



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA & KIAGE, J.J.A)

CIVIL APPEAL NO.120 OF 2014

BETWEEN

**DR. WILFRIDA ITOLONDO.....1ST
APPELLANT**

**DR. MUMAH SOLOMON.....2ND
APPELLANT**

**DR. ELENA KORIR.....3RD
APPELLANT**

**MARTHA MIYANDAZI.....4TH
APPELLANT**

**FRED OBARE.....5TH
APPELLANT**

AND

**THE PRESIDENT.....1ST
RESPONDENT**

**THE ATTORNEY GENERAL.....2ND
RESPONDENT**

**THE COUNCIL, KENYATTA UNIVERSITY.....3RD
RESPONDENT**

**THE CHANCELLOR, KENYATTA UNIVERSITY.....4TH
RESPONDENT**

**THE MINISTER FOR HIGH EDUCATION SCIENCE AND TECHNOLOGY.....5TH
RESPONDENT**

**PROF. OLIVE MWIHAKI MUGENDA.....6TH
RESPONDENT**

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....7TH
RESPONDENT

NATIONAL COHESION & INTEGRATION COMMISSION.....8TH
RESPONDENT

*(An Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Odunga, J.),
delivered on 21st March, 2014*

in

H.C. JR.APPLICATION NO.232 OF 2012)

JUDGMENT OF THE COURT

The present appeal was provoked by the judgment of the High Court (***Odunga, J.***), delivered on 21st March, 2014, following the appellants' judicial review application filed in Court on 25th July, 2012 through the firm of Lumumba, Mumma & Kaluma Advocates. The motion was brought by virtue of the powers donated by ***sections 8, 9 of the Law Reform Act (Cap 26 Laws of Kenya) and Order 53 rr.3, 4 of the Civil Procedure Rules.*** The application was predicated on the requisite statutory statement and the verifying affidavit.

The five appellants were described as academic and other employees of Kenyatta University, represented here by its Council (the 2nd respondent) and the Chancellor (the 3rd respondent). All the respondents were described. But of central interest here is the 6th respondent, ***Prof. Olive Mwihaki Mugenda*** in respect of whom the appellants sought two orders, namely:

“(a) an order of mandamus compelling the respondents to institute the process of appointment and to appoint the Vice Chancellor of Kenyatta University;

(b) an order of prohibition to prohibiting (sic) Prof. Olive Mwihaki Mugenda from acting or purporting to act as the Vice-Chancellor of Kenyatta University unless appointed/reappointed as required by law.

(c) costs.”

From the several grounds in support of the notice of motion and as expounded on in the statutory statement and the verifying affidavit, the appellants in substance claimed that ***Prof. Olive Mwihaki Mugenda*** (the 6th respondent) was appointed as the Vice-Chancellor of Kenyatta University, „hereinafter the University?, for a period of five years with effect from 1st April, 2006 up to 31st March, 2011. The period had expired and therefore the office of the Vice-Chancellor had become vacant. The process of appointment of a new Vice-

Chancellor or the process of reappointment of the 6th respondent had not been done, yet the 6th respondent remained in office, purporting to act as the Vice-Chancellor, hence the judicial review orders sought: *mandamus*, an order directing the relevant authorities to undertake the process to appoint or reappoint the Vice-Chancellor according to ***section 10 of the Kenyatta University Act*** (since repealed), hereinafter „the Act?, and *prohibition* whereby the 6th respondent was to be prohibited from acting or purporting to act as the Vice-Chancellor of Kenyatta University. The appellants then followed this with long claims of allegations of corruption, embezzlement, tribalism, nepotism and such other malpractices against the 6th respondent during the time she remained in office, allegedly irregularly and unlawfully. Plainly put, the appellants' prayers were that the office of Vice-Chancellor at Kenyatta University had

fallen vacant since the expiry of the term of service of the 6th respondent and so due process ought to be put in hand to fill it. And the 6th respondent who was purporting to act in the office, should be ordered to stop from so acting because she had not been appointed/reappointed to fill that office.

The notice of motion was heard by **Odunga, J.** who on 21st March, 2014 delivered the judgment now impugned. The appellants had argued that since the 6th respondent had been appointed after the Constitution of Kenya, 2010 had been promulgated, there ought to have been a letter signed by the President (the 1st respondent), as the appointing authority as evidence of the 6th respondent's lawful occupation of the office of the Vice-Chancellor. Since no such letter was exhibited, the occupation was illegal and ought to be so declared.

