



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 52 OF 2020**

Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: JUDICIAL REVIEW PROCEEDINGS**

**AND**

**IN THE MATTER OF: ARTICLE 23(3)(f) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MAASAI MARA UNIVERSITY COUNCIL...1<sup>ST</sup> RESPONDENT**

**PROF. MOHAMMED ABDILE.....2<sup>ND</sup> RESPONDENT**

**AND**

**OKIYA OMTATAH OKOITI.....EXPARTE APPLICANT**

**JUDGMENT**

By Notice of Motion Application dated **9<sup>th</sup> April 2020**, the Ex Parte Applicant brought this Judicial Review proceedings seeking for orders that;

**1. THAT** an order of **certiorari** do issue, to bring to this Court for purposes of being quashed, and to be quashed:

- a. The decision made by the 1<sup>st</sup> Respondent not to refer the matter to the Public Service Commission, which has jurisdiction to sit on appeal over such decisions of the Council, and instead constitute an Ad Hoc Appeals Committee of the Council to hear and determine the 2<sup>nd</sup> Respondent’s appeal against his summary dismissal by the predecessor Council as the Maasai Mara University’s Deputy Vice Chancellor (Administration, Finance & Planning).
- b. The decision made by the 1<sup>st</sup> Respondent’s Ad Hoc Appeals Committee to hear the 2<sup>nd</sup> Respondent’s appeal, which was filed out of time, against his summary dismissal by the full Council as the Maasai Mara University’s Deputy Vice Chancellor (Administration, Finance & Planning).

- c. The decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to reinstate the 2<sup>nd</sup> Respondent as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).
2. THAT an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:
    - a. The decision made by the 1<sup>st</sup> Respondent not to refer the matter to the Public Service Commission, which has jurisdiction to sit on appeal over such decisions of the Council, and instead constitute an Ad Hoc Appeals Committee of the Council to hear and determine the 2<sup>nd</sup> Respondent's appeal against his summary dismissal by the predecessor Council as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).
    - b. The decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to hear the 2<sup>nd</sup> Respondent's appeal, which was filed out of time, against his summary dismissal by the full Council as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).
    - c. The decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to reinstate the 2<sup>nd</sup> Respondent as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).
  3. THAT an order of mandamus does issue, to compel the 1<sup>st</sup> Respondent to enforce the summary dismissal of the 2<sup>nd</sup> Respondent.
  4. **THAT** consequent to the grant of the prayers above the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
  5. THAT costs be in the cause.

The Judicial Review is premised on the following grounds, inter alia;

1. That these proceedings relate to the patent objection by the **ex-parte** applicant to:
  - a. The **ultra vires** decision by the 1<sup>st</sup> Respondent to constitute an Ad Hoc Appeals Committee to hear and determine the 2<sup>nd</sup> Respondent's appeal against the decision of the whole Council to summarily dismiss him, which appeal can only be heard and determined by the Public Service Commission.
  - b. The **ultra vires** decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to hear the 2<sup>nd</sup> Respondent's appeal, which was filed out of time, against his summary dismissal as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).
  - c. The **ultra vires** decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to reinstate the 2<sup>nd</sup> Respondent as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).
2. That the **ex-parte** applicant is aggrieved that, acting **ultra-vires**, the newly installed Council of the Maasai Mara University has decided to reinstate the 2<sup>nd</sup> Respondent who was summarily dismissed by the immediate former Council for gross misconduct.
3. That the **ex-parte** applicant faults the reinstatement process for being devoid of merit to the extent that the 1<sup>st</sup> Respondent has no jurisdiction to entertain an appeal which was lodged outside the allowed time and in the wrong forum.
4. That further, it is also clear that, within the university's structures, the law only provides for appeals against decisions of committees of the Council and that the law does not provide for appeals against decisions of the full Council within the university's administrative structures.
5. That appeals against decisions of the full University Council must be made, and can only be lawfully made, to the Public Service Commission **within a period of thirty (30) days** from the date of the letter conveying such decision.
6. That the **ex-parte** applicant also posits that a subcommittee of the Council, such as the Ad Hoc Appeals Committee formed to hear and determine the 2<sup>nd</sup> Respondent's appeal, cannot purport to sit on appeal over, let alone overrule, a decision of the full Council. That since the 2<sup>nd</sup> Respondent was dismissed by the full Council, and the law does not provide for any administrative appeals against decisions of the Council, the new Council was dead wrong to appoint a subcommittee of its members to purport to hear and determine an appeal against its predecessor Council's decision.
7. That having been filed out of time, and in the wrong forum, the 2<sup>nd</sup> Respondent's appeal is without merit and the 1<sup>st</sup> Respondent has no jurisdiction to entertain it.
8. That the impugned reinstatement process is so tainted with violations of the law, including of the Constitution that it must be called out and be quashed by this Court.

9. That given the Cabinet Secretary's attempt to lift the 2<sup>nd</sup> Respondent's suspension at the behest of unnamed third parties the **ex-parte** applicant reasonably suspects that the impugned decision to irregularly reinstate the 2<sup>nd</sup> Respondent is also being done at the behest of unnamed third parties who are pressurizing the 1<sup>st</sup> Respondent to do so.

