding that there is no contractual relationship between the appellant and the 1st respondent in so far as his academic studies or status as a student is concerned.

28. We now turn to consider whether there is a legal relationship created between the appellant and the 1st respondent through Legal Notice No. 163 of 2010 or the Universities Act or the Karatina University Charter. To understand the relationship one must determine whether the appellant was a student of the 1st or 2nd respondent. The trial Judge in dealing with this issue expressed as follows at paragraph 43 of the judgment.

"Universities Act (2012) defines a student as any person registered in the university or an

institute offering university education. From the evidence tendered before the court, I find that the plaintiffs were admitted to Moi University but were registered at the Central Kenya Campus which subsequently became Karatina University College in which they continued to be registered up to the time when Karatina University College became a full university.... It therefore follows that the plaintiffs were registered students of Karatina University College as at the time when the same was granted a Charter within the meaning of Section 2 of the Universities Act and Section 1 of the Karatina University Order. It therefore means that the plaintiffs were all subject to the transitional provision of Article 33 of the Charter which stipulated that the students of former Karatina University College, who were pursuing degree, diploma and certificate programs at the commencement date of the Charter shall be allowed to complete their courses and be awarded degrees of the University. The plaintiffs therefore became students of the 1st defendant by operation of law and there being no exception clauses therein are subject to rights and obligations created under the Statute.”

29. With due respect, we do not agree with the conclusions of the trial court as expressed above. DW1, Duncan Njoroge, testified that there is a difference between admission to a university and registration which is done every semester. If registration is a criterion to determine who is a student, we pose the question how come the 2nd respondent graduated students registered with the 1st respondent in 2013 after the Legal Notice had come into force and the Charter had been granted? Upon what legal basis did the 2nd respondent confer degrees of Moi University to students who were registered and undertaking studies at Central Campus at Karatina despite the fact that the 1st respondent was a body corporate under the Legal Notice? The answer is found in the witness statement of Prof. John Mugun Boit at paragraph 14 wherein he stated that this was done because the 1st respondent did not have a Senate of its own. If this is so, it follows that registration at the 1st respondent's institution is not the determining criteria to be awarded and conferred a degree of the 1st respondent.

30. We hasten to add that although the Legal Notice transferred all assets and liabilities of Central Campus to Karatina University College, it is our view that students are neither assets nor liabilities to be transferred to another corporate entity; there is no express provision in the Legal Notice transferring any student. We concur with the statement by Prof. John Mugun Boit at paragraph 15 of his statement wherein he states that despite Legal Notice No. 163 of 2010, examinations offered at Karatina University College were administered under the Senate of the 2nd respondent. This being the case, on what legal foundation did the 2nd respondent continue to administer examination to the appellant as a student undertaking studies at Karatina University College? The answer is found in paragraph 5 of the Legal Notice which provided that those students who were enrolled at Karatina University College would continue to study and be conferred degrees of Moi University. We find that this paragraph has its legal and logical underpinning that those students admitted by the 2nd respondent and placed to study for degree programs previously at Central Campus and now at Karatina University College were students of Moi University.

31. On a factual basis, we find that the appellant was never a student of Karatina University College or Karatina University. Legal Notice No. 163 of 2010 at paragraph 5 acknowledges this position and created an exception by stipulating that the degrees to be awarded by Karatina University College were to be degrees of Moi University. The status of the appellant as a student of Moi University was preserved by Paragraph 5 of the Legal Notice.

32. Paragraph 32 of the Karatina University Charter revoked Legal Notice No. 163 of 2010. What is the legal effect of the revocation on the status of the appellant as a student of Moi University? **Section 23** of the **Interpretation and General Provisions Act**, (Cap 2 of the Laws of Kenya) is relevant in determining the legal consequences of revocation of Legal Notice No. 163 of 2010. **Section 23(3)** provides as follows:-

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not:

“23(3)

a.

b.

c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.

d.

e. affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation and such legal proceedings or remedy may be instituted, continued or enforced as if the repealing written law had not been made.”

33. The respondents contend that revocation of the Legal Notice brought to an end Paragraph 5 of the Notice which was not saved and as such; the act of revocation made the appellant eligible for a degree of Karatina University. The appellant contends that the revocation did not alter his status as a student of Moi University eligible to be conferred a degree of that University.