On the other hand, the respondents had posited that the 6th respondent had indeed been reappointed by the 1st respondent in accordance with Section 10 of the Act. **Odunga, J.**, cognizant of the fact that the notice of motion under review had only sought orders of *mandamus* and *prohibition* and not *certiorari* to quash the 6th respondent's reappointment, found that he could not grant the relief which was not set out in the statement that accompanied the motion.

Citing the case of **Kenya Examination Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others [1997] eKLR (C.A. No.266 of 1996)**, the learned judge delivered himself as follows in regard to the two orders sought by the appellants, namely mandamus and prohibition:

“...neither mandamus nor prohibition can quash a decision already made. Therefore in the absence of a prayer for certiorari, to grant the orders herein would be futile. The effect of granting the orders sought herein would be that in effect there would be a risk of having two Vice-Chancellors at the University.”

Turning to the allegations of malpractices made by the appellants against the 6th respondent while performing the duties of the Vice Chancellor, the learned judge, quoting the cases of **Maharashtra State Board of Secondary and Higher Secondary Education & Another vs Kumarsteth [1985] LRC**, an Indian case and **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300**, from Uganda said:

“82. As already stated hereinabove this Court in the exercise of its judicial review jurisdiction is not concerned with the merits of the decision in question but only concerned with the process with which that decision was arrived at.”

The appellants had argued before the learned judge as noted above, that there was no letter exhibited duly signed by the 1st respondent to evidence that the 6th respondent had been reappointed to the office of the Vice-Chancellor. They disputed the validity of the letter dated 16th December, 2010 signed by **Amb. Francis K. Muthaura**, Permanent Secretary in the Office of the 1st respondent.

The appellants had told the learned judge that such a letter should have been signed by the 1st respondent himself. They had further challenged the validity of the ***Gazette Notice No.15500 dated 31st October, 2012*** signed by the 1st respondent, in that it came long after the judicial review proceedings had been instituted. The learned judge, having been satisfied that **Amb. Muthaura's** letter validly conveyed the fact of the reappointment of the 6th respondent by the 1st respondent, said the following, quoting the case of **Catholic Diocese of Moshi vs Attorney General [2001] 1 EA 25 (CAT)** in respect of the gazette notice aforesaid, which publication he noted, was _

“...with no legislative effect whatever [and] being given publicity in the Gazette was no more than directory. The failure to comply with the directive ... did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it.”

His Honour then concluded:

“ 86. Therefore it is my view and I so hold that unless the instrument in question expressly provides that an appointment thereunder is effective on gazette, the gazette is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment.

87. In this case, I have not been referred to a specific provision which requires that the appointment of the Vice-Chancellor of Kenyatta University was to take effect only on gazette.”

We quote from the impugned judgment *in extenso*, in order to focus on the areas which essentially provoked the present appeal and how each side argued it, following the dismissal of the notice of motion.

The appellants filed the memorandum of appeal with twenty seven grounds which were, however, condensed into four broad ones as shall be noted presently. Both sides filed written submissions and were permitted brief highlights.

The 1st appellant, **Dr. Wilfrida Itolondo**, presented the submissions on behalf of the appellants. Learned counsel, **Ms. Scola Mbilo**, appeared for the 1st, 2nd and 5th respondents, **Mr. Emmanuel Wetangula**, for the 3rd and 4th respondents and **Mr. Njoroge Regeeru** for the 6th respondent.

In her submissions the 1st appellant set out the four grounds for determination which, as paraphrased, contended that the High Court:

- i. **failed to determine whether or not there was any lawful appointment/reappointment to the position of Vice- Chancellor of the University;**
- ii. **failed to determine whether the alleged reappointment of the 6th respondent undermined the need for competitive recruitment of public officers in accordance with Articles 10, 73, 134(2) (b), 135 and 232 of the Constitution;**
- iii. **failed to determine that the continued occupation of the Vice-Chancellor’s office by the 6th respondent, violated section 10 of the Act; and**
- iv. **misdirected itself as to the validity of the gazette notice aforesaid.**