10. That it is also a matter of public record that on Tuesday, 17<sup>th</sup> March 2020, citing integrity issues, the National Assembly rejected the 2<sup>nd</sup> Respondent's nomination for appointment as the Chief Executive Officer of National Government Constituencies Development Fund Board.

11. That the **ex-parte** applicant posits that the impugned reinstatement of the 2<sup>nd</sup> Respondent is contrary to the national values and principles of governance in Article 10 of the Constitution and that it also violates Article 73(2).

12. The 1<sup>st</sup> Respondent's decision to violate the law is contrary to Articles 10(2) and 47(1) which entrench the rule of law in the Constitution.

13. That it will undermine the Constitution, statute, and case law if the impugned actions of the respondents are allowed to stand.

14. That the impugned actions of the respondents are a nullity **ab initio** and of no consequence in law for being offensive to Kenya's national values and principles of governance enunciated in the Constitution, including rule of law, democracy and participation of the people, human rights, good governance, integrity, transparency and accountability, and sustainable development.

15. That the impugned actions of the respondents are against the public interest.

16. That unless the orders sought herein are granted, the **ex-parte** applicant and the people of Kenya will suffer great loss as the rule of law and constitutionalism in general will be violated and overthrown.

17. That this application faults as irregular, unreasonable, illegitimate, unlawful, **ultra vires**, and, therefore, unconstitutional, null and void **ab initio** the impugned decision of the current members of the 1<sup>st</sup> Respondent to sit in appeal over the decisions of their predecessors and to remand the 2<sup>nd</sup> Respondent's appeal to the Ad Hoc Appeals Committee of the Council, which is an administrative organ lower than the full Council.

18. That the **ex-parte** applicant is inviting the Court to intervene and quash the 1<sup>st</sup> Respondent's impugned actions and order it to abide by the law.

19. That the **ex-parte** applicant has a right of access to this Court to safeguard his rights and those of other members of the public which have been, are being and are in danger of further infringement.

In his statutory statement, the Ex Parte Applicant reiterates the above grounds.

In opposing the aforesaid Notice of Motion, the 1<sup>st</sup> Respondent in a Replying Affidavit dated 16<sup>th</sup> September 2020, laid the following grounds, inter alia;

**1. THAT** the applicant is not entitled to any of the orders sought at all and in particular orders of certiorari, prohibition and mandamus as outlined therein in his application.

**2. THAT** the 2<sup>nd</sup> Respondent was/has been an employee of Maasai Mara University pursuant to an employment contract entered into by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent on 5<sup>th</sup> February, 2019 and serving in the position of Deputy Vice Chancellor (Administration, Finance and Planning).

**3. THAT** following the Citizen TV expose' aired on 1<sup>st</sup> September, 2019 there arose tension within the university and the 2<sup>nd</sup> Respondent was adversely mentioned in incitement related activities.

**4. THAT** the 2<sup>nd</sup> Respondent immediately moved to court and on 14<sup>th</sup> November 2019 the 1<sup>st</sup> Respondent was served with orders stopping the 2<sup>nd</sup> Respondent from appearing before it on 18<sup>th</sup> November 2019 as had been scheduled.

**5. THAT** following numerous gross misconduct actions portrayed by the 2<sup>nd</sup> Respondent it was resolved that he be suspended pending investigations in the allegations facing him and the 1<sup>st</sup> Respondent issued him with a suspension letter on 15<sup>th</sup> November 2019.

**6. THAT** on 27<sup>th</sup> February 2020 the 2<sup>nd</sup> Respondent's application came up for hearing and the University was able to demonstrate to the court how the 2<sup>nd</sup> Respondent interfered with its operations, consequently the court vacated the subject orders and on 4<sup>th</sup> March 2020 the 1<sup>st</sup> Respondent terminated the 2<sup>nd</sup> Respondent's employment contract after due process.

**7. THAT** on 3<sup>rd</sup> May 2020 the 2<sup>nd</sup> Respondent lodged an Appeal to the Chairman of the 1<sup>st</sup> Respondent against his summary dismissal in accordance with Article 5.1 (n) of the Collective Bargain Agreement governing the employer-employee relationship.

8. **THAT** the 1<sup>st</sup> Respondent constituted the Appeals Committee (Ad Hoc Committee) of the Council in line with Schedule 1 of the Universities Statutes and with the consent of the Council, legitimate, objective and purposive members were appointed to the Appeal's Ad-hoc committee in accordance with **Statute XVIII** of the **Maasai Mara University Statutes 2019**.

9. **THAT** on 19<sup>th</sup> May 2020 the Appeals committee convened a meeting in relation to the Appeal lodged by the 2<sup>nd</sup> Respondent on the 3<sup>rd</sup> of May, 2020.

10. **THAT** for purposes of independence and effectual discharge of its mandate the committee was to make its own terms of reference and rules of procedure as they found appropriate when conducting the case.

