REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 62 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 23,

41, 47, 50, 159, 162, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED AND/OR THREATENED CONTRAVENTION OF

FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10,

41 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT NO 4 OF 2015

AND

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, NO 20 of 2011

AND

IN THE MATTER OF: THE STATUTORY INSTRUMENTS ACT, NO 23 OF 2013

AND

IN THE MATTER OF: THE TOURISM ACT, NO 28 OF 2011

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, NO 11 OF 2011

AND

IN THE MATTER OF: THE LABOUR RELATIONS ACT, NO 14 OF 2007

BETWEEN

UNION OF KENYA CIVIL SERVANTS.....PETITIONER

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF TOURISM AND WILDLIFE.....1ST RESPONDENT

KENYA UTALII COLLEGE.....2ND RESPONDENT

JUDGMENT

The petitioner is a trade union that was established in 1959 pursuant to Section 11 of the then Trade Unions Act (repealed by the Labour Relations Act, No 14 of 2007) mandated to organize and represent employees within the service of the Government in all matters relating to their terms and conditions of employment.

The 1st Respondent is the Permanent Secretary in the Ministry of Tourism and Wildlife and a member of the Council of Kenya Utalii College pursuant to Section 20 of the Tourism Act (No 28 of 2011) (Service of summons shall be done through the Petitioner's Advocates' office).

The 2nd Respondent is the Kenya Utalii College which was established in 1975 under the Hotels and Restaurants Act (repealed) which has since been replaced by the Tourism Act (No. 28 of 2011) and provides for the establishment of Kenya Utalii College under Section 17 of the Act with the object of undertaking tourism and hospitality training, capacity building for tourism sector and any other function related or incidental as may be directed by the Minister.

In the petition dated 24th April 2020, the Petitioner avers that the 2nd Respondent is a body corporate capable of suing or being sued in its name. That as per the provisions of the Tourism Act, specifically Section 20(1) thereof, any decision of the 2nd Respondent that affects the functioning, operation or management of the 2nd Respondent ought to be made by the Council of the 2nd Respondent which is in charge of the general management and control of the 2nd Respondent.

The Petitioner avers that it is the Council of the 2nd Respondent that is mandated to make decisions such as expansion or contraction of the 2nd Respondent through respectively the opening or closure of the 2nd Respondent's satellite campuses as particularly provided under Section 19(l)(a) of the Tourism Act which provides that the 2nd Respondent has power to establish, with the approval of the Minister, such campuses or centres for training and capacity building as are necessary and in furtherance of the objects of the College

That it is the Council of the 2nd Respondent that is given authority to enter into associations with other institutions, or enter into contracts with other entities and conversely it is the Council that has mandate to bring such associations, affiliations or contracts to an end.

The Petitioner avers that the 2nd Respondent in fulfilling its statutory mandate established the Utalii Hotel (hereinafter referred to as the Hotel). The purpose of establishing the Hotel was to provide an avenue for tourism and hospitality training and capacity building for the tourism sector. That the 2nd Respondent and the Hotel share the same management.

That in addition, and in compliance with its mandate and power conferred by its parent statute, the 2nd Respondent established two satellite campuses in Kisumu and Mombasa. The 2nd Respondent employed personnel to work both in the Hotel and in the two satellite campuses. These personnel constitute part of the Government's civil service force.

The Petitioner avers that it entered into a recognition agreement with the Government to represent and articulate interests of civil servants. That the 2nd Respondent's employees in the Hotel and the satellite campuses are part civil servants. That the recognition agreement between the Petitioner and the Government binds the Government and its departments, agencies, parastatal and State Corporations such as the 2nd Respondent.

That it is a provision in the recognition agreement between the Petitioner and the Government that the Petitioner has mandate to represent, protect and advance the interests of all civil servants.

The Petitioner avers that on or about the 20th April 2020, the 1st Respondent purported to direct the closure of the Hotel. That according to the 1st Respondent, the Hotel was to be closed immediately until such a time the 2nd Respondent's Board and Management in conjunction with the Ministry develops a sustainable and profitable management and operational plan.

The Petitioner avers that the 1st Respondent directed the immediate closure of the 2nd Respondent's satellite campuses in Kisumu and Mombasa and directed that any pending programs be completed online. That by closing the Hotel and the satellite campuses on account of them suffering losses the personnel employed in these institutions will in effect lose their places of employment and this amounts to termination of employment and/or declaration of redundancy.

The Petitioner avers that the said decision by the 1st Respondent has the effect of illegally and unprocedurally summarily terminating the employment of members of the Petitioner employed in the Hotel and the campuses and/or unprocedurally rendering the Petitioner's members redundant.

Further to the foregoing, the Petitioner avers that the decision by the 1st Respondent violates the Petitioner's members' constitutionally protected rights and is ultra vires and illegal for having contravened several provisions of the Constitution and statute law.

It is the averment of the Petitioner that the letter dated 20th April 2020 from the 1st Respondent to the 2nd Respondent violates Articles 10, 41 and 47 of the Constitution and is therefore ultra vires and illegal.

That the decision of the 1st Respondent further violates Section 4(3)(a) and (b) of the Fair Administrative Actions Act, Sections 35 and 40 of

the Employment Act and Section 20 of the Tourism Act. That the decision further violates the provision of Section 5 of the Statutory Instruments Act.

The Petitioner seeks the following reliefs –

> *1. A declaration that the 1st Respondent's decision to immediately close down the Utalii Hotel and the 2nd Respondent's satellite campuses is ultra vires, illegal unconstitutional null and void.*
>
> *2. A conservatory order to permanently stop the implementation of the 1st Respondent decision contained in the letter dated 20th April 2020.*
>
> *3. An order of judicial review by way of certiorari to remove into this court the decision of the 1st Respondent contained in the letter dated 20th April 2020 for the purposes of quashing on account of it being unconstitutional, ultra vires and an illegality.*
>
> *4. General damages for the breach of the Petitioner's members' constitutional rights.*
>
> *5. Costs of the Petition.*
>
> *6. Interests on (4) above at court's rates from the date of filing of the petition until payment in full.*
>
> *7. Any other orders that this Court deems fit and just to grant in the circumstances.*

Together with the petition, the Petitioner filed a motion under certificate of urgency seeking the following orders –

> *1. Spent.*
>
> *2. Pending the hearing and determination of this application the Court be pleased to issue a conservatory order in the nature of an injunction staying the implementation of the 1st Respondent's decision contained in the letter dated 20th April 2020.*
>
> *3. Pending the hearing and determination of the petition filed herewith this Court be pleased to issue a conservatory order in the nature of an injunction staying the implementation of the 1st Respondent's decision contained in the letter dated 20th April 2020.*
>
> *4. Costs of this application be provided for.*

The application is supported by the grounds on the face thereof and affidavit of OLE KINA JERRY, the 1st Deputy Secretary General of the Petitioner. The grounds in both the application and the supporting affidavit are those set out in the petition as already summarised above.

The application was heard exparte on 29th April 2020 and orders granted as follows –

> *1. Spent.*
>
> *2. I issue conservatory orders staying the decision by the 2nd Respondent contained in the letter of 20th April 2020 pending the hearing and determination of this application inter partes*
>
> *3. I order the application be served upon the respondents and be heard on the 11th May 2020*

The petition and application are opposed by the Respondents.

1st Respondent's Case

The 1st Respondent filed a replying affidavit of SAFINA KWEKWE –TSUNGU, the Principal Secretary for Tourism in the Ministry of Tourism and Wildlife sworn on 15th May 2020 in opposition to the application.

In the affidavit, the Affiant states that the role of the Parent Ministry to a State Corporation is to provide policy direction to ensure cost effective and efficient functioning of the State Corporation.

The Affiant avers that the 2nd Respondent's is a State Corporation under the Ministry of Tourism and Wildlife and is governed by policy directives issued by the Ministry to ensure well-coordinated and functioning on all parastatals under the ministry.

The Affiant states that the Kenya Utalii College is established under Section 17 of Tourism Act. It has a Council under Section 21.

That Kenya Utalii College runs a number of facilities and programmes. These include the regular programme, the parallel programme, Utalii Village, Utalii Hotel, Utalii Hostels at main campus, Kitchen, Gym, Sports and Recreational Centre, amongst others.

That additionally, Kenya Utalii College has rented facilities in Kisumu and Mombasa to run academic programmes. That these are referred to as satellite campuses.

That the Kenya Utalii College design of the Utalii Hotel and the satellite campuses was such that these units would be self-sustaining, commercially managed undertakings since they charge for the services they offer.

The Affiant avers that the Ministry has always worked in consultation with the parastatal and have ensured independence of the institution for efficient functioning.

That the advent of COV1D-19 has precipitated extraordinary times that have led the Government to take drastic measures. These include closure of all Educational institutions, hotels and restaurants (except take away services).

The Affiant avers that the Government through a budgetary revision, has reallocated its resources to fight the pandemic. That one of such measures has been to stop all expenses of Government Ministries, Department and Agencies except for those that relate to payment of salaries.

That the Ministry led by the Cabinet- Secretary and Ministry's top leadership, in the wake of COV1D-19 measures, held meetings with all the State Corporations in the Ministry in the month of March and April 2020. That the objective of the meetings was twofold; First, to receive the current financial status of every state corporation as of 31st March 2020 and determine the savings that are available. Secondly, to task each agency to demonstrate its plans post COVID-19, given the new normal that was to happen, not just in Government but also the Tourism Sector.

The Affiant avers that every parastatal attended and the participating delegation comprised the Chair of the Board, the Chief Executive Officer (CEO) and the respective top management. This was to ensure that the information submitted at the meeting had shared ownership of the parastatal Board, its chief Executive Officer and its top management.

That the Kenya Utalii College delegation attended a meeting on 19th April 2020 comprising the Chair of The Council, the Chief Executive Officer (CEO) and its top management.

That in their presentation, Kenya Utalii College submitted that the College had closed down following Ministry of Health directive. Further, that one of the facilities, the Utalii Hotel remained open because it was hosting nine guests who were on a long stay. The 56-room hotel with over 114 staff members was serving nine guests.

That in the Kenya Utalii College's financial statements, it was clear in the case of the hotel, that while their estimated annual expenditure was Kshs.183 million, they only raised Kshs 108 million as revenue. As at 31" March 2020, actual expenditure for 2019/20 financial year was Kshs.137.4 million against actual sales of 81.9 million. The Satellite Campuses do not attract adequate number of students as projected despite them operating from rented premises and with fulltime lectures.

That the letter from the Principal Secretary, Tourism was to reiterate findings of the Council in their submissions. It was also to exercise the Ministry oversight role to direct action based on the submitted findings.

The Affiant avers that the allegation of employees losing their jobs is speculative, as the Council has not met to provide operational directions.

That the action by the Ministry was most prudent to ensure that public money was put to best use, particularly during the difficult COVID 19 pandemic times

The Affiant avers that the application and petition are prematurely before court thus defective for reasons that the decision made is an administrative decision and any challenges expected in implementing it should be handled administratively before resorting to legal action.

The Affiant avers that the petition before court is bad in law and lack merit and should be struck out, as it discloses no constitutional violations against the Respondents.

The Affiant further deposes that the petition is bad in law and lacks merit, that the orders sought are final and if granted would determine the petition at interlocutory stage, and would occasion irreparable harm to the Respondents. Further, that the acts sought to be prohibited had already occurred at the time of the service of orders upon the Respondents.

The Affiant deposes that the Petitioner has not demonstrated how the Respondents have violated the Constitution and the cited regulations, that the orders sought are not definite or specific leaving the Court to guess what the Petitioner wants. It is further the position of the Affiant that this Court lacks jurisdiction to adjudicate on administrative matters within the ambit of the Ministry and that the petition and application are an abuse of court process as the Petitioner does not have a labour dispute with the Respondents.

2nd Respondent's Case

The 2nd Respondent filed a replying affidavit of HASHIM MOHAMED, the Principal and Chief Executive Officer of the 2nd Respondent. He deposes that the objective of the College is to undertake tourism and hospitality training and capacity building for the tourism sector and perform functions related or incidental to the main objective.

That pursuant to the Tourism Act the College has powers to establish, with the approval of the Minister, such campuses or centres for training and capacity building as are necessary and in furtherance of the objects of the College.

The Affiant avers that Kenya Utalii Hotel is a department of Kenya Utalii College established as part of the College's training laboratory to allow the students to undertake their practical lessons as well as give them hands on experience and competitive advantage in the market place upon completion of their course. That Kenya Utalii Hotel is not an independent organization but a department. He further avers that there are no separate employees for the college and the hotel. All employees belong to 2nd Respondent.

The Affiant avers that there exists no recognition agreement between the Petitioner and the 2nd respondent and that the 2nd Respondent's employees are under contractual agreement with the 2nd Respondent and within its mandate under the Act. That the employees are not employed for specific units/departments as they can be deployed to work in various units/departments.

The Affiant depose that he received the letter dated 20th April 2020 from Principal Secretary Ministry of Tourism and the letter was placed before the College Council for direction.

He deposes that no employees have been terminated illegally and/or summarily following the issuance of the letter dated 20th April 2020 from Principal Secretary Ministry of Tourism.

Petitioner's Supplementary Affidavit

In a supplementary affidavit sworn by OLE KINA JERRY on 2nd November 2020 in response to replying affidavits of the Respondents, he deposes that there is no documentary evidence to prove that there was a meeting on 19th April 2020 as alleged by the 1st Respondent or that the 2nd Respondent attended such meeting.

Further, that no financial statement has been availed to the Court to support the averments at paragraph 18 of the replying affidavit of the 1st Respondent. The Affiant confirms that there is a recognition agreement between the Petitioner and 2nd Respondent, a copy of which is annexed as exhibit OKJ together with a list of the Petitioner's members.

It is further deposed by the Affiant that there is no resolution of the Board approving the closure of the Hotel and Satellite Campuses of the 2nd Respondent. Further, that the contracts of several employees on contract have not been renewed. Copies of contracts allegedly not renewed are annexed as Exhibit OKJ2.

Evidence

The petition was disposed of by way of written submissions.

Determination

The issues arising for determination from the pleadings and submissions are the following –

1. Whether this court has jurisdiction,

2. Whether the decision of the Respondent was ultra vires and illegal, and

3. Whether the Petitioner is entitled to the remedies sought.

Jurisdiction

Although parties have not submitted on the jurisdiction of this court, the 1st Respondent in its replying affidavit severally stated that this Court has no jurisdiction to handle the petition. The jurisdiction of this Court is provided for in Article 162(2) and (3) the Constitution as follows –

> **(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**
>
> > **a) employment and labour relations; and**
> >
> > **b) the environment and the use and occupation of, and title to, land.**
>
> **(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)**

Section 12 of the Employment Labour Relations Court Act provided for this Court's jurisdiction as follows –

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

a) disputes relating to or arising out of employment between an employer and an employee;

b) disputes between an employer and a trade union;

c) disputes between an employers' organisation and a trade union's organisation;

d) disputes between trade unions;

e) disputes between employer organisations;

f) disputes between an employers' organisation and a trade union;

g) disputes between a trade union and a member thereof;

h) disputes between an employer's organisation or a federation and a member thereof;

i) disputes concerning the registration and election of trade union officials; and

j) disputes relating to the registration and enforcement of collective agreements

The Act further provides for the persons who may file claims in the Court at Section 12(2) as follows –

2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

The Petitioner being a trade union with members working for the 2nd Respondent and having entered into a recognition agreement with the 2nd Respondent, this Court has jurisdiction to hear and determine any disputes between the Petitioner and the 2nd Respondent.

Whether the decision of the 2nd Respondent was ultra vires and illegal

The letter that prompted the Petitioner to file the instant petition is reproduced below –

"Ref: MT 10/6 *20th APRIL, 2020*

Mr. Hashim Mohammed

Chief Executive Officer/ Principal

Kenya Utalii College

NAIROBI

Dear Hashim,

RE: TRANSFORMATION OF UTALII COLLEGE

The meeting between the Ministry Top Leadership and the Kenya Utalii College governance body and Top Management held on 17th April 2020, on the above subject matter refers.

Following the submissions made by your office, it was noted that;

- *It is not viable for the institution to operate the Kenya Utalii hotel as it does not generate revenue and yet depletes the institution's resource in covering overhead costs*
- *The satellite Campuses in Kisumu and Mombasa are expensive to operate yet there are not enough students to sustain their operations.*

In this regard, it is thus directed that;

1. The Utalii Hotel be closed immediately until such a time the Kenya Utalii College Board and Management in consultation with the Ministry develops a sustainable and profitable management and operational plan. All the guests currently occupying the premises to be vacated.

2. The immediate closure of Kisumu and Mombasa satellite Campuses. Any pending programs to be completed via online learning.

You have been duly guided.

Yours Sincerely,

SIGNED

Hon. Safina Kwekwe Tsungu, CBS

PRINCIPAL SECRETARY"

It is the submission of the Petitioner that the Council of the 2nd Respondent is mandated by law to make decisions on behalf of the 2nd Respondent by statutory instrument.

That the letter dated 20th April 2020 which directs the Chief Executive Officer to close the Utalii Hotel and the Kisumu and Mombasa Satellite Campuses is ultra vires and illegal as authority to make such decisions is the preserve of the Council by dint of Section 21 of the Tourism Act. That the letter of 20th April 2020 was written without the involvement of the Council.

That the 1st Respondent, a Member of the Council with a singular vote cannot purport to individually and without a Council resolution make direction as were contained in the letter. The Petitioner submits that no legal action can stem from an illegality and the maxim ex *nihilo nihil fit* holds. It relied on the decision in **Republic v Business Premises Rent Tribunal & Another v Ex-Parte Albert Kigera Karume & another [2013] eKLR** where it was held:

"*The position is that if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there as it will collapse."*

The Petitioner submits that the decision of 20th April 2020 led to the violation of its members' right to fair labour practices as provided under Article 41(1) of the Constitution, which provides that every person has the right to fair labour practices. The Petitioner relies on the case of **Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2013] eKLR** held thus:

"What is this right to fair labour practices?

First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the Constitution. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under Article 41(5) every trade union, employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.

Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."

The Petitioner submits that the direction contained in the letter of 20th April 2020 has the effect of affecting the Petitioner's members' employment without due process and the same amounts to an unfair labour practice. This includes unfair termination of employment, withholding of salaries and unprocedural declaration of redundancy.

The Petitioner submits that pursuant to the impugned decision to close the Hotel and the satellite campuses, the 2nd Respondent has failed, neglected and/or refused to renew the Petitioner's members' employment contract and has effectively terminated their employment.

The Petitioner submits that its members applied for extension of their employment contracts in accordance with the 2nd Respondent's guidelines and requirements but these requests were not responded and/or attended to.

That the failure by the 2nd Respondent to extend the employees' contracts of employment amounts to an unfair termination of employment and thus violates the Petitioner's members' right to fair labour practice. That in **Robert Muriithi Ndegwa v Minister for Tourism [2012] eKLR** the Court made a determination that failure to renew a contract amounted to a violation of the right to fair labour practices and fair administrative action. The Court held:

> *"A declaration that the respondent's actions in failing to renew the petitioner's contract... for no reasonable cause or at all... is unfair, unlawful and constitutes breach of the petitioner's constitutional rights to fair labour practices and fair administrative action."*

The Petitioner submits that the failure by the 2nd Respondent to renew its members' employment contracts is equally a violation of the members' right to fair administrative action as provided under Article 47(1) and (2) of the Constitution. The Article provides:

> **47. Fair administrative action**
>
> **1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

That no reasons were given to the members for the failure to renew their employment contracts and this amounts to a violation as rightly held by this Court in **Robert Muriithi Ndegwa (supra).**

The Petitioner submits that the impugned decision which led to the failure to renew the contracts of its members is also a breach of the provisions of Section 35 and/or 40 of the Employment Act and therefore is an unfair termination under Section 45 of the Employment Act.

That Section 35 of the Employment Act provides for termination notice to be issued on termination of employment while section 40 of the Act provides for the procedure to be followed where termination of employment is on account of redundancy or financial constraints. Section 43 then requires an employer to provide proof of reasons for termination of employment.

The Petitioner submits that the 2nd Respondent, on the strength of the impugned letter, has failed, neglected and/or refused to renew the employment contracts of its members. No reasons (whether termination by notice or on account of redundancy) have been given by the 2 nd Respondent. That this is an unfair termination of employment as contemplated by Section 45 of the Employment Act and as held severally by the Courts. The Petitioner relied on the case of **George Onyango Akuti v Security Services Kenya Limited (2013) eKLR** where it was held that –

> *"An unfair termination could be because no notice was given as required by Section 35 (1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Employment Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract ..."*

The Petitioner submits that this Court held that failure to renew employment contracts is unfair termination of employment. That in the case of **John Nduba v Africa Medical and Research Foundation (AMREF Health Africa) [2020] eKLR** the court held that:

> *"The question that begs answer is whether the failure to renew the contract was grounded on valid and reason(s), and whether fair procedure was followed ... It is a well settled jurisprudence from this court and the court above that termination of employment of an employee is unfair unless the employer proves that it was grounded on a valid and fair reason(s), and that a fair procedure was followed. The said jurisprudence is founded on the provisions of Section 45(2) of the Employment Act which traces its origin from the ILO Convention 158 on the Termination of Employment Contracts. Section 43 of the Act puts the burden of proof on the employer in legal proceedings like the instant case, to prove on a balance of probability the reason for the termination and in default, the termination is unfair within the meaning of section 45 of the Act ... The reason for termination of the claimant's contract herein was financial challenges in the respondent organization, which meant that she could no longer afford to pay salary to the claimant. It follows therefore from that explanation by the employer, that the reason for the termination was redundancy. However as I have already found herein above, the alleged financial challenges were not true and did not constitute a valid and fair reason for terminating the claimant's contract of service ... In the circumstances, I agree with the claimant that the reason cited for not renewing his contract for two (2) years was not valid and fair. Consequently, I return that the respondent has failed to discharge her burden of proving that she terminated the claimant's contract on ground of a valid and fair reason and as such the termination was unfair within the meaning of Section 45 of the Employment Act. Even if the reason was valid, which is not the case, the termination would still be unfair because the employer has not proved that she complied with the mandatory redundancy procedure laid down under Section 40 of the Act ..."*

The Petitioner further relies on the Court of Appeal decision in **Oshwal Academy (Nairobi) & another v Indu Vishwanath [2015] eKLR** where it was held that –

> *"In **Kenya Union of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited, [2013] eKLR**, the Industrial Court, as it was then known held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Act. That applies in a case for termination as well as in a case that warrants summary dismissal. We respectfully agree and add that it was incumbent upon the appellants to take the respondent through the mandatory process in this case as spelt out in Section 40 of the Act. This did not happen from our perusal of the record too and as such whereas the appellants may have had good reasons for termination, the claim still amounted to unfair termination under Section 45 of the Act."*

The Petitioner submits that the failure by the 2nd Respondent to renew the employment contracts which failure, neglect and/or refusal derives its strength from the impugned letter and the failure to inform the Petitioner's members of reasons for the non-renewal of their contracts is an unfair termination of the Petitioner's members' employment. That the 2nd Respondent not only failed to pay the Petitioner's members' salaries but also embarked on removal of some of the Petitioner's members from the allocated houses.

For the 1st Respondent it is submitted that in the wake of COVID-19 pandemic, there was a consultative meeting involving all state Corporations with a view to establishing the general effect and economic damages thus it is not true that the 2nd Respondent was unfairly singled out. That all the top officials of the 2nd Respondent attended a meeting of 19th April 2020 including the Chair and CEO. That they gave presentation exposing the dire financial state of the institutions.

It is submitted that the letter from the Principal Secretary, Tourism was merely to reiterate findings of the Council in their submissions. It was also to exercise the Ministry oversight role to direct action based on the submitted findings. That significantly, none of the averments have been disputed by the Petitioner.

The 1st Respondent submitted that the decision to shut down the Utalii Hotel and the two satellite campuses was based on a reasonable cause and subsequent to a consultative meeting with the top leadership of the 2nd respondent.

That Sections 19(1)(a) and 20 of the Tourism Act No. 28 of 2011 should not be read in isolation but simultaneously with section 21(4) of the said Act and Section 4 of the State Corporations Act.

That Section 21(4) of the Tourism Act 11 states that:

> **The Minister may in consultation with the Council, by notice in the Gazette, make regulations and guidelines as are necessary to carry out the purposes of this section.**

Section 4 of the State Corporation Act provides:

> **4. Ministerial responsibility for state corporations**
>
> **The President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Ministers as the President may by directions in writing determine.**

The 1st Respondent submitted that it did not act ultra vires in any way. That in the letter addressed to the Chief Executive Officer, it merely reiterated the findings of the Council and initiated the process of administrative action by the council. The 1st Respondent relied on the case of **Council of Civil Service Unions v Minister for the Civil Service (1985) AC 374** where Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action ultra vires. These grounds are: illegality, irrationality and procedural impropriety.

It is further the submission of the 1st Respondent that the Petitioner failed to prove that it deserves the judicial review orders sought. That the court has pronounced itself on numerous occasions on the aspect of the threshold to be met when granting judicial review orders. That in the case of **Republic v University of Nairobi & 3 Others ex parte Patrick Best Oyeso** it was held that –

> *"In order to succeed in an application for Judicial Review, the applicant must show that the impugned decision is tainted with illegality, irrationality and procedural impropriety."*

The 1st Respondent further relied on the case **of Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR** and **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300**. That in **Republic v Secretary County Public Board & another Ex parte Hulbai Gedi Abdille [2015] eKLR** and **Republic v Kenya Power & Lighting Company Limited & Another [2013] eKLR** it was held that:

> *"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."*

That in **Joccinta Wanjiru Raphael v William Nangulu - Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** it was held that:

> *"... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one. It must be exercised on the evidence of sound legal principles ... The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The Court would refuse to grant judicial review remedy when it is no longer necessary: or has been overtaken by events; or where issues have become an academic exercise: or serves no useful or practical significance."*

The 1st Respondent also relied on the case of **Anarita Karimi Njeru v Republic (No. J) (1979) K.L.R 154** the superior Court sitting at Nairobi stated that;

> *"Where a person is seeking redress from the High Court on a matter involving a reference to the constitution it is important (if only to*

ensure that justice is done to his case) that should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

The 1st Respondent submitted that the Petitioner failed to set our specifically the manner in which his constitutional rights were allegedly violated. It further submitted that the issues raised in the petition are yet to crystalize and such there is no decision that can be termed as having been illegal irrational or one that is marred with procedural impropriety. That the Petitioner has not met the criteria to be granted the judicial review orders sought.

The 1st Respondent submits that the petitioner has failed to prove that the actions of the Respondents contravened any of its constitutional rights.

The 1st Respondent relies on Section 109 of the Evidence Act states that –

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

That in the case of **Susan Mumbi v Kefala Crebedhin (Nairobi HCCC No.332 of 1993)** Juma J. stated that –

"The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial."

The 2nd Respondent urged the Court to be guided by the Ugandan case of **Pastoli v Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

"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: See ***Council of Civil Service Union v Minister for the Civil Service [1985] AC 2****; and also* ***Francis Bahikirwe Muntu and Others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).***

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. Such a decision is usually in defiance of logic and acceptable moral standards: ***Re An Application by Bukoba Gymkhana Club [1963] EA 478*** *at page 479 paragraph "E".*

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. ***(Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876****)."*

The 2nd Respondent submitted that it is the position of public bodies and their responsibilities was described in the case of **R v SOMERSET (1995) QBD 523** where at page 524 the Court stated:-

"But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealing constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose …

"But in every such instance and no doubt many others where a public body asserts claims or Defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in the sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which defines its purpose and justifies its existence, under our law that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them".

The 2nd Respondent urged the Court that in order to arrive at a more definitive determination of this petition, the Court needs to interrogate the mandate of both the 1st and 2nd Respondents, and establish whether the Respondents are autonomous from one another.

The 2nd Respondent submitted that it is not an independent organization, but an appendage of a state department and it is bound by policies, directives and regulations made by the 1st Respondent

The 2nd Respondent submitted that it had not entered into any recognition Agreement with the Petitioner. That there is no member of the Petitioner presently in employment of the 2nd Respondent that has been terminated from employment.

That the statutory authority to run the tourism sector, to which the 2nd Respondent is an appendage is bestowed upon the 1st Respondent, and it can therefore make any rules and regulations that it may deem fit, to achieve its mandate. That for effective management of the affairs of the sector, it is not possible for the 1st Respondent and the 2nd Respondent to consult the Petitioner and other subordinate members in the course of effecting their statutory duties in their day- to-day operations.

The 2nd Respondent relied on the case of **Susan Mungai v The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011** in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of **Republic v The Council of Legal Education ex parte Tames Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported):**

> *"I find and hold that it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decisions made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of* ***R v Judicial Service Commission ex-parte Pareno Misc. Civil Application No. 1025 of 2003 (now reported)*** *that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."*

The 2nd Respondent also relied on the case **Newton Gikaru Githiomi & Another v AG/Public Trustee Nairobi HC TR 472 of 2014** where it was submitted that:

> *"It must be remembered that the nature of orders sought by the petitioner are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized."*

It further relied on the decision by Mativo J. in the case of **A M v Premier Academy [2017] eKLR** where he stated the following:

> *"In my view the petitioner has failed to discharge the burden of proof to the required standard. To my mind, the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon* ***in Rhesa Shipping Co SA v Edmunds {1955} 1 WLR 948*** *at 955.*
>
> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*
>
> *Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case.*
>
> *Similarly, a three-judge bench in* ***Dock Workers Union & 2 others v Attorney General & 2 others; Kenya Ports Authority & 4 others (Interested Parties) [2019] eKLR*** *stated that -*
>
> > *"...The Petitioners would want this Court to believe that the MOU infringes upon the Constitutional rights of the persons they represent. The burden of proving the allegations lay squarely upon the Petitioners."*

The 2nd Respondent submitted that the petition as it is fails to disclose any infringements of rights.

From the submissions of the Petitioner, it is clear that its concern was the security of jobs for its members. It is not clear from the Petitioner's submissions how Article 10 of the Constitution, specifically public participation, is relevant in an employment situation where the issue is termination of employment or redundancy as is the case here.

An employer does not need to carry out public participation before making a determination on how to manage its staff, or where to open or close its operations. The Petitioner has not established the relevance of public participation in this circumstances of this case.

On the violation of Article 41 of the Constitution, the Petitioner has not demonstrated the Respondents violated its labour rights or the labour rights of its members.

Indeed the Petitioner has not proved that any employee lost his or her employment as a result of the directions in the letter dated 20th April 2020.

The letters attached to the supplementary affidavit of OLE KINA JERRY are in respect of fixed term contracts, which had lapsed and were not renewed. An employer is under no obligation to renew a fixed term contract which has expired. Further, considering the circumstances of

the 2nd Respondent where it was operating at a loss, any prodent employer would not renew the contract of an employee if it is not optimal to the operations of the employer. As was held in the case of **Fatuma Abdi v Kenya School of Monetary Studies (2017) eKLR**, a fixed term contract of employment is a lawful mode of employment with a start and end date. Again, in **Rajab Barasa and 4 Others v Kenya Meat Commission**, it was held that a fixed term contract will not be renewed automatically.

The same was also the holding in the case of **Cleopatra Kama Mugyenyi v Aidspan (2019) eKLR** where the Court stated that for an employee to have legitimate expectation of renewal of contract, there must be an indication from the employer that it would renew the contract.

I therefore find no probative value in the contracts annexed to the supplementary affidavit. The case of **Robert Muriithi Ndegwa v Minister for Tourism** cited by the Petitioner in support of its case is also not applicable to this case as in that case the Petitioner who was the Chief Executive Officer applied for renewal of contract, was assessed by the Board and recommended for renewal. A letter was written to the Minister forwarding the recommendation of the Board. A legitimate expectation was proved. Those are the circumstances under which the Court ordered the Respondent to renew the contract of the Petitioner in that case.

On the Petitioner's averments of violation of Article 47(1) and (2) and Section 4(3)(a) and (b) of the Fair Administrative Actions Act, I have already stated above that this was a commercial decision of an employer relating to a private employment relationship and the provisions of fair administrative action are not applicable.

Was the decision of the Cabinet Secretary ultra vires?

As submitted by the Respondents, Section 9 of the State Corporations Act gives authority to the parent ministry to supervise the operations of a State Corporation and to issue policy directions.

In the further replying affidavit of **Mukasa Mwambu Muliro**, the Chairman of the Council of the 2nd Respondent, he deposes that the Kenya Utalii College is an independent and autonomous entity and the parent ministry issues policy directives, which are thereafter deliberated upon by the Council. That the Council has not yet deliberated or passed a resolution to close Utalii Hotel or the Satellite Campuses. That at a special Council meeting of 27th April 2020 the Council pronounced itself on the directives of the parent ministry and sought audience with the parent ministry.

That there has been no resolution by the Council regarding termination of any employees and the petition is therefore premature.

I find that the Petitioner has not proved that the letter dated 20th April 2020 was ultra vires or that the letter violated Articles 10, 41 or 47 of the Constitution. I further find no proof of breach of Section 35 and 40 of the Employment Act or any other provisions of the Employment Act.

I agree with the Respondents that the petition was premature as it is pegged on the provisions of a letter from the Ministry of Tourism and Wildlife, which had not been acted upon by the 2nd Respondent at the time of filing the petition.

For the foregoing reasons, I find no merit in the petition and dismiss the same.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH 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 15th March 2020 and subsequent directions of 21st 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 had 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