The appellants’ position was that the High Court erred in upholding the reappointment of the 6th respondent as Vice-Chancellor of Kenyatta University thereby contravening the Act and the Constitution. We heard that the 6th respondent was not reappointed to that office because it fell vacant when her term expired and section 10 of the Act was not followed, which would have ended with a letter of reappointment personally signed by the 1st respondent in accordance with **Articles 134(2)(b)** as read with **Article 135**. We heard further that the letter of reappointment signed by **Amb. Muthaura**, earlier referred to, was invalid in the light of the constitutional provisions. And more, that the High Court failed to appreciate the need for competitive recruitment of public officers as provided for in **Article 232(1)(f)(g) (h)**. In the result the 6th respondent is an impostor in the office of the Vice-Chancellor.

Turning to why the appellants had not sought the order of *certiorari* to quash the decision to reappoint the 6th respondent, the 1st appellant told us that their case being that the 1st respondent never reappointed the 6th respondent, there was no purpose to be served by praying for an order of *certiorari*, because there was no decision to be quashed. Reverting to the gazette notice aforementioned, we were told that the learned judge misdirected himself as to its validity, therefore it should have been expunged from the record because it was published five months after the judicial proceedings had been instituted, and only on account of “*abundant caution*.” And that in any event, the court had found that gazette notice to have

been merely for the purpose of notification.

The appellants continued that the High Court abdicated its supervisory role when it failed to direct the 7th and 8th respondents to investigate and act on the complaints laid by the appellants regarding malpractices of corruption, embezzlement, nepotism and many others levelled against the 6th respondent acting as the Vice-Chancellor.

We were therefore urged to allow the appeal and declare that the 6th respondent was not validly reappointed, whereby the office of the Vice-Chancellor remains vacant and, therefore we should order that a fresh process of appointment/reappointment of the holder of that office be commenced. The appellants also complained that the High Court should not have condemned them to pay costs, much as that was in its discretion, because theirs was a matter of great public interest and substantial national importance. And as we conclude the appellant's submission, we note that they made therein reference to several decided cases but the same were not placed before us at all.

In reply, **Ms. Mbilo**, on behalf of the 1st, 2nd and 5th respondents told us that in the High Court, the appellants prayed for orders of *mandamus* and prohibition only. That the order of *mandamus* could not issue because the process to reappoint the 6th respondent had already been undertaken by the relevant bodies in accordance with section 10 of the Act. That section provided for the process of making such a reappointment; the process was followed to the end so that by the time the judicial review proceedings were instituted in court, the action was done. Counsel told us that the respondents followed due course, whereupon the 1st respondent made the reappointment and that decision was communicated by **Amb. Muthaura** in a letter dated 16th December, 2010. That **Amb. Muthaura** did not make the reappointment; he simply conveyed the reappointment undertaken by the 1st respondent. Then that reappointment was later published in the gazette notice no.15500 signed by the 1st respondent.

Regarding constitutionality of the reappointment, **Ms. Mbilo** told us that that was not a matter for **Odunga, J.** sitting in a judicial review proceeding, to decide. Such could only be addressed by an appropriate petition filed in a constitutional division of the High Court.

Referring back to section 10, counsel told us that it provided for reappointment of a Vice-Chancellor whose term was due to end, who had applied for renewal and the 3rd respondent had accordingly recommended to the 1st respondent. The appellants had not demonstrated that the proper course to reappoint had not been followed. As for the gazette notice publication, we were told that this was not a requirement and could as well be considered as superfluous.

Ms. Mbilo continued that judicial review orders being the sort of reliefs given in the discretion of the court, the appellants had not demonstrated that **Odunga, J.** misused or misapplied that discretion. Accordingly, the order of *mandamus* could not issue because the duty to reappoint the Vice-Chancellor had already been properly discharged. Similarly, the order of prohibition could not issue because the act of reappointment had since been done and so there was nothing to prohibit. And, indeed, those reliefs could not issue in the light of the fact that the appellant had not prayed for an order of *certiorari* to quash the reappointment of the 6th respondent, as stated in the case of **Kenya National Examination Council** (supra).

Turning to the prayer that this Court declare the 6th respondent not properly reappointed, we were told that that relief was not sought in the High Court and so it cannot be prayed for before this Court.

Lastly, regarding the stand of the Attorney-General in Misc. Cause No.280/13, different from what he took in the present matter, it was clarified that that cause was determined by a competent court then and therefore could not be brought into this one.