11. **THAT** after the Appeal's Committee hearing both parties and after considering every allegation levelled at the 2<sup>nd</sup> Respondent and the holding of the trial Disciplinary Council, it unanimously resolved that the 2<sup>nd</sup> Respondent be reinstated to his earlier position as the Deputy Vice Chancellor (Administration, Finance and Planning).

12. **THAT** this being an employment dispute the same was to be guided by the Employment and Labour Relations rules and thus the 2<sup>nd</sup> Respondent's employment was governed by the Contract of employment between him and the 1<sup>st</sup> Respondent, the terms of the Memorandum of Agreement between the 1<sup>st</sup> Respondent and the Kenya University Staff Union (KUSU) and the Employment Act, 2007.

13. **THAT** further, the Appeal by the 2<sup>nd</sup> Respondent was an internal dispute which involved an employee-employer relationship thus falls within the ambit of private law and the orders sought herein by the ex-parte Applicant are inappropriate and cannot stand in law since no public wrong has been occurred.

14. **THAT** in view of the foregoing, the instant application by the ex-parte Applicant seeking orders for judicial review is inappropriate, incompetent and invalid as the Appeal's Committee is well enshrined in Clause 9.5 of the Maasai Mara University Human Resource Policy.

15. **THAT** the charges leveled against the 2<sup>nd</sup> Respondent and determined by the Appeals Committee of the council were wrongs purely done in breach of contract of service and stated guidelines between the employer and employee and not the public, thus the ex-parte Applicant cannot purport to have the same directed to the Public Service Commission whilst procedure mandated an internal Appeals committee of the council to conduct the same.

16. **THAT** the 1<sup>st</sup> Respondent duly complied with section 63 of the Universities Act, the provisions of the Fair Administrative Act and Article 47 of the Constitution as outlined therein during the Appeal hearing and arriving at the final verdict.

17. **THAT** orders of judicial review are of a discretionary nature and that the ex-parte Applicant has not advanced any reasonable grounds for the court's discretion to be exercised in his favour.

18. **THAT** the orders sought herein are highly prejudicial to the Respondents particularly taking into account that the Respondents complied with the laid down procedures and in accordance with the governing law when conducting themselves.

The Application was canvassed by way of written submissions where the parties submitted as follows;

### **Exparte Applicant's Submissions**

In his submissions, the Ex Parte Applicant reiterates the contents of his Notice of Motion application dated 9<sup>th</sup> June 2020 seeking Judicial Review orders of Certiorari, Prohibition and Mandamus. The applicant also reiterates the contents of his Supplementary Affidavit dated 21<sup>st</sup> October, 2020. In a nutshell, it is the Ex Parte Applicant's case that, being functus officio upon its summary dismissal of the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent had no jurisdiction to entertain the 2<sup>nd</sup> Respondent's appeal against his summary dismissal by the predecessor University Council. That, having been summarily dismissed under Section 44 of the Employment Act No. 11 of 2007, the decision could only be appealed as provided for under sections 47 as read together with 49 of the Employment Act. No internal administrative mechanisms of the Maasai Mara University could be invoked in the matter. Further that, even if the internal mechanisms were applicable, which they are not, the appeal was filed outside time, and that it was wrongly based on the university's Collective Bargaining Agreement which was not applicable to the case since, as Deputy Vice Chancellor, the 2<sup>nd</sup> Respondent was not unionisable, and he did not belong to the Kenya Universities Staff Union (KUSU).

On whether the petition qualifies as public interest litigation the ex-parte applicant submits that this Petition is filed in good faith pursuant to Article 3(1) of the Constitution and thus meets the tests of bona fide public interest litigation. That the facts relied upon in the petition are prima facie true and correct in the sense that the respondents herein have violated clear provisions of the Constitution and statutes, which this Court should redress by upholding and enforcing the law. The Ex Parte Applicant relies on the case of the case of **People's Union for Democratic Rights & Others v Union of India & Others (1982) 3 SCC 235**.

On whether the petitioner has standing to move the Court, the ex-parte applicant submits in the affirmative and cites Articles 22 and 258 of the Constitution which he posits are tailored for the community and enacted into the Constitution of Kenya the doctrine of public interest litigation. The Ex Parte Applicant further submits that Articles 22 and 258 of the Constitution take away the notion of locus standi which meant that only an aggrieved party demonstrating damage or harm can approach the Court and seek a remedy. The ex-parte applicant cites the case of **Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016] eKLR** and **Trusted Society of**

**Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another [2013] eKLR**, where the Court held that a petitioner had the relevant locus standi once it was established that the petition was about a public interest issue.

The ex-parte applicant further submitted that the Respondents contravened the provisions of the Constitution of Kenya thereby inviting this court to intervene. To support this, the ex-parte applicant maintains the 1<sup>st</sup> Respondent's decision to accept the 2<sup>nd</sup> Respondent's Appeal on the merits, is a derogation from Article 10 of the Constitution of Kenya 2010 which promotes the rule of law, transparency, good governance and accountability and demands that public actors observe national values. That it is also a derogation of Article 41(1) on fair labour practices, and Article 47(1) on fair administrative action. Further that the impugned reinstatement of the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent is contrary to and a violation of the guiding principles of leadership and integrity under Article 73(2)(b), (c), and (d) of the Constitution of Kenya 2010. To underscore the above averment, the ex-parte applicant submits that the Respondent violated Articles 73(2) of the Constitution to the extent that its decision was not impartial or objective and was actuated by bad faith and malice. He further posits that the fact that the Cabinet Secretary of Education vide a letter **Ref: MOE/CON/2/22 dated 21<sup>st</sup> November 2019** claimed to have lifted the 2<sup>nd</sup> Respondent's suspension at the behest of unnamed third parties proves that the impugned decision to irregularly reinstate the 2<sup>nd</sup> Respondent was done at the behest of the unnamed third parties who pressurized the 1<sup>st</sup> Respondent to reinstate the 2<sup>nd</sup> Respondent in utter violation of Article 73(2). The ex-parte applicant cites the case of **Felix Kiprono Matagei v Attorney General & 3 others [2016] eKLR**, where the Court held as follows:-

“The Constitution dictates and demands objectivity from public officers under Article 73(2)(b). It also demands that public officers be not influenced by favoritism or other improper motives in their decision making under Article 73(2)(b). The Constitution also demands impartiality of public officers under Article 232(1)(c). Where there is a real possibility of conflict of interest or of the potential of conflict of interest, then the very principles enshrined under Articles 10, 73 and 232 of the Constitution are unlikely to be met. Public officers, in my view, whose duties invite the potential of conflict of interest are unlikely to inspire public confidence in their offices or the services they offer.”

The ex-parte applicant further submitted that the principle of “*Functus Officio*” stripped the 1<sup>st</sup> Respondent of jurisdiction and was an absolute bar to the University Council reopening the matter on the merits. That when it sat as a disciplinary forum the 1<sup>st</sup> Respondent was a tribunal exercising a quasi-judicial function and it could thereafter not revisit/revise/review/modify the final decision it made and communicated to summarily dismiss the 2<sup>nd</sup> Respondent. That the summary dismissal was a final order of punishment by the Appointing Authority and could only be appealed as provided for under sections 47 as read together with Section 49 of the Employment Act.

The Ex Parte Applicant further submits that, the 2<sup>nd</sup> Respondent lodged his appeal forty three (43) working days after his dismissal contrary to the fourteen (14) working days as provided at **Paragraph 3.31(e) of the Maasai Mara University Human Resource Policy** which provides:

e) A member of staff who is not satisfied with the committee's *verdict may appeal to the Appeals Committee of the University Council* within a period of fourteen days (sic) (14) working days.

The ex-parte applicant further posits that it was fatal to lodge and hear the 2<sup>nd</sup> Respondent's appeal under the CBA. That Vice Chancellors and Deputy Vice Chancellors of public universities are not unionisable because they are not permanent employees of universities as they are employed on contract at grades 16 and above. That by appealing under the CBA which was not applicable to him, the 2<sup>nd</sup> Respondent acted outside the law and in vain since, as DVC at Job Grade 17, he was in management and, therefore, he was not unionisable and he was not a member of KUSU. That based on the above it goes without saying that the University Council lacked the jurisdiction to hear the appeal against a summary dismissal. Further that the Council lacked jurisdiction to entertain an incompetent appeal filed outside time and based on the inapplicable CBA as without clear provisions in law for doing so, and given the principles of natural justice, the new Council could not purport to review and overturn this particular decision of its predecessor.

For the above reasons, the exparte applicant submits that he is entitled to the prayers sought and prays that the application be allowed with costs.

### **1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> respondent posits that the ex-parte applicant's application is gross and is an abuse of the court process as it does not raise any triable issues before this court. That the allegations posited in the application do not hold water as the 1<sup>st</sup> respondent arrived at its decision after proper consideration of the facts laid before it and within the confines of the stipulated laws.

The 1<sup>st</sup> Respondent further posits that the employment relationship between him and the 2<sup>nd</sup> Respondent is governed by private law and the relationship was governed by the contract of employment, Employment Act, 2007, Maasai Mara statutes, 2019, Human Resource Policy and the terms of the Memorandum of Agreement between Maasai Mara University and Kenya University Staff Union Memorandum of Agreement (KUSU) of 2017-2021. That it should not be presumed that because the employer was a public body then the law governing it is therefore public law relying on the decision in the case of **Republic v Kenya Airports Authority and Another Exparte Moses Echwa [2015] eKLR**, where it was held that

“...in relation to the nature test, the Court of Appeal was emphatic that the fact that an employer is a body corporate sustained by public funds does not ipso facto render the duties it owes to employees of public nature. It would be wrong for employees of public bodies to be clothed with exceptional legal rights by allowing them to liberally apply for Judicial Review.’ In addition, the Learned Judge held that ‘Judicial Review is to be invoked where a public wrong has taken place not where breach of private law is alleged.”

That the disciplinary action taken against the 2<sup>nd</sup> respondent was purely on allegations of breach of contract of service at his place of work

and not as a public officer to the public. That as such the proper channel to address the same was the internal mechanism established therein. That the ex parte applicant cannot therefore come before this court seeking equitable remedies of injunction and specific performance on internal matters that underwent the proper procedure laid by the relevant statutes and laws governing the said relationship. That the application does not raise any matters of general public importance for it does not affect any other group of civil servants, or the public at large.

On the issue as to whether the 1<sup>st</sup> Respondent acted ultra vires in entertaining the appeal the 1<sup>st</sup> Respondent submits that it had the jurisdiction to entertain the appeal under its established appellate system. That the First Schedule of the Maasai Mara University Statutes, section 5 provides for the establishment of the Appeals committee of the council (Ad-hoc committee). Further that the duration within which an employee can lodge an Appeal is not specified, and as such the 1<sup>st</sup> Respondent entertained the appeal without undue regard to technicalities.

That the 1<sup>st</sup> Respondent duly complied with Section 63 of the Universities Act, the provisions of the Fair Administrative Act and Article 47 of the Constitution as outlined therein during the Appeal hearing and arriving at the final verdict and as such the Application should be dismissed with costs.

## **2<sup>nd</sup> Respondent's Submissions**

The 2<sup>nd</sup> respondent in his submissions reiterates the contents of his Replying Affidavit dated the 16<sup>th</sup> September, 2020. Through his advocate on record, he submits that the 1<sup>st</sup> Respondent's Appeals *Ad hoc* committee constituted by the 1<sup>st</sup> Respondent had the jurisdiction and power to reinstate the 2<sup>nd</sup> Respondent. That the Maasai Mara University's Human Resource Policy paragraph 1.5 (a) states that it is the university's objective to attract, develop, motivate and retain qualified and competent staff as per established structure. Further that the Mara University Statutes 2019 gives powers to the 1<sup>st</sup> Respondent to determine the procedures of Appointment, recruitment and promotion of all staff of the University. That it empowers the 1<sup>st</sup> Respondent to establish *Ad hoc* committees as need arises and can delegate some of its functions to the committees as was in the instant case. That Clause 5 of the Mara University Statutes 2019 establishes the Appeals Committee of Council (*Ad hoc* committee) which is mandated to receive and consider all appeals from the Disciplinary Committee of Council.

The Learned counsel for the 2<sup>nd</sup> Respondent further argues that the disciplinary committee referred to by the ex-parte applicant is only required to determine whether or not a staff has contravened the University's Code of Conduct and does not have the powers to summarily dismiss a Staff member. That the 2<sup>nd</sup> Respondent was summarily dismissed by the former members of the University Council after its 84<sup>th</sup> Special meeting of the Council. That the Ex-parte Applicant conveniently fails to disclose the provision that expressly states that the Appeal to the Vice Chancellor is for the junior and mid-level staff and that the 2<sup>nd</sup> Respondent falls under the category of Academic, senior, Library and Administrative staff whose Appeal is to be made to the Council for which there are no set time limits within which to appeal. Further, counsel cites Clause 5.1 (n) of the Collective Bargaining Agreement between the 1<sup>st</sup> Respondent and the Kenya University Staff Union (KUSU) which states as follows;

"A member of Staff whose services have been terminated has a right of Appeal. Such an appeal will be responded to within fourteen (14) days. The member of staff shall be accompanied by two (2) accredited union representatives in the Appeals committee."

Counsel argues that Clause 5.1 (n) of the Collective Bargaining Agreement does not prescribe a timeline within which to file an Appeal but prescribes that an appeal is to be responded to within fourteen (14) days. Further that section 59 of the Labor Relations Act which provides that an employer and employee who are parties in a Collective Bargaining Agreement are bound by the terms stated therein.

That the University has established a comprehensive internal dispute resolution mechanism thus the 2<sup>nd</sup> Respondent did not need to invoke the above section. That the University's internal employment dispute resolution mechanism are well established to handle employment/staff disputes relating to senior staff and specifically the 2<sup>nd</sup> Respondent. The dispute between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent was resolved through the internally set rules and regulations and the exhaustion of local remedies doctrine does not warrant the involvement of another body/tribunal or Court. Further that where the internal mechanisms are not exhausted, the High Court or Subordinate Court cannot review any administrative action except in exceptional circumstances which do not apply in this matter. Section 9(2) of the Fair Administrative Actions Act states as follows;

**The High court or subordinate Court under sub section (1) shall not review an Administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or reviews and all remedies available under any other written law are first exhausted**

That an appeal to the Public Service Commission would have kicked in if the 2<sup>nd</sup> Respondent was dissatisfied with the 1<sup>st</sup> Respondent's Appeals *Ad hoc* committee decision but that with the 2<sup>nd</sup> Respondent being satisfied with the decision of the council to re-instate him he did not need to Appeal to the Public Service Commission in accordance with section K.10 of the PSC Human Resource Policies.

The learned counsel further posits that the persons affected by the decision were heard before it came to a determination/ decision, and that in making the decision the Ad hoc committee took into account relevant matters in that Both parties were afforded the opportunity to present their case and supporting evidence and that the decision to re-instate the 2<sup>nd</sup> Respondent was made taking into account that the 2<sup>nd</sup> Respondent was not afforded an opportunity to be heard prior to the summary dismissal which was against the rules of natural justice and the Fair Administrative Actions Act.

On the issue as to whether the ex-parte applicant's application warrants the issuance of the administrative relief sought, counsel submits in the negative and argues that the Ex-parte Applicant has failed to prove/demonstrate the grounds under which he instituted this Judicial Review proceedings to warrant the issuance of the prerogative writs prayed for. That the applicant has not met the conditions set in Section

7(2) of the Fair Administrative Action Act. Counsel cites the case of **Republic v Inspector General of Police & 2 others; Ex parte Boniface Nginyo Mwaura [2019] eKLR** where the court cited with approval the holding in the case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** where it was held:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: ... Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality ... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision...Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

That the Ex-parte Applicant has not demonstrated to this court that the decision of the 1<sup>st</sup> Respondent to re-instate the 2<sup>nd</sup> Respondent was tainted with illegality, irrationality and procedural impropriety. That to the contrary, the 2<sup>nd</sup> Respondent has demonstrated that the Appeals *Ad hoc* committee constituted by the 1<sup>st</sup> Respondent had the powers and mandate to hear and determine the Appeal and it followed procedures and ensured that there was Fair Administrative Action. That the Ex-parte's application is vexatious, frivolous and an abuse of the court process and is meant to prevent the 2<sup>nd</sup> Respondent from assuming office and assist the office of the Director of Public Prosecutions (DPP) and the Directorate of Criminal Investigations (DC1) who are investigating the financial impropriety in the University. Counsel urges this court not to allow itself to be used as a conduit by the Ex-parte Applicant (and the persons whom he represents) to frustrate the ongoing prosecution and investigations against the corrupt former officials and/or employees of the University.

### **Determination**

The issues for determination are;-

- a. Whether the Ex Parte Applicant has met the grounds for seeking of Judicial Review Order of Certiorari, mandamus and Prohibition.
- b. If so, whether the application dated 9<sup>th</sup> April 2020 is merited.
- c. Who is entitled to costs of these proceedings?

### **Whether the Ex Parte Applicant has met the grounds for seeking of Judicial Review Order of Certiorari, mandamus and Prohibition.**

The purpose of Judicial Review was laid down in the case of **Municipal Council of Mombasa v Republic Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2007 (2002) eKLR**, where the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power that is the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

The circumstances under which orders of **Judicial Review** can be issued were elaborated by **Justice Kasule** in the Uganda case of **Pastoli v Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.**

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality ---.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (**Al-Mehidswi v Secretary of State for the Housing Department (1990) AC 876**”.

Having laid down the circumstances and threshold that must be established in Judicial Review cases, the court must now consider the said circumstances and threshold and juxtapose it upon the facts of the instant case to establish whether the Exparte Applicant has met the threshold required in judicial review applications.

In the instant case, the ex- parte applicant contends that the 1<sup>st</sup> Respondent acted ultra vires in forming an ad hoc committee to entertain an appeal by the 2<sup>nd</sup> Respondent. That the 1<sup>st</sup> Respondent did not have the jurisdiction to entertain the appeal as any such appeal ought to have been lodged with the Public Service Commission or before this court.

It is the Court's considered view that the Ex Parte Applicant herein has established the threshold for seeking the orders of Judicial Review proceedings as it is questioning whether the 1<sup>st</sup> Respondent acted **ultra vires** and whether it had the jurisdiction to entertain the aforesaid appeal.

It is further the Court finding that the 1<sup>st</sup> Respondent being a public body, it is bound by Articles 10, 73 and 232 of the Constitution.

### **Whether the application dated 11<sup>th</sup> April 2019 is merited**

As stated above, the main issue in contention is whether the ad hoc committee that heard the 2<sup>nd</sup> Respondent's appeal had jurisdiction to entertain the appeal. The ex-parte argues that the 1<sup>st</sup> Respondent lacked jurisdiction for three reasons

- a. That the 2<sup>nd</sup> Respondent is non-unionisable and could not therefore invoke the provisions of the 1<sup>st</sup> Respondent and Kenya University Staff Union (KUSU) Collective Bargaining Agreement (KUSU) of 2017-2021.
- b. That the 2<sup>nd</sup> Respondent filed the appeal out of time and therefore the 1<sup>st</sup> Respondent lacked jurisdiction as the appeal was time barred.
- c. That the 1<sup>st</sup> Respondent became functus official upon summarily dismissing the 2<sup>nd</sup> Respondent.

The ex-parte applicant avers that the 2<sup>nd</sup> Respondent was not covered under the Collective Bargaining Agreement as he was in the top management of the university. That it is a matter of public record that at the time he was summarily dismissed, he was at Pay Grade 17.

The 2<sup>nd</sup> Respondent argued that the ad hoc committee was appointed in accordance with Article 5.1(n) of the Collective Bargaining Agreement governing the employer employee relationship. The said article provides that:

“A member of Staff whose services have been terminated has a right of Appeal. Such an appeal will be responded within 14 days. The member of staff shall be accompanied by two (2) accredited union representatives in the Appeals Committee.”

Clause 2.1 of the CBA provides as follows:

“Whereas by the terms of the Recognition Agreement between the Employer and the Union, the Employer having recognized the Union as properly constituted and the sole labour organization capable of representing the interest of staff in Grades 5 up to 15, in matters of Salaries, Terms and Conditions of service.”

Section 5.1 (n) provides as follows:

“A member of staff whose services have been terminated has a right of appeal. Such an appeal will be responded to within fourteen (14) days. The member of staff shall be accompanied by two (2) accredited union representatives in the Appeals Committee.”

The Respondents have not rebutted the allegation that the 2<sup>nd</sup> Respondent was at Grade 17. It is clear from Clause 2.1 of the CBA that staff in Grade 17 are not covered by the CBA which covers staff in grade 5 to 15. The ad hoc Committee was established under section 5.1 (n) of the CBA. As such the adhoc committee had no jurisdiction to entertain the appeal by the 2<sup>nd</sup> Respondent.

Further, under Statute VI of the Maasai Mara University Statutes, 2019 a Deputy Vice Chancellor's appointment is provided for as follows:–

### **STATUTE VI: THE DEPUTY VICE-CHANCELLORS**

#### **Appointment**

- a. The Council shall competitively recruit Deputy Vice-Chancellors as per Clause 15 of the Charter.
- b. Subject to the Charter and these Statutes, a Deputy Vice-Chancellor shall hold office for a period of five (5) years which may be renewed once for a further period of five years subject to satisfactory performance as will be determined by the Council.
- c. The Council may terminate the appointment of a Deputy Vice-Chancellor in accordance with the terms of contract.

d. A Deputy Vice-Chancellor may resign in writing addressed to the Secretary of the Council in accordance with the terms of contract.

Statute XXXIX provides for staff matters as follows –

**STATUTE XXXIX: STAFF MATTERS**

a. All members of staff of the University shall be subject to the general authority of the Vice Chancellor and the Council.

b. All members of staff shall be engaged as per the manner prescribed in the Terms of Service and letter of appointment at the time of engagement.

c. Members of staff of the University shall be appointed by the Council and on such terms and conditions as shall be specified in the letter of appointment to the member of staff.

d. Disciplinary procedures shall be as per the terms and conditions of service of the University Staff provided that they shall include among others the following conditions:

i. Subject to the Charter, these Statutes and Regulations, that any person appointed to an office under these Statutes may be removed from such office by the Council for good cause and may not be reinstated without the approval of the Council.

ii. Subject to the Charter, these Statutes and Regulations, and any other written law, no person shall be removed from employment under this Statute unless they shall have been given adequate notice of any charge made against them and access to any documents introduced in evidence and a reasonable opportunity to:

- be heard in person;
- be represented by a person of their own choice;
- call witnesses; and
- examine witnesses called against them.

e. ‘Good Cause’ when used in reference to removal from office, membership or employment means:

i. conviction of a felony, misdemeanor or any other offence which the Council shall deem to be such as to render the member of staff concerned unfit to continue to hold office or;

ii. gross deflection of duty, professional misconduct or proven incompetence or;

iii. insubordination or any other conduct which the Council shall consider scandalous or disgraceful thus rendering the member of staff unfit to continue holding office in the University; and

iv. breach of provisions of the Code of Conduct and Ethics for Public Universities.

f. The Council may declare a person removed from office, employment or place in pursuance of this Statute to be unfit to continue to hold office or employment in the University and any such person not be eligible for further nomination, election or appointment to any office, employment or place in the University, including any ex-officio position, unless the said declaration shall be rescinded.

g. There shall be a relevant Staff Disciplinary Committee of the Council which shall consider all disciplinary cases of members of staff. Provided that the Council shall have the right to invoke the provisions of the Employment Act and other relevant laws of Kenya as may be appropriate.

h. Subject to the Provisions of the Employment Act a member of staff may appeal against a decision of the Disciplinary Committee as follows:-

i. Academic, Senior Library and Administrative staff – to the Council

ii. Junior and middle level staff – to the Vice Chancellor and thereafter to the Council. An appeal against the Staff Disciplinary Committee decision must be done in writing and addressed to the Vice Chancellor within fourteen (14) days of the communication of the Committee’s decision. The appeal shall be chaired by the Vice-Chancellor who shall appoint an odd number of members.

(Emphasis added)

It is clear from Statute XXXIX that the appeals provided for under paragraph (h) does not contemplate an appeal by a Deputy Vice Chancellor as a Deputy Vice Chancellor does not fall under either category (i) or (ii) thereunder. Academic, Librarian and Administrative Staff are defined in the Charter as –

**"Academic Staff" means a member of staff of the University, who is a Professor, an Associate Professor, a Senior Lecturer, a Lecturer, an Assistant Lecturer and such other persons in the employment of the University engaged in teaching or research therein as Council, acting in accordance with the recommendation of Senate, may from time to time grant the status of members of the university;**

**"Librarian" means the person appointed to be the librarian of the university.**

**"Administrative Staff" means a member of staff of the University, who is appointed for general purposes of performing duties related to general management and administration of the University as shall be specified in the Statutes,**

Under the First Schedule to the Statute, the Human Resources Committee composition and Terms of Reference are the following –

### **"3. Human Resource Committee**

#### **b) Disciplinary Committee of Council**

**(For staff in Grade 13 and above – Revert to old terms layout)**

#### **Membership**

- i. Council member - Chairperson
- ii. Two members of Council - Independent Members
- iii. Principal Secretary - Ministry for University Education
- iv. Principal Secretary - The National Treasury

#### **Terms of Reference**

1. Reviewing and recommending to Council staff establishment and organization structure.
2. Developing and reviewing human resource policies.
3. Reviewing and recommending to council schemes of service for all staff.
4. Reviewing and recommending to council the terms and conditions to council as and when necessary when directed by council from time to time.
5. Reviewing and recommending on staff training development needs.
6. Recommending staff promotions as may be required.
7. Shall be responsible to the council for all staff disciplinary matters as required.
8. Considering and interviewing candidates to fill vacant positions.
8. Selection and appointment of staff in grade 13 and above.
10. Recommending staff promotions to grade 13 and above based on performance.
11. Recommending to the Council job grading as the Committee may consider appropriate from time to time;
12. Recommending to the Council schemes of Service for all staff;
13. Reviewing and recommending to the Council the Terms and Conditions of service as when necessary or to when directed by the Council from time to time;
14. Dealing with all matters related to the training and in particular:
  - to receive and consider on behalf of the Council all reports on staff training needs of the University;
  - to advise the Council on all matters relating to the training policy and to be the custodian of the same and to recommend its review from time to time;

- to deal with any other matter the Council may refer to it.

15. Appraising and recommending promotions on annual basis;

16. Considering, reviewing and recommending to the Council, human resource strategic planning and management policies.

(Emphasis added)

The Disciplinary Committee is provided for as follows –

**b) Disciplinary Committee of Council**

**(For staff in Grade 13 and above)**

**Membership**

- i. Council member - Chairperson
- ii. Two members of Council - Independent Members
- iii. Principal Secretary - Ministry for the time being responsible for University Education
- iv. Principal Secretary - The National Treasury

The composition Appeals Committee is provided for as follows –

**5. Appeals Committee of Council (Ad-hoc Committee)**

**(For staff in Grade 13 and above)**

**Membership**

- i. Chairperson of Council - Chairperson
- ii. Two Independent members of the Council
- iii. Vice-Chancellor - Secretary

**Terms of Reference**

To receive and consider all appeals from the Disciplinary Committee of Council.

The preamble to the Maasai Mara University Human Resource Policy provides that: -

“The University aspires to acquire a well-informed workforce, comprising both teaching and non-teaching staff from Grades 1-15. Thus, this policy is to provide a sound framework for human resource management in MMU based upon the requirements of the Universities Act 2012, the Constitution of Kenya 2010, the State corporations Act 446, Leadership and Integrity Act 2012, Labour Laws, the National Cohesion and Integration Act 2012, The Public Officers Ethics Act 2003, and the Persons with Disabilities Act 2003 and MMU Statutes, among others. This policy shall be the guiding instrument in all the University's operations relating to human resource management. The policy shall be reviewed from time to time.”

(Emphasis added)

The 2<sup>nd</sup> Respondent was dismissed by the Council. The Ad Hoc Appeals Committee referred to under the First Schedule to the statute has jurisdiction to receive and consider appeals from the Disciplinary Committee. The 2<sup>nd</sup> petitioner's appeal was against the decision of the Council and not the Disciplinary Committee of the Council.

The decision of a full Council cannot be the subject of appeal to a Committee of the Council as there is no provision for such in the Statute or in the Charter.

Based on the foregoing, the Court finds and holds that the 1<sup>st</sup> Respondent's ad hoc Committee had no jurisdiction to entertain the appeal by the 2<sup>nd</sup> Respondent. The decision of the Ad Hoc Appeals Committee is therefore null and void for want of jurisdiction.

Having found as above, I do not need to make any determination on whether or not the appeal was filed out of time.

In conclusion, I find that the Ex Parte Applicant has satisfied the threshold for grant of the orders sought and order as follows: -

**1. THAT** an order of **certiorari** do and is hereby issued to quash:

a. The decision made by the 1<sup>st</sup> Respondent to form an Ad Hoc Appeals Committee of the Council to hear and determine the 2<sup>nd</sup> Respondent's appeal against his summary dismissal by the predecessor Council as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).

b. The decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to hear the 2<sup>nd</sup> Respondent's appeal, against his summary dismissal by the full Council as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).

c. The decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to reinstate the 2<sup>nd</sup> Respondent as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance & Planning).

**2. THAT** an order of prohibition do and is hereby issued prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing the decision made by the 1<sup>st</sup> Respondent's Ad Hoc Appeals Committee to reinstate the 2<sup>nd</sup> Respondent as the Maasai Mara University's Deputy Vice Chancellor (Administration, Finance and Planning).

**3. THAT** an order of **mandamus** do and is hereby issued compelling the 1<sup>st</sup> Respondent to enforce the summary dismissal of the 2<sup>nd</sup> Respondent.

In view of the fact that this suit was filed as a public interest litigation, there shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF MAY 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**