34. It is our view that revocation of the Legal Notice did not affect the status of the appellant as a student of Moi University. First, **Section 23 (3) (c) & (e) of Interpretation and General Provisions Act** is explicit that a right, privilege or liability acquired, accrued or incurred is not repealed. In the instant case, the appellant under the doctrine of legitimate expectation and pursuant to the provisions of Paragraph 5 of the Legal Notice No. 163 of 2010 had acquired a right to be conferred a degree of Moi University; the 2nd respondent had also incurred and acquired an obligation to confer the degree. It is our considered view that revocation of the Legal Notice did not affect the acquired rights and accrued obligations of the parties hereto. Second, the appellant became a student of Moi University upon admission in 2009 under the provisions of Moi University Act (Cap 210A) and not vide the provisions of Legal Notice No. 163 of 2010. Revocation of the Legal Notice did not revoke the Moi University Act pursuant to which the appellant became a student of the University; revocation of the Legal Notice had effect on those students who were admitted by Karatina University College when it became a body corporate after Legal Notice No. 163 of 2010 was gazetted; it is these students who became students of Karatina University pursuant to Paragraph 33 of the Charter. Third, the Charter has no express provision converting students of Moi University who were at the Karatina University College to become students of Karatina University. Paragraph 33 of the Charter applies to students of “former Karatina University College” who were pursuing degrees.

36. The legal issue is whether the appellant was a student of former “Karatina University College”. There is no definition of who is a student in the Charter. However, Legal Notice No. 163 of 2010 at paragraph 1 thereof defines a student to mean a person registered by the University College for purposes of obtaining a qualification of the University College or any other person who is determined by the Academic Board to be a student.

36. It is our considered view that from the time of his application for university education to his admission in 2009, the appellant was a student of Moi University; the definition of a student in Legal Notice No. 163 of 2010 does not apply to the appellant because he was not a person eligible to obtain a qualification of Karatina University College; under paragraph 5 (1) of the Legal Notice the appellant’s status was preserved as a person eligible to obtain qualification of Moi University; it is our finding that paragraph 5 of the Legal Notice preserved the status of the appellant as a student of Moi University; it is also our finding that paragraph 33 of the Charter applies to former students of Karatina University College and the appellant was not a former student of Karatina University College under Legal Notice No. 163 of 2010. Revocation of the Legal Notice No. 163 did not operate to convert students of Moi University to be students of Karatina University; if this were so, it would lead to absurdity for example even students of Moi University at Eldoret campus or any other campus would have been converted to Karatina University students. We find and hold that former students of Karatina University College mean

students who applied and were admitted by Karatina University College after it became a body corporate by virtue of paragraph 3 (2) of the Legal Notice and not students admitted by Moi University who were undertaking studies at the Central Campus prior to the Legal Notice.

37. The appellant was not one of the students admitted to Karatina University College and neither was he admitted or registered as a student of the College after the Legal Notice No. 163 of 2010 came into effect. We hasten to add that unless expressly stated, Legal Notice No. 163 of 2010 and the Karatina University Charter do not have retroactive effect and did not retroactively give Karatina University students that it did not have prior to its establishment. The Charter under Paragraph 33 only transferred students of Karatina University College to become students of Karatina University.

38. It is the 2nd respondent's contention that its relationship with the appellant should not be construed as based on the law of contract and enforcing such a contract would perpetuate an illegality. We have considered this submission and pose the question if the relationship between the appellant and the 2nd respondent should not be construed as based on contract, then on what is it based? The 2nd respondent admits that it has some relationship with the appellant; a relationship cannot exist in vacuum, it must be based on a legal concept from which specific rights and obligations ensue. On our part, we are satisfied that the relationship between the appellant and the 2nd respondent is contractual.

39. Our analysis and re-evaluation of the pertinent facts and applicable law leads us to conclude that the appellant has no contractual and legal relationship with the 1st respondent, Karatina University, in so far as it relates to award and conferment of its degree to the appellant. The appellant's contractual and legal relationship for award and conferment of a degree is with the 2nd respondent, Moi University.

Legitimate Expectation, contractual relationship and doctrine of frustration:

40. The next issue for our consideration is whether the appellant has an enforceable legitimate expectation to be awarded a degree of Moi University; a corollary to this is whether the relationship between the appellant and Moi University was frustrated by Universities Act and the grant of Charter to Karatina University.

41. The trial court in considering the appellant's expectation to be awarded and conferred a degree of Moi University expressed as follows at paragraph 49 of the judgment.

"From the evidence tendered by the defendant, it is clear that the role of granting a university a charter is statutorily established by an Act of Parliament which gives the rights and liabilities of the established institution. The plaintiffs' rights to Moi University degree were extinguished by an operation of the said Act which granted the 1st defendant a charter through a procedure established...(emphasis ours).