It was then the turn to hear **Mr. Wetangula** on behalf of the 3rd and 4th respondents. Counsel began by positing that the 1st to the 5th respondents did not fail in their duty to reappoint the 6th respondent as the

Vice-Chancellor of Kenyatta University. The appellants did not seek an order of certiorari to quash that reappointment on ground that it was illegal or invalid. They had filed judicial review proceedings, which only concern themselves with the process of decision-making and not the merits or criteria of the decision.

Accordingly, the appellants' motion was properly dismissed because the respondents had validly performed the duty to reappoint the Vice-Chancellor, in which case no order of mandamus could be directed to them. Similarly, with the 6th respondent validly reappointed and performing the duties appertaining to her, an order of prohibition could not issue because the act sought to be prohibited had long passed. **Mr. Wetangula** then narrated the whole process from the governing instrument issued by the 1st respondent dated 23rd November, 2010 on appointment/reappointment of chief executives in the public service, to the 6th respondent's application for reappointment, all the way to her reappointment by the 1st respondent and eventual gazettement. **Mr. Wetangula** demonstrated that no step in the whole process was omitted. In the circumstances, the legality of the 6th respondent's reappointment could not be questioned and in any case such could not be raised in judicial review proceeding, having in mind the strict provisions of Order 53(4) of the Civil Procedure Rules which confine reliefs to be considered only as set out in the statutory statement of an applicant.

In the light of all that, counsel did not see the applicability of Articles 10,73,75, 232 or any other, of the Constitution. He, too, cited the case of ***Kenya National Examination Council*** (supra) to emphasize that since the appellants did not seek orders of certiorari to quash the decision to reappoint the 6th respondent as the Vice-Chancellor, the reliefs of mandamus and prohibition pleaded, could not avail them.

Mr. Regeru for the 6th respondent, basically echoed the sentiments of the other respondents stressing that she was validly reappointed as the Vice-Chancellor of Kenyatta University, according to the law and by the appropriate authority. Her reappointment had not been challenged and in that regard counsel cited the case of ***Baber Alibahi Mawji vs Greenfiled Investments Ltd and Another in Civil Appeal No269/2001 consolidated with Civil Appeal No.155/2004***, among others. We heard that the subject reappointment was made in December, 2010. It was no matter that the same was gazetted in October, 2012, there having been no particular format to notify the public of the reappointment and the gazette notice not being imperative in any respect.

Lastly, **Mr. Regeru** told us that the claims of malpractices levelled against the 6th respondent – corruption, nepotism and others could not be waged by way of judicial review proceedings and so the High Court could not be faulted for dismissing the appellants' notice of motion. Counsel then remarked on the supplementary record of appeal which the appellants filed but was in relation to another ruling, not one under review, and that therefore that record was irrelevant.

In response the 1st appellant, on behalf of her co-appellants conceded that the supplementary record was not relevant and thus we could ignore it.

However, she insisted that the impugned gazette notice was published long after the High Court proceedings were under way. The **Muthaura** letter was of no validity in the light of Article 135 of the Constitution, and further that the 2nd respondent (the Attorney-General) had taken a different stand from the one he took in petition No.280/13.

In determining this appeal we will proceed to decide the four issues the appellants set out above, the same having formed the basis of arguments from both sides. But first, we begin with the basic purpose and focus that judicial review proceedings serve. In the present cause, the appellants sought two orders – mandamus and prohibition, from the High Court under Order 53 of the Civil Procedure Rules.

Halsbury's Laws of England, 4th Edition Vol. 1(1), 1989 at page 92 says:

“Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is thus

different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

In the present proceedings, it is not in dispute that the legal basis of appointing/reappointing a Vice-Chancellor is vested in accordance with section 10 of Kenyatta University Act (since repealed) which reads or read:

“10 (1) There shall be a Vice-Chancellor of the University who shall be appointed by the President after consultation with the Council, and with the Chancellor if the President is not the Chancellor and who shall be the academics and administrative head of the University and shall have such powers and duties as may be provided by the statutes.

2.....

3. The Vice-Chancellor and Deputy Vice-Chancellor shall hold office upon such terms and for such period as way be provided by the statutes and upon the expiration of that period shall be eligible for reappointment.”

The first ground concerned the reappointment of the Vice-Chancellor: The 6th respondent had served her term of five years with effect from 1st April, 2006 to 31st March, 2011. So hers was to seek a reappointment if she so wished, by indicating such desire, we were told, as per the circular from the office of the 1st respondent, **Ref. No.OP/CAB.9/1A dated 23rd November, 2010**. That circular required that the Chief Executive Officer, here the Vice-Chancellor seeking reappointment should so indicate to the Board, here the Council, (the 3rd respondent) in writing six months before expiry of the current term. The Council had to evaluate the performance of the 6th respondent and make a report to the appointing authority, the 1st respondent, recommending either a renewal or termination of the contract upon expiry.

The first ground of appeal was that the High Court (**Odunga, J.**), failed to determine whether or not there was a lawful reappointment to the position of Vice-Chancellor of Kenyatta University. The reappointment in question is, of course, that of the 6th respondent. To agree or not, or even reach our own conclusion whether the 6th respondent was validly reappointed or not, we have to look at the steps taken in the exercise and if they accorded with section 10 of the Act.

The affidavit evidence placed before the High Court with relevant annexures exhibited and which we have perused, yields the following:

- i. On 11th October, 2010 the 6th respondent wrote a letter to the 3rd respondent (the Council) requesting that her contract as Vice-Chancellor be renewed. She wrote that letter before the O.P. Circular (above) and well within the time before expiry of her current contract.
- ii. On 30th November, 2010 the Council deliberated on the 6th respondent's request and as per its minutes, it heard her on her management of the University. It recommended renewal of her contract.
- iii. By its letter dated 1st December, 2010 the Council wrote to the Chancellor (the 4th respondent) of Kenyatta University on its decision of recommendation.
- iv. On 10th December, 2010 the 4th respondent wrote a letter to the President (the 1st respondent) communicating the Council's recommendation to reappoint the 6th respondent. After due consultations the 1st respondent reappointed the 6th respondent as Vice-Chancellor of Kenyatta University.

v. On 16th December, 2010, **Amb. Muthaura** conveyed to the Chancellor the President's decision to reappoint the 6th respondent under section 10(1), of the Act.

vi. On 23rd December, 2010, the Chancellor informed the 6th respondent that the President (the 1st respondent) had reappointed her as the Vice-Chancellor.

Thus even as we comment on the impugned gazette notice later, we are satisfied that due process to reappoint the 6th respondent as Vice-Chancellor was carried out in accordance with the governing statute.

The learned judge on his part cited several authorities on the efficacy of judicial review orders. He noted that since the appellants had sought orders of mandamus and prohibition only, neither of which can quash a decision already made as in the circumstances, then said:

“Therefore in the absence of a prayer for certiorari, to grant the orders sought herein would be futile. The effect of granting the orders sought herein would be that in effect there would be a risk of having two Vice-Chancellors at the University.”

Odunga, J. came to that point, having earlier on gone over the rival arguments whether the reappointment of the 6th respondent was factual or not and concluded that:

“In effect the applicants recognize that the 1st interested party was appointed whether regularly, illegally or otherwise.”

And focusing on the prayer by the appellants that he declare that appointment illegal so that the process of appointment or reappointment of the Vice-Chancellor may start afresh, the learned judge found that the orders of mandamus and prohibition pleaded could not apply in the circumstances because the object for which the application was made had already been realized. In the result, we find that **Odunga, J.** did not fail to determine whether there was a lawful reappointment to the position of Vice-Chancellor.

He determined it and accordingly, both in law and fact, declined to declare the reappointment of the 6th respondent invalid. We agree with him and therefore find that this ground lacks merit and is dismissed.

The 2nd issue is whether the reappointment of the 6th respondent violated the Constitution. The appellants specifically cited **Articles 10, 72, 134(2)(b), 135 and 232**: For this appeal, we only find relevance in the last three Articles which we proceed to deal with in that order:

i. Article 134(1) (2)(b): The pertinent parts touching on presidential powers to appoint read as follows:

“134. (1) A person who holds the office of the President or who is authorized in terms of this Constitution to exercise powers of the President--- shall have and exercise the following:

2. The powers referred in Clause (1) are –

(a) ---

(b) the nomination or appointment of any other public officer whom the Constitution or legislation requires the President to appoint;

(c)---

(d) ---”

We have seen that under section 10 of the Act the President (the 1st respondent) has the function of appointing Vice-Chancellors.

Then comes Article 135:

“135. A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.”

The appellants' position is that the letter conveying the reappointment of the 6th respondent addressed to the 4th respondent was signed by **Amb. Muthaura** and not the President himself as required by Article 135. The respondents maintained the view that **Amb. Muthaura** only conveyed the 1st respondent's decision to reappoint the 6th respondent; he did not do the reappointing or otherwise as claimed. We perused **Amb. Muthaura's** letter dated 16th December, 2010. It was addressed to **Prof. Justice (Rtd) Onesmus K. Mutungi**, Chancellor, Kenyatta University – the 4th respondent.

The body of the letter was couched thus:

“RE: RE-APPOINTMENT OF PROF. OLIVE MWIHAKI MUGENDA AS VICE CHANCELLOR OF KENYATTA UNIVERSITY WITH

EFFECT FROM 21ST MARCH 2011.

Reference is made to our letter dated 10th December 2010 addressed to His Excellency the President, communicating the recommendation of Council of Kenyatta University, supporting renewal of the contract of the Vice-Chancellor, Prof. Olive Mwihaki Mugenda, for a further period of five (5) years with effect from 21ST March, 2011.

Further, pursuant to the consultations undertaken between yourself and His Excellency, the President, in exercise of his powers conferred on him by section 10(1) of Kenyatta University Act, Chapter 210C Laws of Kenya, has reappointed Prof. Olive Mwihaki Mugenda as Vice-Chancellor of Kenyatta University for a further five (5) years with effect from 21st March, 2011.

Please take the necessary action.

(signed)

Francis K. Muthaura, EGH

Permanent Secretary, Secretary to the

Cabinet and Head of the Public Service”

The letter was copied to the 6th respondent. It was at no time alleged by the appellants that the 1st respondent did not sign the reappointing instrument on whose strength **Amb. Muthaura** conveyed the reappointment. Nor was it claimed and demonstrated that no such instrument existed in the Office of the President as a basis on which **Amb. Muthaura** conveyed the reappointment of the 6th respondent by the 1st respondent. Indeed it was not claimed that **Amb. Muthaura's** letter was the appointing instrument. Our reading of that letter points to the the 1st respondent making the reappointment then directing **Amb. Muthaura** to convey that to the 4th respondent. And that is how the public service or other institutions generally operate - a top operative taking a decision and requiring his/her subordinate officers to convey it. Such conveyed decision is and remains valid for all purposes and intents. It did not require to be displayed in court, the actual reappointing instrument signed and sealed by the 1st respondent, to make the

reappointment of the 6th respondent acceptable to the appellants or anybody else, for that matter. At any rate, the 1st respondent in re-appointing the 6th respondent was not exercising a power under the Constitution which would have required a written and sealed instrument under Article 135. Rather his action was under the Act, a statutory function, without corresponding requirements as to the form the decision was to take. On our part we are satisfied that the 1st respondent duly reappointed the 6th respondent and the same was conveyed in a proper and valid manner.

We now turn particularly to **Article 232(1)(g) of the Constitution** regarding competitive recruitment:

“232(1) The values and principles of public service include _

(a) ... (h) ...

(g) subject to paragraphs (h) and (i) fair competition and merit as the basis of appointments and promotions;”

(h) (i)

... (2) ... (3) ...”

The appellants prayed that we determine the issue:

“(2) Whether the Superior (sic) Court misdirected itself by failing to determine whether the alleged reappointment of Prof. Olive Mwhaki Mugenda (6th Respondent henceforth) to the office of the Vice-Chancellor of the University undermined the need for competitive recruitment of public officers, and was inconsistent with the provisions of Article 10, 73, 134 (2) (b), 135 and 232 of the Constitution of Kenya, 2010 and thus irregular, unlawful, unconstitutional and in consequence null and void.” (underlining supplied.)

It was not quite clear as to what exactly the appellants sought by presenting this ground for us to determine, except for what appears in their submission at 6-16:

“6-16. By dismissing the JR application No. 232 of 2012 with costs the Superior (sic) Court failed to uphold the appellants’ right and obligation to protect the Constitution through public interest litigation as enshrined in Articles 3, 10, 22, 232 and 258 of the Constitution of Kenya, 2010.”

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. As quoted above, administrative law treatises and case law state that judicial review proceedings and reliefs sought in them, do not concern themselves with the merit of the decision taken, instead focus is laid on the decision-making process. This was amply enunciated in, and the learned judge cited the case of Municipal Council of Mombasa vs. R., Epuffic & Umoja Consultants Limited Civil Appeal No. 185 of 2001 which held, *inter alia*, that:

“Judicial review is concerned with the decision-making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision

makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters... the court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.

Accordingly ***Odunga, J.*** was not expected to and he could not properly go into the question whether the reappointment of the 6th respondent was in accordance with the merit of competitive recruitment of Vice-Chancellor or not.

And as we have already said, this was not a fresh recruitment, anyway. It was a reappointment provided for under section 10(3) of the Act to which the 6th respondent was entitled if, she wished for one, after the expiry of her contract. And again as we have already said, the process of reappointing was according to the law and the procedure laid down. Therefore we find that this ground lacks merit and it, too, is dismissed.

The next ground argued before us was: whether the continued occupation of the Vice-Chancellor's office by the 6th respondent was lawful and not in violation of section 10. We have said enough on this point by finding that the 6th respondent was properly and validly reappointed as Vice-Chancellor, Kenyatta University – by competent authority and as by law established. The 1st respondent received the Council's recommendation that she had displayed exemplary performance as Vice-Chancellor and so she deserved reappointment. The 1st respondent then reappointed the 6th respondent to the post. This ground similarly is devoid of merit and must fail.

Lastly the appellants impeached the validity of Gazette Notice No. 15500 dated 31.10.2012. The appellants argued that that notice was published five months after the judicial proceedings had commenced in the High Court and was backdated two years. We think the appellants were of impression that that notice duly signed by the 1st respondent was an afterthought or that it was meant to remove the carpet from under the feet of the appellants who had pleaded that by ***Amb. Muthaura's*** letter, the 6th respondent could not have been validly reappointed. The respondents' view was that the statute under which the 6th respondent was reappointed did not require that such reappointment could only be effective with gazette. That the gazette notice was meant only to notify the public or those who needed to know that the reappointment had been made and no more. On his part as reproduced above, the learned judge considered the gazette notice as constituting an administrative act which had no legislative or appointative effect whatever, the publicity given by the gazette being no more than directory.

We have considered this ground and are in agreement with the High Court. Section 10 of the Act or the Constitution did not require that the reappointment of the 6th respondent be gazetted. It was gazetted, nonetheless, but the appellants did not demonstrate how it impacted on the validity or otherwise of the reappointment of the 6th respondent. Accordingly, we dismiss this ground as well.

There were peripheral issues raised by the appellants, partly in the oral highlights or in the written submissions, including one to the effect that the High Court failed in its supervisory role by not directing the Ethics & Anti-Corruption Commission (7th respondent) and the National Cohesion & Integration Commission (8th respondent), to act on the complaints of malpractices of corruption and tribalism reported to them by the appellants. To this, we can only say that that was not the relief sought in the judicial review proceedings before ***Odunga, J.*** The appellants only sought orders of mandamus and prohibition to direct the respondents to begin the process of reappointing the Vice-Chancellor Kenyatta University and prohibiting the 6th respondent from acting in that office. There was no order of *mandamus* sought to be directed to the 7th or 8th respondents and so this by-the-way argument was untenable, if not misconceived. In this regard ***Order 53(4)(1) of Civil Procedure Rules*** is pertinent:

“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand, and no grounds shall, subject as hereafter in this rule provided, be relied

upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

(Underlining supplied.)

So we cannot entertain this ground first, because it was not in the statement that accompanied the motion **Odunga, J.** heard and so the High Court did not make a finding on it. Second, since it was not an issue in the High Court, we cannot entertain it on appeal.

The other point concerned the High Court order condemning the appellants to pay costs. For this, we can but refer to *section 27 of the Civil Procedure Act*. It states *inter alia*, that the award of costs is in the discretion of the court. The High Court awarded costs to the respondents. The appellants have not demonstrated that that discretion was irregularly exercised and therefore we decline to interfere with the High Court decision on this aspect.

In the result, we dismiss this appeal in its entirety and order that the appellants shall pay its costs to the respondents.

Dated and delivered at Nairobi this 11th day of May, 2015.

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR