



**Republic v Cabinet Secretary, Ministry of Education & 2 others; Amukhono
(Ex parte Applicant); Toroitich & 3 others (Interested Parties) (Judicial
Review E023 of 2025) [2025] KEELRC 2020 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E023 OF 2025**

**HS WASILWA, J
JUNE 30, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

UNIVERSITY OF NAIROBI 3RD RESPONDENT

AND

OMUYOMA AMUKHONO EX PARTE APPLICANT

AND

SALLY NGERINWONY TOROITICH INTERESTED PARTY

AHMED SHEIKH ABDULLAHI INTERESTED PARTY

PARMAIN OLE NARIKAE INTERESTED PARTY

CARREN KERUBO OMWENGA INTERESTED PARTY

RULING

1. The Respondents/Applicants filed a Notice of Motion dated 24th April 2025 seeking orders that: -
 1. spent
 2. pending the hearing and determination of this Application inter parties this Honourable Court be and is hereby pleased to discharge, set aside and or vary the orders on 23rd April 2025.



3. pending the inter parties hearing and determination of this application, the Honourable court be and is hereby pleased to grant order of interim injunction restraining the 1st, 2nd, 3rd and 4th Interested Parties from sitting, deliberating, transacting, undertaking and or in any other way participating in the activities of the Council of the University of Nairobi.
4. pending the hearing and determination of the petition, this Honourable Court be and is hereby pleased to discharge, set aside and or vary the orders on 23rd April 2025.
5. pending the inter parties hearing and determination of the petition, the Honourable court be and is hereby pleased to grant order of interim injunction restraining the 1st, 2nd, 3rd and 4th Interested Parties from sitting, deliberating, transacting, undertaking and or in any other way participating in the activities of the Council of the University of Nairobi.
6. the costs of this application be provided for.

Respondents/Applicants' Case.

2. The Respondents/Applicants aver that Section 36 of the *Universities Act*, Cap 210B grants the Cabinet Secretary the statutory mandate to appoint persons to the university councils, being the apex organs of universities. Additionally, Section 51(1) of the Interpretations and General Provisions Act provides that the power to appoint includes to amend, rescind, revoke or vary such appointments unless a contrary intention appears.
3. The Respondents/Applicants aver that the 1st Respondent in exercise of the powers conferred by the aforementioned provisions, appointed: the 1st to 4th Interested Parties as members of the Council University of Nairobi; the 1st Interested Party as member of the Council University of Embu; 3rd Interested Party as member of the Council University of Eldoret and Council Karatina University vide Gazette Notices 4656, 4657, 4658 and 4659 all of 11th April 2025.
4. The Respondents/Applicants aver that the Ex-parte Applicant filed an application on 14th April 2025 at Milimani High Court in Judicial Review Application E093 of 2025 seeking leave to institute judicial review. The court subsequently declined jurisdiction on 15th April 2025 and transferred the suit to the Employment and Labour Relations Court.
5. It is the Respondents/Applicants case that having reached a finding that it does not have jurisdiction, the High Court ought to have downed its tools.
6. The Respondents/Applicants aver that orders issued without jurisdiction are null and void ab ignition, therefore, the orders issued by the High Court on 15th April 2025 was without jurisdiction thus irregular, null and void ab initio.
7. The Respondents/Applicants aver that this court issued directions on 23rd April 2025 and granted stay orders in the application dated 14th April 2025 which have immediate and far reaching effect of restraining the 1st Respondent from exercising his lawful and constitutional mandate of appointment and dismissal in respect of a university council.
8. The Respondents/Applicants aver that the continued existence and effect of the impugned orders prejudice public interest by obstructing the lawful functioning and strategic oversight of the 1st Respondent.



9. The Respondents/Applicants aver that impugned orders were issued ex-parte and without following the 1st and 2nd Respondents an opportunity to be heard, thus, offending the rules of natural justice and violating Article 50(1) of *the Constitution* which guarantees the right to a fair hearing.
10. It is the Respondents/Applicants' case that unless the orders are reviewed, varied and/or set aside as matter of urgency, substantial injustice will be occasioned to the government and the public at large through the continued disruption of lawful governance and executive administration. And no party will be prejudiced if the orders sought are granted.

Ex-parte Applicant's Case.

11. In opposition the application, the Ex-parte Applicant filed a replying affidavit dated 25th April 2025.
12. The Ex-parte Applicant avers that the Respondents/Applicants' reliance on Section 6(1)(e) of the *State Corporations Act* and Section 36 of the *Universities Act* is misleading as it omits critical provisions governing the 3rd Respondent's council appointments: Section 18(3) of the University of Nairobi Charter outlines specific grounds for vacating a council member's office; and Regulation 7(5) of the Universities Regulations 2023 (Gazette Supplement No.57) mandates the appointments under Section 36(1)(d) of the *Universities Act* must be preceded by a transparent process involving a selection panel chaired by a person with 15 years of university management experience, must advertise, shortlist, interview and recommend candidates to the Cabinet Secretary.
13. It is the Ex-parte Applicant's case that the 1st Respondent's unilateral revocation and transfer of the Interested Parties via gazette notices 4656-4659 of 11th April 2025 disregarded these procedural safeguards.
14. The Ex-parte Applicant avers that Section 18(3) of the University of Nairobi Charter and Regulation 7(4) of the Universities Regulations, 2023 expressly limit the 1st Respondent's powers under Section 51(1) of the Interpretations and General Provisions Act by prescribing specific conditions under which a council member's tenure may be terminated. Therefore, the purported transfer to other universities violated these provisions as no lawful process was followed to revoke or reappoint them.
15. The Ex-parte Applicant avers that the filing of Judicial Review Application No. E093 of 2025 at the High Court was aimed at halting the administrative paralysis caused by the unlawful gazette notices revoking the Interested Parties' appointments; and at the time, he reasonably believed the High Court was the appropriate forum to safeguard the 3rd Respondent's day to day management and operations.
16. The Ex-parte Applicant avers that the removal of the Interested Parties directly impacts governance structures tied to the appointment of the Vice Chancellor, a matter falling under labour relations. Thus the High Court transfer of the matter to this court ensured specialized adjudication of employment related statutory breaches.
17. It is the Ex-parte Applicant's case that Hon. Lady Justice Aburili appropriately certified urgency and transferred the matter to this court without substantive orders, deferring to this court's specialised mandate. Subsequently, Hon. Justice Manani granted leave on 23rd April 2025 for the substantive application, affirming the legitimacy of the current proceedings and compliance with judicial hierarchy.
18. The Ex-parte Applicant avers that the Respondents/Applicants' contention of jurisdictional impropriety is untenable as this court's adherence to Article 159(2)(d)(e) of *the Constitution* eschewing technicalities to uphold constitutional purpose reflects the collective wisdom of judges with over 30 years legal experience. Therefore, their stance undermines the judiciary's role as *the constitution's* guardian.



19. The Ex-parte Applicant avers that the affidavit of service dated 22nd April 2025 confirms they were notified of the proceedings and their failure to appear cannot justify vacating lawful orders that safeguard public interest.
20. It is the Ex-parte Applicant's case that it is trite that any order of stay that is granted ought to be in favour of public interest and this court must identify the public interest in the application; vacating the orders of 23rd April 2025 would plunge the 3rd Respondent into an administrative crisis.

Respondents/Applicants' Submissions.

21. The Respondents/Applicants submitted that it is settled law that jurisdiction is the lifeblood of judicial proceedings; without it, a court acts in vain. They relied in the Supreme Court case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR which held that: "A court's jurisdiction flows from either *the Constitution* or legislation or both." Therefore, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
22. The Respondents/Applicants contends that it is not disputed that the judicial review application was initially filed in the High Court, in the Constitutional and Human Rights Division, under Judicial Review No. E093 of 2025. However, on 15th April 2025, the High Court declined jurisdiction. It is therefore, their submission that the High Court ought to have struck out or dismissed the matter, not transfer it; transferring a matter that the court has expressly found it has no jurisdiction over is a nullity in law and cannot give rise to valid proceedings in the receiving court. They cited the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) whereby it was held that:

"in numerous decided cases, including this court have held that it would be illegal for the high court in exercise of its powers under Section 18 of the *civil procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign..."
23. It is the Respondents/Applicants submission that Article 159(2) (d) cannot override express constitutional or statutory limitations on jurisdiction. A court acting without jurisdiction cannot validate its actions through the backdoor of procedural flexibility; to do so would be to subvert *the Constitution* under the guise of upholding it. The proper procedure in such a scenario was for the High Court to strike out the application without making further orders. The Ex-parte Applicant cannot now seek to benefit from orders obtained through a legally incompetent process. To uphold such a transfer would be to sanction illegality and encourage forum shopping, allowing litigants to circumvent statutory forums and rely on procedural irregularities to sustain defective proceedings. It would also offend the constitutional design of specialized courts under Article 162(2), which was intended to prevent exactly such jurisdictional confusion and abuse.
24. The Respondents/Applicants submitted that the ex-parte orders issued by this Court on 23rd April 2025 emanating from proceedings transferred without jurisdiction are null and void ab initio and must be set aside.
25. The Respondents/Applicants submitted that the ex-parte stay orders issued on 23rd April 2025 ought to be set aside as they were obtained through material non-disclosure; the Ex-parte Applicant failed to disclose that the High Court had already declined jurisdiction on 15th April 2025. The well-established



- principles governing the review and setting aside of such orders as discussed in *Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare* [2018] eKLR, the Court outlined the threshold for setting aside stay orders, holding that such orders may be set aside where there is non-disclosure of material facts, concealment of material documents, or misrepresentation.
26. The Respondents/Applicants submitted that this non-disclosure was a deliberate omission, designed to mislead the ELRC into issuing ex-parte relief in proceedings it had no lawful basis to entertain. Furthermore, the issuance of the ex-parte orders under such circumstances offends the principle of fairness, and undermines the integrity of judicial review remedies as held in *Kogo Muganda Vincent Vs John Mbugua Kungu*[2003] eKLR.
 27. The Respondents/Applicants submitted that having initiated proceedings in the wrong forum, and with knowledge that the High Court had already found it lacked jurisdiction, the Ex-parte Applicant nevertheless proceeded to secure ex-parte orders from the ELRC without any formal application or proper proceedings before that court. There was no valid motion before the ELRC to ground those orders; no directions had been issued by the court; and the respondents had not been given notice or a hearing. In substance and form, the orders were issued without jurisdiction and in clear violation of the rules of natural justice.
 28. The Respondents/Applicants submitted that the ex-parte orders of 23rd April 2025 were not only procedurally flawed, but also constitutionally offensive, having been obtained without jurisdiction, without disclosure, and without due process. They should be set aside ex debito justitiae as a matter of right, not discretion.
 29. The Respondents/Applicants submitted that the stay orders issued on 23rd April 2025 were made ex-parte, without affording them an opportunity to be heard or to present facts in rebuttal. The impugned orders had the immediate and sweeping effect of suspending the lawful and constitutional mandate of the Cabinet Secretary to appoint and reconstitute the University of Nairobi Council, thereby paralysing the governance and oversight structures of a critical public institution. Therefore, the grant of such f orders without notice, hearing, or input from the affected parties constitutes a violation of the Respondents' right to a fair hearing.
 30. It is the Respondents/Applicants submission that the nature and impact of the orders granted were not interim preservatory but had the effect of determining rights and duties without hearing the affected parties. This is procedurally unfair and constitutionally impermissible as it denied the Respondents/Applicants a fair hearing in violation of Article 50(1) of *the Constitution*. They urged the court to set aside the ex-parte orders issued on 23rd April 2025 and allow the matter to proceed with full participation of all parties to uphold the rule of law and constitutional justice.
 31. The Respondents/Applicants submitted that the 1st Respondent acted strictly within the confines of the law in revoking the appointments of the Interested Parties and reconstituting the Council of the University of Nairobi. The exercise of this authority is firmly grounded in clear statutory and regulatory frameworks that vest the Cabinet Secretary with both the power of appointment and the corresponding power of revocation under Section 36(1)(d) of the *Universities Act* and Section 51(1) of the *Interpretation and General Provisions Act*.
 32. It is the Respondents/Applicants submission that the revocation and reconstitution were properly effected through Gazette Notice No. 4656 of 11th April 2025, and subsequent related notices, indicating lawful exercise of the powers conferred by statute. No contrary intention is expressed in the *Universities Act* or any other applicable law to limit the Cabinet Secretary's authority to revoke.



33. The Respondents/Applicants submitted that Clause 1.5 of the Code of Governance for State Corporations (Mwongozo), which applies to public university councils, provides that the maximum tenure of a board member is two terms of three years or a cumulative six years. This reinforces the limited tenure and the oversight function of the Cabinet Secretary in enforcing governance compliance. Therefore, in exercising the power of revocation and reappointment, the Cabinet Secretary was not acting arbitrarily or ultra vires, but discharging a statutory and policy-driven mandate in accordance with lawful authority.
34. The Respondents/Applicants submitted that by fettering the Cabinet Secretary's statutory authority to manage university councils critical oversight organs in public institutions the impugned orders suspend the lawful operations of a key public institution without judicial finality on the underlying dispute.
35. The Respondents/Applicants submitted that the governance of public universities, including the University of Nairobi, requires the prompt and effective exercise of this power to ensure that councils are properly constituted with individuals capable of discharging their functions. Any judicial order that disables the Cabinet Secretary from acting within this statutory framework directly undermines the delivery of education policy and the strategic oversight mandated by law.
36. It is the Respondents/Applicants' submission that the orders place the governance of a major university in a state of paralysis, causing administrative confusion and stagnation in policy execution contrary to the public interest which demands stability, continuity, and lawful oversight in the management of public universities. The orders reinstate members who had been lawfully removed and reassigned to other institutions, contrary to principles of effective public administration.
37. The Respondents/Applicants submitted that the continuation of the orders in question serves not the public interest but elevates private grievances above the systemic need for good governance and legal order.
38. The Respondents/Applicants submitted that the orders sought seek to uphold constitutional and statutory order, restore executive functionality, and prevent continued injustice arising from ex-parte orders granted without jurisdiction. Equity demands that no party should be allowed to benefit from an irregular process, particularly where the process culminates in restraining the lawful execution of a public duty by a constitutional office.
39. The Respondents/Applicants submitted that in exercise of powers conferred by Section 36(1)(d) of the *Universities Act* and Section 51(1) of the *Interpretation and General Provisions Act*, the 1st Respondent lawfully revoked and reconstituted the University of Nairobi Council. These were executive decisions made in the public interest and within the statutory framework. However, the impugned ex-parte orders of 23rd April 2025 unjustifiably suspended the operation of these lawful appointments, effectively paralysing the governance of a critical public institution.

Ex-parte Applicant's Submissions.

40. The Ex-parte Applicant submitted that the judicial review filed at the High Court was not deemed incompetent; but was only deemed to be filed in the wrong forum. This action was purely administrative in the interests of justice.



41. He relied in on the case of *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties)* [2020] KEHC 2971 (KLR) where it was expressed as follows:

“In my view lack of jurisdiction is limited to the handling of the dispute at hand substantially. Transfer or referring cases to the Court with the proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case at hand. It has nothing to do with jurisdiction. All what the Court will be saying is that “you have come to the wrong forum, please take your file to the correct forum”. I don’t think such an order needs jurisdiction or can be held as null and void. This is my honest view. Further, I do opine that the contrary view will be running against the provisions of Article 159 of *the Constitution* in relation to procedural technicalities. Justice should not be made expensive to litigants. Striking out the matter would lead to the filing of a fresh suit before the Court with proper jurisdiction. This entails the typing of fresh pleadings, filing the same in Court and paying Court fees afresh. Thereafter service has to be effected upon all the respondents and interested parties. On the other hand, when the matter is referred to the proper Court, the proceedings will start afresh and the file will be allocated a fresh Court file number. I believe such process saves litigants time and money and is in line with the spirit of *the Constitution*.”

42. The Ex-parte Applicant submitted that the claim that the orders were issued on the grounds of material non-disclosure are baseless as this Court was well aware of the orders issued Hon. Aburili J, which are present in the court record, and which give rise to the proceedings before it.
43. The Ex-parte Applicant submitted that the Respondents were afforded a reasonable opportunity to appear in court and make their representations before leave and conservatory orders were issued. The Respondents have not challenged the validity of the Affidavit of Service sworn on 22nd April 2025, to demonstrate service upon them, or sought to have its deponent cross-examined to ascertain the facts deposed.
44. It is the Ex-parte Applicant’s submission that the Affidavit of Service dated 22nd April 2025 confirms the Respondents were notified of the proceedings but chose not to participate. Natural justice does not shield parties from the consequences of tactical absences.
45. The Ex-parte Applicant submitted that the 1st Respondent’s revocation of the Interested Parties’ appointments is ultra vires and devoid of legal foundation. Section 18(3) of the University of Nairobi Charter confines the termination of a council member’s tenure to three exhaustive grounds: resignation, incapacity, or death. None apply in this particular case. The Cabinet Secretary’s contrivance of a “transfer” mechanism to circumvent these safeguards is a legislative fiction, rendering his actions unlawful under Section 7(2)(a)(ii) of the *Fair Administrative Action Act*, which prohibits decisions made in excess of statutory authority.
46. The Ex-parte Applicant submitted that the applicable laws, being the *Universities Act*, the University of Nairobi Charter, and the Universities Regulations 2023, have been outrightly derogated. As such, public interest is in favour of upholding the conservatory orders issued by this Court on 23rd April 2025.
47. It is Ex-parte Applicant’s submission that Section 18(3) of the University of Nairobi Charter erects an impermeable legal barrier against capricious removals. It stipulates, in unequivocal terms, that a council member’s tenure may only terminate upon resignation, incapacity, or death. These grounds are



exhaustive, leaving no room for executive improvisation, therefore, the 1st Respondent's contrivance of "transfer" as a mechanism to sidestep this framework is unlawful.

48. The Ex-parte Applicant submitted that the purported "transfer" of the Interested Parties to other institutions is a legal fiction with no basis in statute. Neither the Universities Act nor the University of Nairobi Charter contemplates such a mechanism. The 1st Respondent's action is devoid of rationality and violates Section 7(2)(i) of the Fair Administrative Action Act, which prohibits administrative actions not rationally connected to the purpose of the empowering provision.
49. It is the Ex Parte Applicant's submission that the judicial review orders of certiorari to quash Gazette Notices Nos. 4656–4660 and mandamus to reinstate the Interested Parties are not only warranted but imperative to rectify the 1st Respondent's egregious violations of law, logic, and procedural fairness. He further submitted that these orders are anchored in the tripartite test for judicial review articulated in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR: illegality, irrationality, and procedural impropriety.
50. I have considered the averments and submissions of the parties herein. The applicants have raised a pertinent jurisdictional issue on whether a court lacking jurisdiction can transfer and claim to a court with jurisdiction.
51. The applicants have pointed out that Hon. J Aburili when considering the application before her in HCJR 093/25 considered the issues and determined that the high court was not the right forum to handle the JR application. She then promptly transferred the application before the ELRC which is now ceased of the matter.
52. The argument by the applicant is that the transfer was a nullity as this court was not therefore capable of handling what didn't exist. In *Equity Bank Ltd vs Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) the court considered this issue and made a finding that it would be illegal for the high court to exercise its powers under section 18 of the Civil Procedure Act and transfer a case filed in a court lacking jurisdiction to one with jurisdiction and therefore sanctify an incompetent suit.
53. The holding of the court was to the effect that court without jurisdiction should not transfer a case to a court with jurisdiction. Indeed if a court finds that it has no jurisdiction, it should proceed and down its tools since it would be transferring something essentially non-existent. The proper way to handle such an issue is to strike out the application/suit so that the parties can then file in the court with appropriate jurisdiction.
54. It is indeed true that a suit filed in a court without jurisdiction is a nullity and cannot be transferred to another court. The reasoning behind this proposition is that without jurisdiction no order even of transfer/stay should be made but to either strike out or dismiss the claim.
55. This application having been transferred before this court without the requisite jurisdiction implies that the application was dead on arrival and it is indeed true as submitted by the applicants that this court could not proceed and issue any orders as it did on such an application. I do agree with the applicants therefore, and proceed to set aside/review and discharge orders of 23rd April 2025.
56. By virtue of the orders/ reasons which are given in this ruling, I proceed to strike out the entire Judicial Review application. There will be no order of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH OF JUNE, 2025.

HELLEN WASILWA

JUDGE