At paragraph 53, the trial court continued

"From the evidence tendered herein, the plaintiffs were aware that the 1st defendant had applied for a charter and it was evidence of DW1 that during the said period of processing the charter the plaintiffs together with other students were duly informed of the process. There is also no evidence tendered by the plaintiffs to show that the defendant had promised them that they would be awarded its degree. I find no merit on the plaintiffs claim to legitimate execution (sic) as against the defendants herein and would therefore dismiss the same (emphasis ours)."

42. "Legitimate expectation" is a doctrine well recognized within the realm of administrative law. *In re Westminster City Council*, [1986] A.C. 668 at 692 (Lord Bridge):

"...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation. Legitimate expectation applies the principles of fairness and

reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill a promise.”

43. A party that seeks to rely on the doctrine of legitimate expectation has to show that it has *locus standi* to make a claim on the basis of legitimate expectation. ***Wade and Forsyth in their work, Administrative Law, 10th edition (pages 446-448)***, discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation. Citing the House of Lords decision in ***R. v. DPP ex p. Kebilene [1999] 3 WLR 972 (HL)***, the learned authors observe that a statement made by a Minister cannot found an expectation that an independent officer will act in a particular way. In ***R. v. DPP ex p. Kebilene, (supra)*** it was stated that clear statutory words override any expectation howsoever founded.

44. The principle of legitimate expectation is well reflected in judicial practice in Kenya. In ***Republic v. Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR*** it is stated that legitimate expectation cannot override the law. In ***Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited [2004] 2 eKLR 530*** it was held a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

45. Legitimate expectation is founded upon a basic principle of fairness - that legitimate expectation ought not to be thwarted – that in judging a case a Judge should achieve justice and weigh the relative strength of expectation. In ***South African Veterinary Council v. Szymanski 2003 (4) S.A. 42 (SCA) at [paragraph 28]***: the Court held that “***the law does not protect every expectation but only those which are 'legitimate'***”. The requirements for legitimate expectation include the following:

i. *The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification':* ***De Smith, Woolf and Jowell (op cit -98- Petition No. 14 of 2014 [Judicial Review of Administrative Action 5th ed] at 425 para 8-055).***

ii. *The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.*

iii. *The expectation must be reasonable:* ***Administrator, Transvaal v. Traub (1989 (4) SA 731 (A)) at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8- 037).***

iv. *The representation must have been induced by the decision- maker:* ***De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney- General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.***

v. *The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate:* ***Hauptfleisch v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G. This was also referred to with approval in Walele v. City of Cape Town and Others; 2008 (6) S.A 129 (C.C.) paragraph 41. -99- Petition No. 14 of 2014.***

46. The Kenya Supreme Court in ***Communications Commission of Kenya & 5 Others .vs.Royal Media Services Limited & 5 Others, Petition No. 14 of 2014*** stated at paragraph 269 that the emerging principles on legitimate expectation may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;

c. the representation must be one which was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

47. In the instant case, we have examined the record to ascertain if there was any express, clear and unambiguous promise or representation made to the appellant and given by the 1st or 2nd respondents as public authorities. If there was any such promise or representation it falls to this Court to consider whether such representations were predicated upon the relevant law.

48. As stated earlier, the appellant had a contractual relationship with Moi University. The nature of this contractual relationship is underpinned by the fact that the appellant was admitted by the 2nd respondent to undertake studies leading to the award and conferment of a degree of Moi University. It is our considered view that by admitting the appellant to undertake studies at Moi University, the 2nd respondent made a promise and representation to the appellant that upon successfully undertaking the course of study, it shall award and confer its degree to the appellant. We find that a clear and unambiguous promise or representation was made by the 2nd respondent to the appellant and the doctrine of legitimate expectation is applicable. It would be an illegitimate expectation on the part of the appellant to expect a degree from any other university except that which admitted him and whose program of study he undertook; it is also an illegitimate expectation for the 2nd respondent to admit students and expect to confer them with degrees of another university.

49. As regards the 1st respondent, there is no evidence on record that any representation or promise was made by the 1st respondent to confer its degree to the appellant. We find that the doctrine of legitimate expectation is inapplicable to the relationship between the appellant and the 1st respondent.

50. The next issue for our consideration is whether the promise made by the 2nd respondent to the appellant is well founded in law capable of giving rise to a right founded on legitimate expectation. For this, it must be demonstrated that the 2nd respondent, Moi University, had lawful capacity to make such promise or representations to the appellant.

51. Under the repealed ***Moi University Act*** (Cap 201A), one of the functions of the University was to train qualified graduates leading to award and conferment of degrees. In line with this function, the University was empowered to admit students to be provided with education and training. Pursuant to this function, the 2nd respondent in 2009 admitted the appellant as its student. The 2nd respondent by admitting the appellant as its student had a legal underpinning to make an express promise that gave rise to legitimate expectation that upon successfully undertaking his studies the appellant shall be conferred with a degree of Moi University. We hasten to add that an express promise need not be in writing but can be by conduct or action. The promise or representation giving rise to legitimate expectation made by the 2nd respondent to the appellant is fortified by a further assurance or confirmation through Paragraph 5 of the Legal Notice No. 163 of 2010 which provided that “***the degrees and postgraduate diplomas to be awarded by the University College shall be the degrees and postgraduate diplomas conferred by Moi University.*** We find that by admitting the appellant as its student in 2009, the 2nd respondent by its action and conduct competently and lawfully made a promise to the appellant that it would confer him with a degree of Moi University. We find that upon admitting the appellant as its student in 2009, the appellant acquired a vested legitimate expectation that upon successful completion of his studies, he shall be conferred a degree of Moi University. At the time the Charter was granted to the 1st respondent, the appellant had a vested, existing right and legitimate expectation to a degree of the 2nd respondent.

52. The respondents in rebutting the appellant’s case contend that it is government policy to expand university education through establishment of constituent colleges which later become fully fledged universities. It is contended that through this policy, students of constituent colleges are as a practice conferred degrees of the new fully fledged university whether or not they were initially admitted by the constituent college. In line with the practice, the respondents urged this Court to find that the appellant

was not entitled to conferment of a Moi University degree. The respondents' further contend that as a matter of government policy, any legitimate expectation that the appellant had was frustrated by the Universities Act and the grant of Charter to the 1st respondent.

53. What is the legal effect of such general policy statements? Can government policy take away acquired, vested or existing rights and legitimate expectation and frustrate the contractual relationship between citizens? Can government policy abrogate legitimate expectations that have been acquired and vested in contract and recognized in law? On the specific facts of this case, Paragraph 5 of the Legal Notice embodies the government policy that students who belonged to Moi University would be conferred degrees of that University; likewise, the Karatina University Charter at paragraph 33 (2) recognizes that only former students of Karatina University College were to be conferred degrees of Karatina University. It is inherent that persons who were not former students of Karatina University College could not be conferred degrees of Karatina University. Having found that the appellant was not a former student of Karatina University College, we hold that government policy as espoused in the **Universities Act** and the Karatina University Charter recognizes the doctrine of legitimate expectation that the appellant, who was not a student or former student of Karatina University College could not be conferred a degree of that University.

54. The respondents submitted that by virtue of operation of law the doctrine of frustration applied to annul any legitimate expectation on the part of the appellant to be conferred a degree of the 2nd respondent. In support of this submission, the 2nd respondent stated it was not in charge of the legal instruments and the process that led to the grant of a Charter to the 1st respondent; that even if the appellant was its student, their relationship was frustrated by a legal process and legislative action that was not within the power and control of the respondent and the appellant; that as things stand now, the Senate of Moi University cannot approve the award and conferment of a degree to the appellant who undertook his studies at Karatina University which is now a full fledged University and an independent body corporate; that Moi University Senate cannot satisfy itself for the award of degrees in relation to courses taught and examined by Karatina University; that the relationship between the appellant and the 2nd respondent was frustrated by operation of law and there is impossibility of performance on the part of the 2nd respondent.

55. The trial court at paragraph 50 of the judgment expressed as follows:

“Both defendants are creatures of statutes and having been established by statute they can only do that which the statute creating them allows them to do and therefore this court is unable to grant mandatory injunction against the 1st defendant as to do so will amount to directing it to violate the law creating it...”

56. From paragraph 50 of the judgment noted above, it is not clear which specific law the trial Judge had in mind that the 1st defendant would be violating. We deduce that the learned Judge alludes to the transitional Paragraph 33 of the Charter which stipulates that the former students of Karatina University College would be allowed to complete their studies and be conferred degrees of Karatina University.

57. At paragraph 60 of the judgment, the trial court alludes to the concept of frustration of contract and impossibility of performance when it states that:

“Evidence was tendered by the 2nd defendant that the courses which are being taken by the plaintiffs are no longer being offered by the 2nd defendant and therefore the plaintiffs can only now lawfully graduate and be awarded the degrees of Karatina University....”

58. With due respect we disagree. The appellant was admitted in 2009 to undertake university education offered by the 2nd respondent; the curriculum that the appellant studied was developed, taught and examined by the 2nd respondent; when the appellant had two months to complete his studies, the 2nd respondent disowns him and asserts that he can only be conferred a degree by the 1st respondent. In our

view, the 1st respondent is a stranger to the university academic curriculum and study undertaken by the appellant. There is no evidence to support the contention that by virtue of operation of law, the 2nd respondent is unable to fulfill its obligation or that there is frustration on the part of the 2nd respondent. As earlier stated, the 2nd respondent conferred its degree to students who were registered at the 1st respondent institution in 2013; if this was possible then, why not now? If it was not a violation of law then, how can it be a violation of law now yet the law has not changed? It is our considered view that there is no impossibility of performance on the part of the 2nd respondent; what was possible and performed in 2013 is still possible and can be performed now under the same legal framework.

59. As regards frustration, is there evidence on record to support the notion that the contractual relationship between the appellant and 2nd respondent has been frustrated? Frustration is the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. Lord Radcliffe in *Davis Contractors Ltd v Fareham U.D.C. [1956] A.C. 696-729* stated that “frustration occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract.” When frustration succeeds, the party pleads “this is not what I promised to do.” To determine whether a contractual obligation has been frustrated, the Court must act upon a general impression attached to the occurrence of an unexpected event that changes the face of things. But even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing than that contracted for.

60. The criteria to determine frustration is the test of a radical change in the obligation. In the instant case, we do not agree with the submission that the Universities Act or the grant of Karatina University Charter annulled or frustrated the relationship between the appellant and 2nd respondent. Far from it, it is the interpretation and application of the Charter by the respondents that seek to frustrate the legitimate expectation of the appellant. There is no evidence on record to support frustration. The subject matter of contract between the 2nd respondent and the appellant is still in existence; there is no dissolution or intervening incapacity of either party; there is no supervening illegality or change in law or that the method of the 2nd respondent performing its obligation has been rendered impossible or is radically or fundamentally different; or that the purpose and objects of the 2nd appellant is fundamentally different from that which was the substratum of its contractual relationship with the appellant or that there is a frustration of purpose or a delay that is sufficiently long to frustrate the parties intention.

61. It is our finding that there is no conflict between the legitimate expectation made by the 2nd respondent to the appellant and the grant of Karatina University Charter. It is not in dispute that the 1st respondent as a fully fledged university never taught and examined the appellant; the appellant is not seeking an honorary degree from the respondents; it is the 2nd respondent through its constituent college located at Karatina that taught and examined the appellant. It is our considered view that fair administrative action demand that the 2nd respondent be estopped from reneging on its promise that gave rise to legitimate expectation on the part of the appellant. We hold that the doctrine of estoppel and principle of legitimate expectation properly apply to the facts of this case. We find that the learned Judge of the High Court erred in failing to interpret the facts of this case and correctly apply the doctrine of estoppel and the principle of legitimate expectation; a promise or representation need not be in writing; it can be inferred from conduct and action. The trial Judge erred in failing to find that the action or conduct of the 2nd respondent in admitting the appellant as its student was a promise or representation that upon successful completion of his studies, the appellant would be conferred a degree of the 2nd respondent; the learned Judge erred in invoking the concepts of illegality or impossibility of performance by operation of law when there are no facts to support the application of the concepts; there is no evidence to support the notion that it would be illegal for the 2nd respondent to confer its degree to the appellant who was and is its student. Nowhere in the *Universities Act* or in the Karatina University Charter is it stated that Karatina

University is a successor to Moi University or that it assumes responsibility to award and confer degrees to those individuals who were students of Moi University undertaking studies at Karatina University College. Except for honorary or posthumous degrees, it would be against public policy and morals and a violation of academic honesty for the 1st respondent to confer a degree to a student that it never admitted, taught and examined. The doctrine of frustration or illegality of performance cannot be used to promote or sanction academic dishonesty.

62. The respondents submitted that it is a practice in the history of establishment of universities in Kenya that students who are enrolled in constituent colleges are conferred with degrees of the new fully fledged universities and are not conferred degrees of the parent universities that initially admitted them. The 2nd respondent through a witness statement dated 28th May 2013 by Prof. John Mugun Boit stated that the transformation of Karatina University College into a full university is not unique but is as has been the case with other institutions including Maseno University, Eldoret University, Masinde Muliro University of Science & Technology as well as Kabianga University which were all initially constituent colleges of the 2nd respondent; the 2nd respondent to buttress its submissions urged this Court to note that in 1984 when Moi University was established, the first batch of its students were transferred from the University of Nairobi and they graduated in 1987 with degrees conferred by Moi University. Counsel submitted that allowing the appeal would be disruptive and cause confusion to other students who have already been conferred degrees of Karatina University; that allowing the appeal would open floodgates for all students, whether current or former who graduated from institutions that were previously constituent colleges of the 2nd respondent.

63. We have considered this submission and note that the transitional provisions in the Karatina University Charter are very clear that former students of Karatina University College are the ones to be conferred degrees of Karatina University. Any student who was not a student of the former Karatina University College is not subject to award and conferment of the degree of Karatina University. The 2nd respondent properly interpreted this provision as stated in paragraph 14 of Prof. Mugun's witness statement that all students of the 1st respondent who graduated before it attained University status were conferred Moi University degree certificates. We find that the 2nd respondent and the learned Judge erred in law when it was assumed that establishment of Karatina University Senate had the effect of transferring all students of Moi University who were at Karatina to become eligible for conferment of degrees of Karatina University. The establishment of a Senate neither transfers a student from one university to another nor does it change the legal status of any student. As regards the historical submissions as to how universities evolved in Kenya, it is our considered view that the legal instruments establishing each of the universities alluded to were not tendered in evidence to enable the trial court examine each of the transitional provisions to ascertain how students were transited, if at all, from the constituent college to the new full university. In the absence of the legal instruments and the relevant transitional provisions, the universities histories as captured in the witness statements have no evidential weight; each case must be determined on its own merits based on its legal instrument and the relevant transitional provisions.

64. We note that at paragraph 51 of the judgment it is stated that the plaintiffs should have filed suit against the Commission for Higher Education which granted a Charter to the 1st respondent; that the 1st respondent should not have been sued. At paragraph 46 of the judgment the trial court states that:

“The plaintiffs had a remedy under rule 23 which provides that any person or institution who or which is aggrieved by an act or decision of the Commission taken in accordance with any of the provisions of the rules who desires to question that act or decision or any party of it (sic) may within 30 days of the date of such act or decision appeal to the Minister who may give such orders on institutions (sic) as he may consider necessary. The courts have held that where an alternative remedy and procedure is provided for an aggrieved party must follow the said before coming to court....Rule 23 is a remedy or procedure which the plaintiffs should have taken once they were put on notice of the transition they should have appealed to the Minister of Higher Education.”

65. We note the observations by the trial court as stated above. The trial court erred in contextualizing the dispute between the parties in this case; there is no grievance relating to the decision by the Commission to grant a Charter to the 1st respondent. The dispute and issue revolves around the interpretation and administrative application of the provisions of Paragraph 5 of the Legal Notice No. 163 of 2010 and the implementation of the transitional provision in Paragraph 33 of the Charter.

66. At the beginning of this judgment, we posited the following issue: when a student is admitted to study in a constituent college of a parent university and later the constituent college becomes a full fledged independent university halfway before the student completes his study, to which degree is the student entitled to - a degree from the parent university or a degree from the constituent college that is now a new and full fledged university? The answer to this question lies in the transitional provisions contained in the instrument transforming the constituent college into a full fledged university.

67. In the instant case, there are two transitional provisions relevant to the facts of this case: first is paragraph 5 of Legal Notice No. 163 of 2010 and second is paragraph 33 (2) of the Charter establishing Karatina University.

68. At the risk of repetition these two transitional provisions are reproduced hereunder; Paragraph 5 (1) of the Legal Notice No. 163 of 2010 stipulates as follows:

“The degrees and Postgraduate diplomas to be awarded by the University College shall be the degrees and postgraduate diplomas conferred by Moi University.”

Paragraph 33 of the Charter of Karatina University provides as follows:

“The students of former Karatina University College, who were pursuing degree, diploma and certificate programmes as at the commencement date of this Charter shall:

a. be allowed to complete their courses and

b. be awarded degrees, diplomas and certificates of the University.

In the interpretation section of the Charter, University means Karatina University.”

69. The gravamen in this appeal pertains to interpretation and application of the transitional provisions to the appellant. As regards Paragraph 5 (1) of the Legal Notice No. 163 of 2010, it is explicit that the degree to be conferred to the appellant by Karatina University College (a constituent college of Moi University) was the degree of Moi University.

70. In relation to application of the transitional provision in Paragraph 33 of the Charter, the critical question is how many categories of students did Karatina University College have as at the date of commencement of the Charter? Which category of students were transited by paragraph 33 to be eligible and entitled to a degree of Karatina University?

71. The evidence on record shows that there were two categories of students at Karatina University College at the date of commencement of the Charter. The first category were students admitted by Moi University who were undertaking studies at Karatina Central Campus of Chepkoilel University College which was a constituent college of Moi University – these were students admitted prior to gazettment of the Legal Notice No. 163 of 2010 and to whom paragraph 5 of the Legal Notice applied - the appellant was one of these students. The second category were students of Karatina University College admitted after Legal Notice No. 163 of 2010 which established Karatina University College as a body corporate and a constituent college of Moi University.

72. Taking into account these two categories of students, the critical question is which students were transited by Paragraph 33 of the Karatina University Charter? The initial question to be considered in transiting students from a constituent college into a new university is to ask how many categories of

students exist in the college. This question was not asked when Paragraph 33 of the Charter was crafted. Failure to ask the question made Paragraph 33 of the Charter capture the second category of students existing at Karatina University College and declared them former students of Karatina University College. Paragraph 33 failed to consider and transit the students of Moi University who were pursuing their degree studies at the College. No dual mechanism was crafted into the Charter to simultaneously transit the two categories of students. It is our considered view that the appellant being in the first category of students was not transited and he remained a student of Moi University eligible for award and conferment of the degree of the 2nd respondent.

73. Two transitional clauses relating to phase out and phase in should have been crafted into the Charter to phase out the students who belonged to Moi University and phase in students of the former Karatina University College; the present Paragraph 33 only deals with phase in and not phase out; the phase out clause should have either transited students of Moi University at Karatina to become students of Karatina University or provide that all students admitted by Moi University would continue to belong to the said University until they successfully complete their programs of study. We observe that the quandary in this particular case arose from fast-tracking the transformation of Karatina University College into a full fledged University. The College was established in 2010 by Legal Notice No. 163 of 2010 and was converted into a full fledged University on 1st March 2013. This was done in less than four (4) academic years leading to existence of two categories of students and one category was not factored in the crafting of the transitional clause. It is recommended that converting a constituent college into an independent university should take a minimum of four academic years to enable a practical phase out and phase in of all students. We assuage the fear and concern by the 2nd respondent that in allowing this appeal a floodgate shall be opened; this may not occur as other constituent colleges that were converted into full universities were not fast-tracked and the students having graduated there is acquiescence; delay and lapse of time and any dispute may have been overtaken by events.

74. We have been able to consider some persuasive authorities from the High Court relevant to the appeal. Of relevance is a ruling delivered at Mombasa High Court by Kasango, J. on 25th June 2014, in ***Daniel Muthoka Munyao & others vs. Technical University of Mombasa and Jomo Kenyatta University of Agriculture & Technology***, (Mombasa Constitutional Petition No. 32 of 2014). The relevant facts are as follows:

“The Petitioners after passing their high school examinations qualified for university admission. The Petitioners were admitted to undertake various Engineering courses at the Jomo Kenyatta University of Agriculture and Technology (JKUAT). The Petitioners, upon their admission were placed at the Mombasa Polytechnic University College in Mombasa where they were to undertake studies. During the pendency of the Petitioners studies, Mombasa Polytechnic University College acquired a charter on 24th January 2013 and became a fully fledged university and was renamed “Technical University of Mombasa”.... The Petitioners courses before and after the acquisition of the charter were taught, moderated and supervised by lecturers from Jomo Kenyatta University of Agriculture and Technology (JKUAT). The said JKUAT refused to graduate the Petitioners that they were students of Technical University of Mombasa. The Court found that JKUAT was unreasonable in refusing to include the Petitioners names in its graduation list. An order was issued compelling JKUAT to graduate the Petitioners. In arriving at the decision compelling JKUAT to graduate the Petitioners, the court posed the question why did JKUAT refuse to place the Petitioners in its graduation list. The answer was found in an e-mail from the Vice Chancellor of JKUAT to the Vice Chancellor of Technical University of Mombasa. In the e-mail, the Vice Chancellor of JKUAT emphasized “the ones we graduated last year was the final group. You better make arrangements with your senate for these students just like the others you have”. The trial court while observing that JKUAT was saying the Petitioners did not belong to them found that justice demands that the petitioners be placed on the JKUAT graduation list despite the fact that Technical University of Mombasa had obtained a Charter.”

75. In ***Jesse Waweru Wahome & others vs. Kenya Engineers Registration Board and Egerton University & Others***, (2012) eKLR), Justice Majanja at paragraph 102 observed that-

“In a country like ours where citizens place a premium on university education, it is not right to leave graduates in a suspended state where they do not know their fate especially where parents have made sacrifices to educate their children, students have taken out loans from the Higher Education Loan Board and are expected to re-pay these loans and the State has invested taxpayers money....This is a situation that cries out for justice.”

In the instant case, the appellant has undertaken study and education as a student of the 2nd respondent since 2009; he has invested time, energy and resources; two months to completion of his study the 2nd respondent disowns him as its student and asserts that he is a student of the 1st respondent who was neither in existence in 2009 nor taught and examined the appellant. This situation invites the Court to intervene and injunct the 2nd respondent from renegeing on its contractual obligations and the legitimate expectation of the appellant.

76. The appellant contended that his constitutional right to education was violated; it is also contended that the learned judge was biased in arriving at his decision. No constitutional provision was cited in support of the right to university education; there is no evidence on record that justifies an inference of bias on the part of the trial court. We find no merit in this contention. The appellant further made an interesting submission on the status and legality of Paragraph 32 of the Karatina University Charter that revoked Legal Notice No. 163 of 2010. It was submitted that Legal Notice No. 163 of 2010 was a subsidiary legislation gazetted pursuant to the provisions of the now repealed Moi University Act (Cap 210A). In contrast, it was urged that the Karatina University Charter was nothing but an agreement between the Commission of University Education and Karatina University; and an agreement cannot revoke a legal instrument.

77. We have considered the submission and observe that a Charter to a University is granted pursuant to **Sections 19 & 21** of the **Universities Act (2012)**. **Section 19** of the **Universities Act** stipulate *inter alia* that the Cabinet Secretary shall recommend to the President the grant of a Charter and under **Section 21** of the Act, the Cabinet Secretary shall by notice in the Gazette, publish the Charter granted under **Section 19**. We note that Legal Notice No. 163 of 2010 which established Karatina University College was made pursuant to **Section 5** of the now repealed **Moi University Act** (Cap 210A). The contention by the appellant is that a Charter granted under the **Universities Act** is an agreement and not a legal instrument. We disagree and hold that a Charter granted under the **Universities Act** is a subsidiary legislation made pursuant to **Sections 19 & 21** of the Act. This finding is in consonance with **Section 33** of the **Interpretation and General Provisions Act**, (Cap 2 of the Laws of Kenya) which provides as follows:

“Section 33: Acts done under subsidiary legislation deemed done under Act which authorizes it.

An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act.”

78. In arriving at our decision in this appeal, we are cognizant of the fact that the dispute between the parties is of an academic nature. We are aware of the dicta in **Republic .vs. Council of Legal Education ex parte James Njuguna & Others Nairobi HC Misc. Civil Case No. 137 of 2004** where it was stated that,

“In academic matters involving issues of policy, the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable.”

79. However, in the instant case, we are convinced that the trial court erred and failed to properly interpret and address the applicable law on transitional provisions relating to students of Moi University and the doctrines of estoppel and legitimate expectation. As was stated in **R (Bibi) .vs. Newham London**

Borough Council (2001) EWCA Cin. 607; {2002} WLR 237, failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.

80. We note that the relationship between the appellant and the 2nd respondent is contractual in nature. Just as any contract can be varied by consent or acquiescence, we leave it to the parties to either consent or acquiesce to any variation of their initial contractual relationship and any expectations arising therefrom.

81. At the hearing of this appeal counsel for the 1st respondent stated from the bar that he had received a letter dated 12th March 2015 from the 1st respondent (which letter was lodged and filed at the court registry on 18th March 2015) stating that the appellant's name was on the graduation list of those students who were conferred with a degree of the 1st respondent and the instant appeal had been overtaken by events. Conversely, counsel of the appellant stated from the bar that the appellant never attended the 2014 graduation ceremony and if at all the 1st respondent by its own action inserted the appellant's name on its graduation list, this was unilateral and not done with the consent of the appellant and the instant appeal had not been overtaken by events. We observe that the statements made by counsel were from the bar and no application was made before this Court to receive additional evidence.

82. Subject to the foregoing observation and based on the various reasons given above, we hereby allow the appeal and set aside in entirety the judgment of the High Court dated 5th September 2014. We take note of the consent order made on 8th August, 2013 whereby the appellant was to sit his final exams and complete his course of study. Based on the submissions made before us we are satisfied that the appellant is entitled to an order that he be granted a degree of Moi University in accordance with his contract with the said university. A mandatory order be and is hereby issued against the 2nd respondent to award and confer its degree to the appellant. The appellant shall have the costs of the suit before the High Court and in this appeal.

Dated and delivered at Nyeri this 14th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR