JUDICIAL REVIEW

- *No statutory underpinning against removal in the contract of employment. with the University*
- *Judicial review orders refused.*
- *Delay to defeat otherwise meritorious application s for judicial review.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO.30 OF 2007

REPUBLIC .... APPLICANT

VERSUS

THE VICE CHANCELLOR JOMO KENYATTA
UNIVERSITY OF AGRICULTURE
AND TECHNOLOGY .... RESPONDENT

EX-PARTE
DR CECILIA MWATHI
MR MOSES MUCHINA

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JUDGMENT

The application before the Court is the Notice of Motion dated 26th January, 2007. The application is brought under section 8 and 9 of the Law Report Act and order LIII rules 3 and 4 of the Civil Procedure Rules. The Applicants, Dr Cecilia Mwathi and Mr Moses Muchina seek the following orders against the Vice Chancellor, Jomo Kenyatta of Agriculture and Technology:-

1. An order of certiorari to bring to the High Court the decision by the Vice Chancellor made and or dated 25th October, 2006 terminating the services and employment of the Applicants as academic staff members of Jomo Kenyatta University of Agriculture and Technology for purposes of quashing.
2. An order of mandamus to compel the Vice Chancellor of Jomo Kenyatta University of Agriculture and Technology to reinstate and or recognize the Applicants as members of the Academic staff of the said University.
3. An order of prohibition to prohibit the Vice Chancellor of Jomo Kenyatta University of Agriculture and Technology, his servant, agent and or employees from unprocedurally and unlawfully terminating the employment of the Applicants as staff members of the said University.
4. Costs of this application.

The application is based on the following grounds:-

(a) The Vice Chancellor of Jomo Kenyatta University of Agriculture and Technology acted improperly and in abuse of his powers.

(b) The Vice Chancellor of the said university acted in excess of his power with improper motives.

(c) The Vice Chancellor of the said University acted in breach of statutes and the terms and conditions of service of academic staff.

(d) The Vice Chancellor of the said University acted in breach of the rule of law, fairness and natural justice.

(e) The Vice Chancellor of the said university acted in breach of the Code of Conduct and Ethics.

(f) The decision of the said Vice Chancellor is devoid of any basis in law, and Procedure and it is oppressive and discriminatory.

The application is also based on the affidavit of the Applicants and the Statement of facts. The Applicants have contended the following in their statement of facts:-

(i) The letters of termination were not lawful and procedurally issued to the Applicants in view of the clear provisions in the terms and conditions of service as between the university and the Applicants particularly Article 9.4 thereof which provides inter alia:-

(a) The Vice Chancellor has power to suspend a staff member for a good cause.

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(b) Thereafter, the case shall be referred to a committee appointed by the council with powers to terminate with good cause.

(c) The notice of such termination shall be; for a professor and other staff on equivalent grades - six months.

(d) All other staff - 3 months.

(e) A member of staff thereafter has right of appeal to the full Council which must be filed within 3 weeks of notification of the committee's decision to the member of staff.

(ii) The elaborate procedure of termination as enumerated above was not adhered to.

(iii) The Applicants were victimized because they are officials of the Jomo Kenyatta University of Agriculture and Technology chapter of the university Academic Staff Union (UASO) being the Secretary and Chairman respectively.

(iv) The Applicants were mandated by the national office of UASU and its members to be the official co-ordinators of Communication of the decision of the national office.

(v) The terminations of the Applicants by the Vice Chancellor are discriminative as it targets the officials of the Local Chapter of the Union which is contrary to the Laws governing labour and industrial relations.

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(vi) The said act is also in complete breach of the international Labour Organisation Charter that has been ratified by the Government of Kenya as it amounts to harassment and victimization of legally elected officials of a registered Trade Union acting in their capacity as such.

The application was opposed and Professor Francis Njeru, the Deputy Vice Chancellor, Administration, Planning and Development at Jomo Kenyatta University of Agriculture and Technology swore an affidavit on 30th April 2007 which was filed in Court on the same date.

The application of legal principles to any given case, depend on the facts and I now wish to set out the facts. The Applicants were lecturers employed by Jomo Kenyatta University of Agriculture and Technology as academic staff members. The Applicants are also the Chairman and Secretary of University Academic Staff Union (UASU) respectively of Jomo Kenyatta University of Agriculture and Technology Chapter. The Respondent is a member of the Inter-Public Universities Council's Consultative Forum (IPUCCF). On 22nd September, 2006, the Applicant together with other officials of UASU issued the Minister for Labour and Human Resource Development with a 21 days notice to strike. The said Minister tried to intervene and UASU vowed to go on with the strike. On 18th October, 2006, the Applicants and other UASU officials of JKUAT Chapter called a meeting to plan the launch of the strike. On the same day, the Industrial Court issued an order restraining the imminent strike or

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any interruption of services by UASU and its members. On the said 18th October, 2006, the JKUAT University Council held a meeting and resolved that the Respondent do take disciplinary action against any UASU member that proceeds on the impending strike. The Applicants encouraged their members to go on strike and on 23rd October, 2006, they participated in the unlawful strike. On 31st January, 2007 the JKUAT Council Academic staff Disciplinary committee met and ratified the termination of the Applicants' employment.

The Applicants have argued that the Vice Chancellor has no powers to hire and fire University staff as such is power vested in the University Council under sections 16 and 20 of the Jomo Kenyatta University College of Agriculture and Technology Act No 8 of 1994 and the attendant University statutes. The said sections state as follows:-

Section 16(1)

> "subject to this Act, the governance, control and administration of the university shall vest in the Council."

Section 20(3)

> "All members of staff of the University shall subject to this Act, be appointed by the Council ..."

The Applicants further aver that the terms of service for Academic Staff establish a statutory and contractual relationship between

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themselves and the University. According to the Applicants the letter of termination does not quote under which council's meeting the disciplinary action against them was discussed and passed after proper deliberations as paragraph 15 of the Respondent's replying affidavit clearly indicates that the only Council meeting held to discuss the issue was on 18th October, 2006 which was not constituted for any disciplinary hearing and in fact it seems that the Vice Chancellor had terminated the employment of the Applicants in advance.

The Applicants also contend that the Vice chancellor has no powers to terminate the employment of the academic staff as the same is vested in the Council and is to be exercised in a procedure set out in the statute which procedure include the following rights of members:-

(vii) To appear and be heard by the Council.

(viii) To call and examine witnesses

(ix) To appeal to full council.

The Applicants argue that the above procedure was not followed by the Vice Chancellor.

The Applicants contend that the powers of the Vice chancellor only include suspension of a member of an academic staff for a good reason and later refer the case to a committee of the council. When a case is referred to a committee of the council, the suspended staff is given a notice before termination which is for a staff member, 3 months and for a professor, 6 months.

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The Applicants further contend that they were condemned unheard. The decision to terminate the Applicants' employment was made without due process as laid down as they were never given a fair hearing during the disciplinary process and the opportunity to appeal was denied which was in breach of the rules of natural justice and the Constitution of Kenya. The Applicants were represented by M/s Jessee Kariuki Advocate.

The Respondent in its opposition to the Notice of Motion dated 26th January, 2007 has argued that the orders of certiorari sought is directed to the wrong party as the Jomo Kenyatta University of Agriculture and Technology or its council were never enjoined as parties since it is only the Council that has mandate to dismiss the Applicants. The Respondent maintains that the Applicants have not challenged the decision made by the University Council to ratify termination of their services and that the prayer for certiorari fails in *limine*.

The Respondent contend that on 18th October, 2006, he was mandated by the University Council to take disciplinary action against any member of UASU who was to participate on the strike and the Applicants had that information and were also warned. The Applicants participated in the strike prompting the Vice Chancellor to terminate their services. The notice of termination was properly served and although the Applicants had the right to appeal against their termination from employment they chose not to do so and as such they are estopped from alleging that they were not given an

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opportunity to be heard. The termination was later ratified by the University Council after the Applicants waived their right to appeal.

The Respondent argues that there was nothing in the decision making process that was procedurally improper or an affront to the rules of natural justice in any way and therefore the decision to terminate the Applicants' employment was not unreasonable.

The Respondent contends that there is considerable delay in seeking the orders of certiorari by the Applicant and their positions have already been taken up by other lecturers and the Respondent cannot be compelled to reinstate the Applicants as judicial review should not be extended to a purely employment contractual relationship.

The Respondent further states that the Applicants' remedy lie in a claim for damages and not in Judicial review. The respondent relies on the decision in the case of *CONSOLATA KIHARA & 241 OTHERS vs DIRECTOR KENYA TRIPANOSOMIASIS RESEARCH INSTIUTE at page 237 where Justice Kuloba* (as he then was) stated as follows:-

> "The law is well settled that if, where an ordinary contractual relationship of master and servant terminates the contract, the servant cannot obtain orders for certiorari. If the master rightfully ends the contract there can be no complaint: If the master wrongfully ends the contract the servant can pursue a claim for damages."

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The Respondent further contends that the order of prohibition sought by the Applicants to restrain the Vice chancellor from terminating their services has been overtaken by events and does not lie. The Applicants moved to this court on 26th January, 2007 after their dismissal on 25th October, 2006. The act sought to be prohibited has already taken place and the Court cannot reverse or reinstate the Applicants.

The Respondent argues that the employment of the Applicants is governed by the terms and conditions of employment under the contract of employment which falls in the realm of private law. The Respondent dismissed the Applicants in accordance with the terms of the contract. The Respondent also relies on the decision in the case of *MUTHUURI v NATIONAL INDUSTRIAL CREDIT BANK LTD [2003] KLR 145 at page 157* where Justice Ringera as he then was stated:-

> "The laws regarding the master and servant is not in doubt, there cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract, he must pay damages in breach of contract so the question in a pure master and servant does not depend on whether the master has heard the servant is his defiance: It depends on

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whether the facts emerging at the trial prove breach of contract"

The Respondent was represented by M/s Patrick Lutta Advocate.

ANALYSIS

The Court has considered the arguments put forth both by the Applicants and the Respondent. It is clear to the Court that the Applicants were employed by Jomo Kenyatta University of Agriculture and Technology as lecturers. It is also apparent from section 16(1) of the said Act that the University Council is the supreme body in all maters of governance, control and administration of the University. The Applicants have conceded that they were appointed or employed by the University Council in their respective positions. The university Council has powers to remove from the office.

The Applicants were employed by the said University and not the respondent. Although it is the respondent who wrote the letters of termination, his decision was not final and had to be ratified by the University Council. Indeed even the letters of termination were categorical that the Applicants had the right of appeal to the University Council. In the view of the above, the Applicants ought to have joined the University or its Council as a party to these proceedings. In actual sense, the decision to dismiss the Applicants emanated from the Council and as the Counsel for the Respondent rightly argues, the Applicants have not challenged the decision made

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by the Council to ratify their termination as lecturers. From the above, failure by the Applicants to enjoin the University or its Council is a fatal mistake.

The University Council is mandated under section 29 of the said Act to make statutes or regulations. Under Statute XIV (23) the University Council has inter alia power as follows:-

> "subject to the Act, these statutes and any other written law to exercise power of removal from office and other disciplinary control over the academic staff, the senior administrative staff and all other staff in the University. In the case of the academic and senior administrative staff this power shall be exercised for the reasons, on the grounds and in the manner pursuant to the procedures set out in the statutes which procedures shall include the following rights for the member of staff:
>
> i. to appear and be heard by Council, or any person or body to whom the Council has delegated this function;
>
> ii. to call and examine witnesses;
>
> iii. to appeal to the full council.

In view of the above, the Court appreciates that the statutes allow the removal or dismissal of academic staff such as the Applicants and that the general principles of the law of master and servant as applied in employment contracts do apply to lecturers. It is now settled that

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the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision - making process itself. In the case of *REPUBLIC v JUDICIAL SERVICE COMMISSION EX-PARTE PARENO, [2004] KLR 203 AT P.204,* the court held inter alia:

> "Under the Wendesbury principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decisions is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached the decision."

As noted above, the University Council has mandate to hire and remove academic staff such as the Applicants and in discharging the mandate the University Council or any person or body it has delegated the function is the best judge of merit pertaining to the termination of the Applicants' services as lecturers. Parliament has clearly vested the mandate of governance, control and administration to the University Council and it would be inappropriate in the view of this Court to intervene on the merits of the decision made by the University Council or anybody acting under its delegated powers. The Court can only intervene in the following situations:-

1. Where there is abuse of discretion.

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2. Where the decision maker exercises discretion for an improper purpose.
3. Where the decision maker is in breach of duty to act fairly.
4. Where the decision maker has failed to exercise statutory discretion reasonably.
5. Where the decision maker acts in a manner to frustrate the purpose of the Act donating power.
6. Where the decision maker fails to exercise discretion.
7. Where the decision maker fetters the discretion given.
8. Where the decision is irrational and unreasonable.

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I wish to revert to the issue of dismissal of the Applicant where the two sides have taken diametrically opposed positions. The Applicants contend that they were condemned unheard and that the decision to terminate them was made unilaterally by the Respondent with no opportunity even to appeal against his decision. On the other hand, the Respondent maintains that the decision making process was procedurally proper and therefore the decision to terminate the Applicants' services was not unreasonable. I do not find it really necessary to examine in depth the truth on the basis of the evidence in the affidavits and the facts presented or availed to the Court in the proceedings for judicial review. Ideally the determination of the foregoing would be the preserve of a trial court which would have the advantage of hearing oral evidence and observing the cross-examination in order to adjudicate on the point.

The Court has to answer or determine the following questions:-

(i) Whether the Respondent acted improperly and in abuse of his power in terminating the Applicants' services as lecturers?

(ii) Whether the decision of the Respondent to terminate Applicants' services has any basis in law and if it is oppressive and discriminatory?

(iii) Whether judicial review remedies are the most efficacious for the Applicants in the circumstances.

Before addressing the issues at hand the Court need to answer whether it is the decision to terminate which is under attack or the process which led to the termination. From the submissions by the Counsel for the Applicants, both the process and the decision are challenged. From the foregoing the question that begs is what then is the scope of judicial review? The Supreme Court practice 1997 vol 53/1-14/6 states:-

> "The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.
>
> It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is

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no part of that purpose to substituted by law the decision in the matter in question."

The Supreme Court commentary has made the position even clearer by stating in the same paragraph cited above:-

"The Court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Bringtman in Chief Constable of North Wales Police v Evans [1982] I WLR 1155 P 1173."

From the above principles, it is clear to the Court that its function is to decide on whether the process leading to termination was proper and not to adjudicate on the merit of the same since it is not in dispute that the Applicants can be removed from office. From the foregoing principles the court cannot therefore substitute the termination for anything else for example reinstatement because the

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court would be usurping the power clearly vested in the University Council and or the Respondent.

Turning on to the issues for determination by the Court, it must be appreciated that the onus of demonstrating that the Respondent acted improperly and or abused his power in terminating the Applicants' services squarely lie on the Applicants. The Applicants must avail tangible evidence to the Court in order to discharge that burden. Indeed, the Applicants must demonstrate to the Court that the decision to terminate their services is oppressive and discriminatory.

On the first issue, the Applicants maintain that the Respondent acted improperly and abused his power in terminating their services. I have considered the Applicants' annexture marked CM-IV and MNM-I which are the letters of dismissal. The letters emanate from the Respondent and they are identical. The concluding part of the letters read as follows:-

> "Despite the above court order you actively took part in the unlawful strike on 23rd October, 2006 and you did not conduct your lectures as required and as stipulated in your Terms of Service Clause 4.2(i). You also wrote to all UASU members on 25th October, 2006, asking them to soldier on with the strike (copy attached). This is incitement.
>
> Your action amounts to gross misconduct and is deemed by the University Council to be such as to constitute

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failure and inability on your part to continue to perform your duties or comply with the conditions of your appointment. Subsequently your services are hereby terminated with immediate effect and by a copy of this letter, the Deputy Vice Chancellor (APD) is authorized to stop your salary with immediate effect.

You have a right to appeal to the Council if you so wish."

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As earlier stated the University council has power to remove academic staff such as the Applicants from the office. Under statute XIV (23)(i) the persons to be removed are to appear and be heard by the Council or any person or body to whom the Council has delegated that function. Indeed there is no statutory underpinning in the said Act or subsequent statutes protecting the removal of the Applicants. What is important is just adherence to the procedure contained in the above mentioned statute (23)(i).

The Applicants allege that they were not accorded an opportunity to be heard. The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles. In the case of *GENERAL MEDICAL COUNCIL v SPACKMAN [1943] 2 ALLER 337, Lord Wright at Page 345* stated:-

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether

the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision."

Similar sentiments were expressed by Lord Reid in the case of *RIDGE v BALDWIN [1963] 2 ALLER 66 at page 81* where he sated:-

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

I have noted that the Applicants have admitted in their supporting affidavits sworn on 26th January 2007 at paragraph 15 and 9 respectively that they attended the Council meeting of 18th October, 2006. It is therefore not true that they were never given a chance to be heard before their termination. A public body or a local authority while formulating a decision in circumstances to which the principles of natural justice apply need not observe the strict procedures of a court of law. In the case of *THE BOARD OF EDUCATION v RICE [1911] AC 179 at page 182 Lord Loreburn LC* stated:

"In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain

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information in any way they think best, always giving a fair opportunity to those parties in the controversy for correcting or contradicting any relevant statement."

A close scrutiny of Applicants' annextures marked CMIV and MNMI which are the letter of termination at paragraph 2 states as follows:

"The case Cause No.105 of 2006 was mentioned in the Industrial Court on 18th October, 2006 and the court ordered as follows:-

That all the academic staff union members who intend to go on strike or withdraw their services and goodwill and/or to proceed on go-slow are restrained from such strike or withdrawal of services and goodwill, and are also ordered to maintain status quo pending the adjudication and determination of this dispute."

The same date on 18th October, 2006 when the Industrial Court restrained the intended strike, is the same date the Applicants admit to have attended the Council meeting. At paragraph 25 of the said supporting affidavit of the 1st Applicant, the Applicants admitted having participated in the strike which led to termination of their services. It is not correct for the Applicants to allege that they were not heard. It is clear to the court that they were heard on the 18th October, 2006. Furthermore, after the letter of termination of services, each Applicant was given a chance to appeal to the full Council. It appears that none of the Applicant appreciated the chance. Now it is

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too late for the Applicants to allege that they were not given a chance to be heard while they either waived or ignored the right to appeal to the full Council.

For the above stated reasons I do not find anything improper or any abuse of power by the Respondent who is a member of the University Council and who actually followed the procedure for removal from office of academic members of staff. Indeed the Respondent gave the reasons for termination of Applicants' services in the letters of termination.

On the second issue, the Applicants had argued that the decision by the Respondent to terminate their services has no basis in law and it is oppressive and discriminatory. The statute XIV(23) which has been made pursuant to section 29 of the Jomo Kenyatta University of Agriculture and Technology Act No.8 of 1994 is in form of regulations and they allow removal from office for academic staff such as the applicants. The said Act as well as the regulations have no provisions which protects the academic staff from being removed from the office.

The foregoing is captured by the decision in the case of *R v EAST BERSHIRE HEALTH AUTHORITY, ex-prte WALSH (1984) 3 ALLER 425.* In this case the Applicant was employed under a contract of employment. His employment was terminated and he filed judicial review proceedings seeking a review of the dismissal. The Court held:

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> "Whether a dismissal for employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employees position and not on the fact of employment by a public authority perse or the employees seniority or the interests of the public in the functions of the authority. Where the authority was required by a statute to contract with its employees on specified terms with a view to employees acquiring private law rights a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies, it was only if the authority filed or refused to contract on specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations."

Since the regulations allow removal or dismissal of academic staff from office, the general principles of the law of master and servant as applied in employment contracts as apply to the Applicants. In the said case of *RIDGE v BALDWIN at page 65,* it was held:-

> "... The laws regarding master and servant, is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not

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warranted by the contract, he must pay damages for breach of contract."

Since the removal of the Applicants from office was not forbidden by statute, they cannot competently claim to be re-instated as there is no law which expressly confers that right on them. On the meaning of statutory underpinning refer to Professor *MWANGI KIMENYI CASE Misc Civil Application No. 1769 of 2004* a decision by this court. They cannot properly invoke any equitable remedy to underpin their tenure any more than they can obtain one to order specific performance of their employment. Judicial review proceedings may not be of much assistance as the procedure leading to the termination does not warrant intervention by the Court.

The Applicants have also stated that their termination was discriminatory and that they were victimized because they were officials of UASU. Section 82 of the Constitution proscribes discrimination. The said section provides:-

(1) "subject to subsections (4)(5) and (8), no law shall make any provision that is either discriminatory either of itself or in its effect.

(2) Subject to subsections (6),(8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or public authority.

(3) In this section the expression "discriminatory" means affording different treatment to different persons

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> attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

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In order to examine whether the Applicants have been discriminated by the Respondent, it is important to define discrimination in the legal sense as opposed to general meaning in English language. The Black Law Dictionary defines discrimination as follows:-

> "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of ace, age, sex, nationality, relation or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

The Bill of Rights Handbook, Fourth Edition 2001 at page defines discrimination as follows:-

> "A particular form of differentiation on illegitimate ground."

The law does not prohibit all types of discrimination but rather unfair discrimination which impairs the fundamental dignity of human

beings who are inherently equal in dignity. The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and also by the legitimate needs of the society. I do not find any real need to expound on discrimination because the Applicants have not provided the court with any tangible evidence of unfair discrimination whether on the specified ground in the Constitution or any other ground that has impaired their dignity as human beings. The allegation of discrimination by the Applicants is by and large unproven. The termination as principally targeted on those who took part in the strike and not necessary because they were UASU members.

The third and final issue is whether judicial review remedies are the most efficacious for the Applicants in this case? In order to address the foregoing, one must examine the prayers sought in the Notice of Motion dated 26th January, 2007. Judicial review orders are discretionary in nature and the court may decline to grant them even if deserved particularly if the court is of the view that they are not the most efficacious in the circumstances of the case. Speed is the hallmark of judicial review. Time is of essence and an application for judicial review ought to be filed and prosecuted expeditiously. Indeed, the procedures governing the conduct of judicial review proceedings are designed to ensure speedier determination of those proceedings than ordinary civil litigation. The law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires an applicant for judicial review to act promptly to avoid

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frustrating a public body because against the public interest. Good public administration is a factor in the grant of orders for judicial review.

The Applicants have sought an order of certiorari to remove and quash decision by the Respondent terminating the services of the Applicants. The decision challenged was made on 25th October, 2006 and the application for leave to file judicial review was filed on 23rd January, 2007 about two months later. One really doubts if there was any urgency at all. After the Applicants received their letters of termination, they did not even file an appeal to contest the termination. They appear not to have been in a hurry. Perhaps if the Applicants were really serious about their termination, they could have appealed to the full University council and while the appeal was pending moved swiftly under the judicial review proceedings to secure their positions. However, the Applicants did not act with speed and their conduct is certainly against granting of the order of certiorari because time was of essence due to the public interest involved. As at the time of hearing the position could have been filed with other aspirants and firing them in order to accommodate the applicants would militate again good public administration.

The Applicants' second prayer is for an order of mandamus to compel the respondent to reinstate and or recognise the Applicants as members of academic staff of Jomo Kenyatta University of Agriculture and Technology. As already stated, the relationship between the Applicants and the said University, was contractual

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where the Applicants rendered services as lecturers. The law is quite settled that there cannot be specific performance of a contract of service. It would not also be prudent or in the interest of the parties to reinstate the Applicants since their relationship with the University has been strained. For the above reasons, I find that an order of mandamus would not be appropriate as it would amount to a marriage of unwilling partners. The second prayer cannot also be granted.

The third prayer is for an order of prohibition to prohibit the respondent, his servant, agent or employees from unprocedurally and unlawfully terminating the employment of the Applicants as staff members of the said University. In the view of the Court, the third prayer is highly belated and overtaken by events. Ordinarily, prohibition is an order of the High Court issued to prevent a decision that is yet to be made. In the case before court, there is nothing to be prevented as the decision was made more than one and a half years ago. As an order of certiorari was not given herein for the reasons outlined above the order for prohibition which operates as to the future cannot be granted on the same facts.

Having considered all the affidavits, the submissions and all the authorities cited, I am satisfied that the Applicants have failed to establish the requisite grounds available in judicial review. At the heart of the dispute is a contract of employment. I am of the view that the issues that can be canvassed by the parties herein are more related to private law as opposed to public law and following the

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new labour laws the Industrial Court would be the best forum to address the Applicants' concerns. As already stated the relationship that existed between the Applicants and the University was contractual. If there was a breach of contract of employment, the Applicants are entitled to a remedy of damages and there are appropriate courts for that purpose. In the Judicial review Court and going by the evidence on record, it is not possible for the Court to determine whether there was breach of contract or not. It is upon the Applicant to find the right forum to address the same whereof they shall have an opportunity to adduce oral evidence to enable the court to decide on the issues.

In conclusion and for the reasons addressed above, I find that it is not possible to dispose of the dispute herein by way of judicial review in any event and further that the application herein has no merit and it is dismissed with costs to the respondent.

DATED and delivered at Nairobi this 25th day of July, 2008.

J.G. NYAMU

JUDGE

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