IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, J. MOHAMMED & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NOs. 3 AND 11 of OF 2016

BETWEEN

OLIVE MWIHAKI MUGENDA ……. 1st APPELLANT

KENYATTA UNIVERSITY COUNCIL ……. 2nd APPELLANT

AND

OKIYA OMTATA OKOITI ……. 1st RESPONDENT

CABINET SECRETARY, EDUCATION SCIENCE

& TECHNOLOGY ……. 2nd RESPONDENT

STATE CORPORATION ADVISORY COMMITTEEE ……. 3rd RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ……. 4th RESPONDENT

UNIVERSITIES ACADEMIC STAFF UNION ……. 5th RESPONDENT

(An appeal from the Ruling and order of the Employment and Labour Relations Court Nairobi at Nairobi (H. Wasilwa, J.) dated 18th December 2015

in

Nai. PET. NO. 89 OF 2015)

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JUDGMENT OF THE COURT

1. At all material times in this appeal, the 1st appellant, ***Olive Mwihaki Mugenda***, was the Vice Chancellor of Kenyatta University, a public university established by Charter while the 2nd appellant is the governing body of Kenyatta University and is established pursuant to ***Section 17*** of the Kenyatta University Charter.

2. The background facts to this appeal are that the 1st Respondent, ***Okiya Okoiti Omtatah***, filed a **Constitutional Petition No. 89 of 2015** dated 21st October 2015 before the Employment and Labour Relations Court at Nairobi. The Petition cited the 2nd appellant and the 2nd, 3rd, and 4th respondents as respondents and the 1st appellant and the 5th respondent as Interested Parties.

3. In the Petition, the Petitioner prayed, *inter alia,* for the following orders:

"a) A *declaration that Prof. Olive Mugenda, the 1st appellant herein, has served her maximum two terms as Vice Chancellor of Kenyatta University and is not eligible for reappointment.*

b) A declaration that the Kenyatta University Council and the 2nd and 3rd and 4th respondents should immediately commence the process of retiring Prof. Mugenda from the office of Vice Chancellor of Kenyatta University and commence competitive recruitment of her replacement.

c) A declaration that Prof. Mugenda should immediately proceed on terminal leave and a caretaker to be appointed to oversee the transition.

d) A declaration that there is no objective, inclusive, participatory, merit based and competitive criterion for the appointment of persons to the office of Vice Chancellor of Kenyatta University under the law.

e) A declaration that the respondents have failed in their administrative duties as regards competitive appointment of a new Vice Chancellor for Kenyatta University.

f) That a mandatory order do issue to send Prof. Mugenda on terminal leave and to appoint a caretaker committee in her place.

g) That a mandatory order to issue to compel the respondents to commence the process of recruiting and appointing the new Vice Chancellor for Kenyatta University competitively according to the law."

4. While the Petition was pending for hearing before the trial court, on 2nd December 2015, the 2nd appellant ***Kenyatta University Council*** placed a Press advertisement in the Standard Newspaper titled "Declaration of Vacancy for the Position of Vice Chancellor". A similar Press advertisement was placed in the Daily Nation Newspaper of 2nd December 2015. The advertisement invited eligible candidates to apply to fill the vacancy of the office of Vice Chancellor for Kenyatta University.

5. Upon citing the aforestated newspaper Press advertisements, the 1st respondent as Petitioner

filed a Notice of Motion application dated 7th December 2015 seeking

inter alia, the following orders:

"1) *That pending the hearing and determination of the application dated 7th December 2015 and or the Petition, the court be pleased to grant a stay order staying the on-going recruitment exercise for the position of Vice Chancellor of Kenyatta University as stated in the Press advertisement on 2nd December 2015.*

2) That pending the hearing and determination of the application dated 7th December 2015 and or the Petition, the court be pleased to issue a temporary order of prohibition prohibiting the 2nd appellant whether by itself of its employees agents or servants from proceeding to give effect to the Press advertisements.

3) That pending the hearing and determination of the application dated 7th December 2015 and or the Petition, the court be pleased to quash the Press advertisements dated 2nd December 2015.

4) That in the alternative, the 2nd appellant herein be ordered to withdraw the Press advertisement on terms that within 7 days of withdrawal, the Petitioner and the respondents together with the 2nd appellant to hold a roundtable review of the advert and agree on the contents and wording of a new advert to be used to announce the vacancy in Kenyatta University Vice Chancellor's office stating the criterion for eligibility among others.

5) That the 1st appellant to proceed on leave and take up all her pending leave days.

6) That the 2nd appellant to publish and publicize the agreed advert and proceed with the recruitment process provided in law to competitively fill the vacancy in the office of Vice Chancellor of Kenyatta University."

6. While the 1st appellant filed a replying affidavit in opposition to the Notice of Motion dated 7th December 2015, the 2nd appellant and the 2nd, 3rd and 4th respondents herein filed grounds of opposition. In the replying affidavit deponed to by the 1st appellant, the trial court was urged to allow the 2nd appellant to proceed with the process of recruiting a new Vice Chancellor for Kenyatta University. In the grounds of opposition, it was averred that there was no legal basis to stop the recruitment process; that the Petitioner was seeking final orders at the interim stage and that the decision sought to be quashed was non-existent.

7. Upon hearing the parties in relation to the Notice of Motion dated 7th December 2015, the trial court (Hon. Hellen Wasilwa, J.) delivered a Ruling on 18th

December 2015 and granted prayers in the Motion in the following terms:

"a) That it is indeed this Court's finding that the advert as stated has flaws which should be corrected and it will not be prudent to let a flawed process continue and then correct it later. I therefore find that the application has merit and I allow it in terms of prayer 1, 2 and 3.

b) That pending the hearing and determination of the Petition herein a stay order be and is hereby

allowed staying the 2nd appellant's on-going recruitment exercise stated in the Press advertisement titled "Declaration of Vacancy for the Position of the Vice Chancellor" which was published in the media on 2nd December 2015 inviting applications from eligible candidates to fill the vacancy in the office of the Vice Chancellor for Kenyatta University.

c) That pending the hearing and determination of the Petition, a temporary order of prohibition is issued prohibiting the 2nd appellant whether by itself or its employees agents or servants from proceeding to give effect to the Press advertisement titled "Declaration of Vacancy for the position of the Vice Chancellor which was published in the media.

d) That pending the hearing and determination of the Petition, an order be and is hereby allowed to quash the 2nd appellant's Press advertisement titled "Declaration of Vacancy for the Position of Vice Chancellor which was published in the media on 2nd December 2015.

e) That the 2nd appellant be and is hereby directed to convene a meeting with stakeholders of Kenyatta University, especially the respondents and Interested Party within 7 days from the date hereof and chat the way forward and do place a fresh advert within 14 days from the date hereof for recruitment of the Vice Chancellor of Kenyatta University.

f) That the 1st appellant do vacate office immediately and proceed on terminal leave immediately to pave way for a transparent, open, participatory recruitment of a new Vice Chancellor for Kenyatta University."

8. Aggrieved by the Ruling, orders and directions given on 18th December 2015, the 1st appellant filed a Notice of Appeal dated 23rd December 2015 and lodged **Civil Appeal No. 3 of 2016** before this Court. The 2nd appellant lodged its Notice of Appeal dated 21st December 2015 and filed **Civil Appeal No. 11 of 2016.**

9. Prior to the hearing and determination of the two appeals, each of the appellants filed an interlocutory application seeking orders for stay of execution of the Ruling delivered on 18th December 2015. In addition, the 1st respondent filed a Notice of Preliminary Objection dated 29th December 2015 as well as interlocutory applications in each of the appeals seeking orders to strike out the Notices of Appeal and to strike out the interlocutory applications filed by each of the appellants. The interlocutory application filed by the 1st appellant is **Civil Application No. 312 of 2015 (UR No. 267 of 2015)**; and the application filed by the 2nd appellant is **Civil Application No. 310 of 2015 (UR 265 of 2015).** The aforestated applications by the appellants seek stay of execution of the Ruling dated 18th December 2015.

10. The two applications filed by the 1st respondent are **Civil Application No. 318 of 2015 (UR No. 271/2016)** seeking orders to strike out the Notice of Appeal dated 23rd December 2015 and to further strike out Civil Application No. 312 of 2015 filed in relation to Civil Appeal No. 3 of 2016. The other application by the 1st respondent is **Civil Application No. 317 of 2015 (UR 270/2015)** seeking orders to strike out the Notice of Appeal dated 21st December 2015 filed in Civil Appeal No. 11 of 2016 and to strike out Civil Application No. 310 of 2015.

11. The two appeals were heard together and this judgment ensues from the hearing of these two appeals being **Civil Appeal No. 3 of 2016** and **No. 11 of 2016**. The judgment is a determination of the grounds of appeal in the two appeals and also a determination of all the four interlocutory applications filed by the parties and the preliminary objection filed in the matter.

12. It is important to state that after the Ruling was delivered on 18th December 2015, the 1st respondent as the Petitioner filed an Amended Petition dated 31st January 2016 before the trial court. The parties herein filed written submissions before that trial court in relation to the amended Petition and judgment on the Petition as amended is scheduled to be delivered on 6th April 2016. The grounds urged in this appeal relate to the original Petition dated 21st October 2015 before its amendment.

13. The condensed consolidated grounds of appeal from the two Memoranda of Appeal are as follows:

"a) That the learned judge had no jurisdiction to make the orders of 18th December 2015 and the judge did in any event exceeded her jurisdiction in granting orders not sought or available in the interlocutory application before her.

b) The learned judge had no jurisdiction to determine how and the criteria for the 2nd appellant to discharge its statutory duties.

c) The trial court had no jurisdiction to quash the 2nd appellant's Press advertisement calling for candidates to apply to fill the vacancy in the office of Vice Chancellor of Kenyatta University.

d) That the Ruling delivered on 18th December 2015 pre-empts and determines the Petition dated 21st October 2015 without hearing and determining the same on merits.

e) That the 1st respondent had no locus standi to institute and maintain the Petition before the trial court.

f) That the order directing the appellant to vacate her office immediately and to proceed on terminal leave is unreasonable, illegal and capricious.

g) That the judge relied on mandatory provisions of the State Corporations Act which provisions do not exist.

h) That the term of the 1st appellant's contract as the Vice Chancellor of Kenyatta University comes to an end on 31st March 2016.

i) The judge erred in granting both the main and alternative orders that the 1st respondent had sought in the alternative.

j) The judge erred in failing to appreciate that the respondent was bound by his pleadings and he

could not be granted cumulative reliefs that he had not asked for.

k) The judge erred and misdirected herself by granting orders that could only be granted upon a full hearing of the Petition.

l) The judge erred in failing to appreciate that the orders granted would occasion irreparable loss and damage to the University which would suffer a leadership vacuum and disrupt its operations.

m) That the orders granted by the trial court were unreasonable and could not be complied with without unreasonable difficulty and expense and hence the orders are oppressive and prejudicial to the appellants.

n) The judge erred in law by making orders without due regard to the provisions contained in the statutes governing the subject matter of the Petition, in particular the mode of recruitment of the Vice Chancellor of Kenyatta University as set out in the Kenyatta University Act and allied statutes.

o) The judge erred in imposing timelines for compliance with various orders as to make it virtually impossible for the affected parties to comply with the order.

p) That the orders and directions contained in the Ruling dated 18th December 2015 violate the Constitution and the Universities Act and prescribe an illegal process and extra-legal mechanism to recruit and appoint a new Vice Chancellor for Kenyatta University.

q) That the orders and directions made are in contravention of the Rules of Procedure of the Employment and Labour Relations Court and the principles governing adjudication of interlocutory applications."

14. In their Memoranda of Appeals, the appellants prayed for orders to set aside the Ruling dated 18th December 2015 with costs to the appellants.

15. At the hearing of this appeals, the 1st appellant was represented by learned counsel Mr. Njoroge Regeru and the 2nd appellant by learned counsel Messrs Kiragu Kimani and Mr. Kibe Muigai. The 1st respondent acted in person. The 2nd, 3rd and 4th respondents were represented by State Counsel Mr. Kepha Onyiso while learned counsel Mr. Enonda appeared for the 5th respondent. Parties filed written submissions and lists of authorities.

RULING ON THE 1st RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION AND APPLICATION TO STRIKE OUT NOTICES OF APPEAL AND CIVIL APPLICATION Nos. 310 AND 312 OF 2015

16. Pursuant to the directions and orders of this Court, the 1st respondent's Notice of Preliminary Objection dated 29th December 2015 and his applications to strike out the Notices of Appeals were given priority and heard before the substantive appeals. The 1st respondent's applications to strike out the Notices of Appeal are Civil Applications Nos. 317 of 2015 and 318 of 2015.

17. The 1st respondent's application to strike out the Notices of Appeal was made pursuant to ***Rule 84*** of the Rules of this Court. It was urged that the Notices of Appeals dated 21st and 23rd

December 2015 were filed while the appellants were in contempt of court and lacked right of audience; that on 19th December 2015, the appellants placed a Press advertisement in the daily newspapers indicating that they shall not comply with the orders and directions given in the ruling dated 18th December 2015; that on 21st December 2015, the 1st respondent filed an application before the trial court citing the appellants for contempt; that on 22nd December 2015, the trial court (Hon. Nzioki wa Makau, J.) made a finding that the 2nd appellant, Kenyatta University Council, had committed outright contempt; that on 24th December 2015, the 2nd appellant published adverts in the Standard and Daily Nation newspapers which failed to purge the contempt; that since the appellants had not purged their contempt when they filed the Notices of Appeal and their interlocutory applications, they had no right of audience before this Court; that when the Notices of Appeals were filed on 21st and 23rd December 2015, the applicants were in contempt of the orders made on 18th and 22nd December 2015; as they were in contempt, they lacked capacity to file valid Notices of Appeals; that due to lack of capacity, the Notices of Appeals filed on 21st and 23rd December 2013 were invalid for want of legal capacity on the part of the appellants to file valid court documents; that Civil Application Nos. 310 of 2015 and 312 of 2015 filed by the appellants are not properly on record as they were filed by the appellants when they did not have the legal capacity to lodge the same due to contempt of court; that public interest and interest of justice demand that court orders must be obeyed; that whomsoever approaches the court must do so with clean hands without contempt; that since the appellants were in contempt, the two Notices of Appeals and the interlocutory Civil Applications filed in the appeals should be struck off of the record.

18. Another ground urged by the 1st respondent for striking out the Notices of Motions filed by the appellants as Civil Application Nos. 310 of 2015 and 312 of 2015 is that these Motions are an abuse of court process because similar applications were filed before the trial court; that the appellants in parallel filed similar applications seeking analogous stay orders before the trial court and this court; that it is an abuse of court process to file two parallel and similar applications before two different courts; that the appellants' applications being an abuse of court process should be struck out.

19. Learned counsel Mr. Enonda for the 5th respondent supported the application to strike out the Notices of Appeals and Civil Applications Nos. 310 of 2015 and 312 of 2015. He submitted that ***Rule 84*** does not define "an essential step" and in his view, failure to purge contempt is an essential step and consequently, the appellants lacked legal capacity to file valid Notices of Appeal; counsel adopted the 1st respondent's submissions that the two applications filed by the appellants were an abuse of court process. Counsel distinguished the case of **Tetra Radio Limited -v- Communications of Kenya Civil Application No. 121 of 2012** cited by the appellants; that in the ***Tetra Radio*** case, the party cited was not in contempt.

20. The appellants opposed the Notice of Preliminary Objection and the application to strike out the Notices of Appeal and as well as the application to strike out Civil Application Nos. 310 of 2015 and 312 of 2015. The appellants submitted that the Preliminary Objection was ambiguous, imprecise and unclear; that the Notices of Appeals were valid and well founded in law.

21. Learned counsel Mr. Kiragu Kimani, in opposing the application to strike out the Notices of Appeals and the two applications submitted that the governing rule is ***Rule 84*** of the Rules of this Court; that ***Rule 84*** clearly stipulates the conditions upon which this Court can strike out a pleading; that the condition is, if a party has failed to take out an essential step within the stipulated time lines; that contempt of court is not one of the grounds to strike out a pleading under ***Rule 84***; counsel cited the decision of this Court in **Teachers Service Commission -v- Kenya National Union of Teachers & 3 others, Civil Appeal No 196 of 2015** in support of the proposition that contempt of court does not automatically deny a party the right of audience before this Court; the 2nd appellant further submitted that the contempt complained of was purged to the satisfaction of the trial court; that even if a party is in contempt, this does not take away the party's constitutional right of appeal; that a right of appeal is conferred by the Constitution or Statute and such a right cannot be taken away because of contempt; that it is not the law that until a party purges contempt he/she has no right of appeal; that the remedy for contempt is provided for in law and taking away or denial of the right of appeal is not one of the remedies for contempt; that contempt that can deny a party audience is one that interferes with the administration of justice; that the Notices of Appeals filed and the two applicationssought to be struck out do not interfere with the administration of justice ; that as far as possible, courts must hear parties on merit. Counsel urged us to follow the decision in **Tetra Radio Limited -v- Communications of Kenya Civil Application No. 121 of 2012** where this Court expressed as follows:

"…However, before us is an application, at the heart of which lies a presumption that the respondent has already been adjudged guilty of contempt of court or at the very least, has admitted being in contempt of court. So, we are not being asked to hear and determine whether the respondent is in contempt of court, we are being asked to visit upon it the consequences of contempt of court without any application for such order ever having been made, let alone a court of competent jurisdiction having pronounced it."

22. Learned counsel Mr. Regeru, for the 1st appellant, submitted that the Ruling by Justice Nzioki wa Makau, J. held that the 1st appellant was not in contempt of court; that the issue of abuse of court process was sorted out when this Court in the order made on 14th January 2016 observed that the orders of Employment and Labour Relations Court shall remain in force till set aside or varied by the said court. Counsel submitted that at no point did the appellants seek to prosecute simultaneously the applications for stay of execution before this Court and before the trial court.

23. State Counsel Mr. Onyiso for the 2nd, 3rd and 4th respondents opposed the application to strike out the Notices of Appeals and the two Civil Application Nos. 310 of 2015 and 312 of 2015. He submitted that ***Rule 84*** of this Court's Rules does not envisage contempt as a ground for striking out any pleading.

24. In reply, Mr. Okiya Omtatah submitted that "essential step" is not defined under ***Rule 84***, that each bench of this Court should determine what constitutes "essential step" on a case by case basis; that in the instant case, being in contempt of court and failure to purge contempt is an "essential step" that the appellants have not complied with under ***Rule 84.***

25. We have considered the provisions of ***Rule 84*** of the Rules of this Court and the grounds in support of the application to strike out the Notices of Appeal and the two Civil Applications Nos. 310 of 2015 and 312 of 2015. We have also considered the relevant provisions of the Judicature Act dealing with contempt of court; we have taken note of the submission that in the ruling by Hon. Nzioki wa Makau, J., there is a specific finding that the 1st appellant was not in contempt of court.

26. There being a specific finding that the 1st appellant, Prof. Olive Mugenda, was not in contempt, we hereby come to the determination that the 1st appellant's Notice of Appeal dated 23rd December 2015 which is the foundation of Civil Appeal No. 3 of 2016 in which Prof. Mugenda is the appellant is valid and properly on record. Civil Application No. 312 of 2015 which is based on the said Notice of Appeal is also validly on record. Accordingly, we make a finding that the 1st respondent's Notice of Motion filed as Civil Application No. 317 of 2015 (UR No. 270 of 2015) dated 29th December 2015 has no merit and is hereby dismissed. Costs will be costs in the appeal. We find that the 1st appellant has the right of audience before this Court.

27. The 1st respondent's Notice of Motion dated 30st December 2015 being Civil Application No. 318 of 2015 (UR No. 271 of 2015) seeks orders to strike out the 2nd appellant's Notice of Appeal dated 21st December 2015 and an order for this Court to declare the 2nd appellant (Kenyatta University Council) to be in contempt of court. Our consideration and determination of this application is as hereunder.

28. The right to be heard embodies the right of audience; this right is jealously guarded by this Court. In **Richard Nchapi Leiyegu -v- IEBC & 2 Others Civil Appeal No. 18 of 2013**, this Court expressed that the right to a hearing has always been a well protected right and is the cornerstone of the rule of law. In **Rose Detho -v- Ratilal Autombiles & 6 Others, Civil Application No. 304 of 2006 (171/2006UR),** this Court in a bench majority (Githinji and Onyango-Otieno JJA; with Hon. Tunoi JA, as he then was dissenting) observed that if the actions of the alleged contemnor in failing to obey court orders cannot impede the course of justice or make it difficult to ascertain the truth in respect of the matter, then the contemnor can be heard.

29. The 1st respondent seeks orders to deny the 2nd appellant the right of audience before this Court and to strike out the Notice of Appeal dated 21st December 2015. The application is grounded, *inter alia,* on ***Rule 84*** of the Rules of this Court.

30. ***Rule 84*** stipulates as follows:

"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal

as the case may be."

31. A reading of ***Rule 84*** demonstrates that an "essential step" is a step that ought and should be taken under the Rules of this Court within time lines prescribed by the Rules of this Court. The "essential step" must be a step in the proceedings in this Court, not a step outside the proceedings before this Court. In principle, an "essential step" does not connote a step that should or must be taken under provisions of any law; the "essential step" must be a step prescribed by the Court of Appeal rules or a step stipulated in a law or rules applicable to proceedings before this Court.

32. The 1st respondent's contention that contempt is an "essential step" under ***Rule 84*** is not tenable as the specifically alleged contempt is not a step in the proceedings before this Court. Even if the specifically alleged contempt were to be a relevant ground, under the provisions of ***Section 5*** of the **Judicature Act**, contempt is punishable in the first instance by the court where the contempt is committed. The 1st respondent in his application urges this Court to declare the 2nd appellant to be in contempt of court. The alleged contempt committed by the 2nd appellant was not committed before this Court. Except to the extent that an appeal can be lodged against conviction and sentence for contempt, this Court has no original jurisdiction to punish or deal with contempt committed before any other court. This Court cannot declare a party to be in contempt for contempt committed before a trial court. Each of the superior courts in Kenya has separate and distinct original jurisdictional competence to declare and make findings of contempt and or punish contempt committed before it. (See Section 36 of the High Court (Organization and Administration) Act No. 27 of 2015; see also Section 35 of the Court of Appeal (Organization and Administration) Act No 28 of 2015; See also Section 28 of the Supreme Court Act Cap 9A of the Laws of Kenya).

33. It is our considered view that as a general principle, contempt committed before another superior court is punishable by that court and a declaration for contempt and sanctions or remedies for the contempt are determined and enforceable in the first instance by that court. Guided by the foregoing reasoning and taking into account the grounds in support of the present application, we make a finding that this Court has no original jurisdiction to declare the 2nd appellant to be in contempt or to deny right of audience to the 2nd appellant for contempt allegedly committed before another court. Applying the dicta in ***Rose Detho Case*** **(supra)**, the 1st respondent has failed to demonstrate to our satisfaction that the contempt by the 2nd appellant can impede the course of justice or make it difficult to ascertain the truth in respect of the instant appeal. We accordingly grant the 2nd appellant audience before this Court.

34. For the reasons stated above, the 1st respondent's application to strike out the 2nd appellant's Notice of Appeal dated 21st December 2015 and Civil Application No. 310 of 2015 has no merit. Accordingly, the 1st respondent's Civil Application No. No. 318 of 2015 (UR No. 271 of 2015) is ordered to be and is hereby dismissed. Costs in the appeal.

JUDGMENT IN CIVIL APPEALS Nos. 3 AND 11 OF 2016

35. Having determined the Preliminary Objection dated 29th December 2015 and the applications

to strike out the Notices of Appeals, we now consider and determine the substantive merits of the appeals and the 1st respondent's Notices of Preliminary Objection dated 23rd February 2016. The gist of the preliminary objections is that this Court has no jurisdiction to determine the instant appeal because it *sub judices* proceedings in Civil Application No. 317 of 2016; that this Court lacks jurisdiction to entertain the appeal before it determines Civil Applications Nos. 310, 312, 317 and 318 of 2015; that the relief claimed by the appellants cannot be granted because it is barred in law rendering the instant appeal infructuous, fruitless and not maintainable on the ground that the fundamental premises upon which the appeal is based no longer exist because: (a) on 15th December 2015, The Statute Law (Miscellaneous Amendments) Act 2015 amended Section 39 of the Universities Act, 2012; (b) that on 16th February 2016, the original Petition filed before the trial court was amended with the consent of the parties to accord with changes in law. In support of the submissions, the 1st respondent cited dicta from the Indian case of **All India Anna Dravida Munmnetra Kazhagam -v- L.K. Tripathi & Others, Contempt Petition (C) No. 262 of 2007 IN S.L.P. (C) No. 18879 of 2007** where it was stated that ordinarily, a court should refrain from passing an interim order unless in the opinion of the court the main case would become infructuous and different considerations would arise.

36. We remind ourselves that this is an appeal arising from an interlocutory ruling. The judgment on the main amended Petition is pending before the trial court and is scheduled for delivery on 6th April 2016. In this appeal, unless it is absolutely necessary, we shall restrain ourselves from making any findings or pronouncements and determinations that would pre-empt the judgment of the trial court in the Petition.

37. Counsel for the 1st appellant in the substantive appeal urged us to allow the appeal and set aside the orders contained in the ruling delivered on 18th December 2015. It was submitted that the learned judge had no jurisdiction to issue the impugned orders; that in the case of **United States International University (USIU) -v- Attorney General (2012) eKLR**, it was stated that the Employment and Labour Relations Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011; that this position was upheld by this Court in **Judicial Service Commission -v- Gladys Boss Shollei (2014) eKLR.**

38. It was submitted that under ***Section 12*** of the Industrial Court Act, the basis for jurisdiction and any determination by the Employment and Labour Relations Court is the existence of an employer employee relationship; that in the instant case, the trial court failed to appreciate that for an individual to Petition or apply to the Employment Court for violation of fundamental rights and freedoms, there must be an employer/employee relationship and that there is no employer/ employee relationship between the 1st respondent Petitioner and the appellants; that in the absence of employer/employee relationship, the trial court acted without jurisdiction and the ruling of 18th December 2015 is a nullity.

39. The 1st appellant further submitted that the trial court erred in finding that it is a mandatory requirement for all Chief Executive Officers (CEO) under the State Corporations Act to proceed

on terminal leave six months prior to expiry of their contracts; the trial court erred in ordering the 1st appellant to proceed on terminal leave; that a reading of the State Corporations Act reveals that there is no mandatory provision for CEOs to proceed on terminal leave six months prior to expiry of their contract; that because the trial judge relied on a non-existent statutory provision, the ruling delivered on 18th December 2015 was a nullity. Counsel cited dicta in **Macfoy -v- United Africa Co. Ltd. (1961) 3 All ER 1172** where it was held that if an act is void, it is a nullity and it is not only bad but incurably so. It was further submitted that in ordering the 1st appellant to proceed on terminal leave, the trial court interfered with the 1st appellant's contract of employment contrary to the decision in **National Bank of Kenya -v- Pipeplastic Sankolit (K) Ltd. & Another (2001) eKLR** where it was stated that a court of law cannot rewrite a contract between the parties.

40. The 1st appellant submitted that the trial court erred in law by entering into the domain of setting up criteria and a new procedure for recruitment of a Vice Chancellor for Kenyatta University; that having attempted to direct the University Council on the criteria to be used for advertisement and conditions for the calling for applications for the position of the Vice Chancellor, the trial court acted *ultra vires* and lacked jurisdiction to make the orders and directions given on 18th December 2015.

41. The 1st appellant submitted that the trial court erred in granting both the main and alternative orders sought in the 1st respondent's Notice of Motion dated 7th December 2015; that a reading of the Motion shows that the 1st respondent sought prayers 4 and 5 in the alternative to prayers 1, 2 and 3; that the trial court erred in granting both the main and alternative prayers; that in **Alex Wainaina t/a John Commercial Agencies -v- Janson Mwangi Wanjihin (2015) *eKLR,*** this Court held that "where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so." Both cannot be granted in blanket form.

42. The appellant's further ground of appeal is that the trial court erred in issuing final orders at the interlocutory stage; that the trial court issued final orders that could only be granted upon the full hearing of the main Petition; that in the Petition filed on 21st October 2015, one of the specific prayers sought was to send the 1st appellant on terminal leave, that this specific prayer was granted by the trial court in the interlocutory ruling delivered on 18th December 2015. Counsel submitted that in **Vivo Energy Kenya Limited -v- Maloba Petrol Station Limited & 3 Others (2015) eKLR**, this Court held that "we are satisfied that the learned judge erred by making several definitive and final conclusions without the advantage of hearing and seeing witnesses who have been subjected to cross-examination…" The appellant submitted that in the instant case, the trial court erred in making final orders sending the 1st appellant on terminal leave at the interlocutory stage when the main Petition was yet to be heard. The decision in **Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola (2009) eKLR** was cited to support the submission that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.

43. The 1st appellant further submitted that the orders made by the trial court on 18th December 2015 were ambiguous and imprecise as to be incapable of compliance; that the 2nd appellant was required to convene a meeting of stakeholders of Kenyatta University and to consult them; that it is uncertain who these stakeholders were; that the trial court further erred in placing time lines for compliance with various orders making it impossible for the affected parties to comply with the orders; that in the case of **A.B. & another -v- R.B. (2015) eKLR**, this Court held that courts should not issue ambiguous orders.

44. Counsel for the 2nd appellant in his submission urged us to allow the appeal. He submitted that in publishing the Press advertisements to invite applications to fill the vacancy in the office of Vice Chancellor of Kenyatta University, the 2nd appellant was discharging its statutory duty in accordance with the Universities Act 2012 and the Kenyatta University Charter; that the trial court erred and misdirected itself it quashing the Press advertisement and restricting the 2nd appellant's right to perform its statutory duty; that the trial court erred in directing the 2nd appellant on how to perform its statutory duty; citing the case of **West Kenya Sugar Co. Ltd. -v- Kenya Sugar Board & Another (2014) eKLR,** counsel submitted that where a state officer or a public officer has free discretion, the court in exercise of judicial functions should not substitute its own views for views of the decision maker as to what is a reasonable exercise of the power; that the trial court was bound in law to let the 2nd appellant discharge its statutory functions of recruiting the Vice Chancellor; that the court erred and took away the 2nd respondent's statutory mandate to recruit the Vice Chancellor for Kenyatta University; the court erred and substituted its own views and procedures for recruitment of the Vice Chancellor.

45. The 2nd appellant cited the decisions in **Narok County Council -v- Transmara County Council (2000) 1 EA 161** and **Commissioner of Lands -v- Kunste Hotel Limited (1997) eKLR** in support of the submission that courts should show deference to the decision maker and courts should not deal with matters which statute has directed should be done by another party.

46. A significant ground of appeal urged by the appellants is the *locus standi* of the 1st respondent to lodge and maintain the Petition before the trial court. At paragraphs 27 to 29 of the Ruling dated 18th December 2015, the trial court held that the 1st respondent had *locus standi* to file and maintain the Petition despite the fact that there was no employer/employee relationship between the 1st respondent and the appellants. In arriving at its decision, the trial court held that ***Articles 22 (1)*** and ***258 (1)*** of the Constitution conferred standing on the 1st respondent. For the 2nd appellant, it was submitted that the trial court erred in relying on ***Articles 22 (1)*** and ***258 (1)*** of the Constitution, that these provisions confer standing to an individual seeking to enforce any of his rights and fundamental freedoms; that in the instant case, the 1st respondent is not seeking enforcement of any of his fundamental rights and freedoms; that there is no allegation that any fundamental right or freedom of the 1st respondent had been violated; that the 1st respondent does not allege violation of any provision of the Constitution; that the trial court misdirected itself and failed to correctly apply the principle that the Employment Court can only interpret and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes within the provisions of ***Section 12*** of the **Industrial Court Act**. (See **Prof. Daniel N. Mugendi -v- Kenyatta University & Others, Civil Appeal No. 6 of 2012).** It was submitted that the dispute between the 1st respondent and the appellants does not fall within the provisions of ***Section 12*** of the **Industrial Court Act** with the consequence that the 1st respondent has no *locus* to file and maintain the Petition lodged before the trial court.

47. The 2nd appellant submitted that the orders granted by the trial court on 18th December 2015 were improper to the extent that they were final orders that pre-empted the main Petition; that the orders determined the Petition without a hearing on merits; that the trial judge was aware of the relief sought in the main Petition and proceeded to grant the same at interlocutory stage; that the orders granted by the trial court on 18th December 2015 determined prayers (c) (d) (e) (f) (g) and (h) in the main Petition without a hearing.

48. Counsel submitted that the trial court erred in ordering the 2nd appellant to operate contrary to law; that ***Section 35*** of the **Universities Act, 2012** sets out the functions of a University Council which includes, in the case of a public university, recommending a person to be appointed as Vice Chancellor of the University; that the trial court erred in directing the 2nd appellant on how to perform its duty in order to recruit and indentify the individual to be recommended for appointment as Vice Chancellor; that the trial court in directing the 1st appellant to proceed on leave and that stake-holder consultations be held, altered the composition and functions of the Council of Kenyatta University contrary to law; that the Universities Act and the Charter of Kenyatta University does not recognize existence of a “caretaker” to run the affairs of the University; the Charter has no provision for stakeholder consultations in the manner directed by the trial court.

49. The 2nd appellant urged us to find that the Ruling and orders made on 18th December 2015 violated its rights under ***Articles 10, 27*** and ***50*** of the Constitution; that the original Petition filed by the 1st respondent falls outside the provisions of ***Section 12*** of the **Industrial Court Act;** the Petition does not allege violation of any fundamental rights or freedoms and thus falls outside the jurisdictional scope of the Employment and Labour Relations Court to enforce and interpret violations of constitutional rights and fundamental freedoms in matters of employment.

50. State Counsel Mr. Kepha Onyiso for the 2nd, 3rd and 4th respondents in supporting the appeal adopted submissions by counsel for the 1st and 2nd appellants. He submitted that the trial court had no powers to order stakeholder consultation in relation to recruitment of the Vice Chancellor for Kenyatta University.

51. The 1st and 5th respondents opposed the appeal. The 1st respondent submitted that he had *locus standi* to file and maintain the Petition pursuant to the provisions of ***Articles 3 (1), 22 (1)*** and ***258 (1)*** of the Constitution; that his Petition seeks to defend the values and principles of the Constitution; that the Petition is a public interest petition under the provisions of ***Articles 22 (1)*** and ***258 (1)*** of the Constitution; that public interest encompasses more than just parties to a particular matter; that public interest litigation is meant to benefit the wider public and the issues in the Petition are meant to benefit the wider public taking into account that Kenyatta University is a public university.

52. On the issue of validity of the orders made on 18th December 2015, the 1st respondent

submitted that the orders were lawful and proper taking into account the context within which they were issued and the fact that the appellants were intent on doing violence to the original Petition as filed; that orders and directions of the trial court are not controversial and clearly serve the interests of justice; that the trial court issued the orders to protect and prevent the 1st respondent's Notice of Motion dated 7th December 2015 from being rendered nugatory by the contemptuous actions of the appellants in the Press advertisements inviting applications to fill the vacancy in the office of Vice Chancellor; that if the orders were not granted by the trial court, the Petition would have stood dismissed without being heard; that interim orders are granted on the basis of *prima facie* findings and in this case the trial court acted properly in granting interim orders made on 18th December 2015.

53. The 1st respondent cited ***Article 22*** of the Constitution to support the trial court's decision to grant the main and alternative reliefs and submitted that the court had inherent power to make such orders as may be necessary for the ends of justice. The 1st respondent also cited a foreign persuasive dicta from India in the case of

Deoray -v- State of Maharashtra & Others on 6th April 2004 where it was stated:

"**Situations emerge where the granting of an interim relief would be tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would be tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the Petitioner though all the findings may be in his favour. In such cases, the availability of a very strong prima facie case …the court may grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases."**

54. In **Ashok Kumar Bajpai -v- Dr. (Smt) Ranjana Bajpai** on 17th October 2003**,** the Indian court held that in exceptional circumstances, where for one reason or other the court feels compulsion to grant an interim relief which amounts to final relief, the Court must record the reasons for passing such interim relief.

55. On the issue that the trial court erred in sending the 1st appellant on compulsory leave, the 1st respondent submitted that there was no error as the 1st appellant had admitted that her contract and tenure as Vice Chancellor was coming to an end on 20th March 2016; that all that the trial court did was to implement the law that required an exiting CEO to proceed on terminal leave six months prior to the end of his/her contract of employment.

56. The 1st respondent submitted that it is an erroneous submission to say that the trial court relied on a non-existent provision in the **State Corporations Act** to send the 1st appellant on terminal leave. He submitted that under ***Section 2*** of the **Statutory Instruments Act, 2013** a statutory instrument is defined to include any order, direction or guideline made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be made.

57. It was submitted that ***Section 27 (1)(c)*** of the **State Corporations Act** gives the 3rd respondent power to make subsidiary legislation and to advise on the appointment of officers of state corporations; that in granting the orders directing the 1st appellant to proceed on terminal leave, the trial court relied on a circular dated 24th November 2004 and 23rd November 2010 signed by the then Head of Public Service ***Ambassador Muthaura;*** that these circulars are statutory instruments under the provisions of ***Section 2*** of the Statutory Instruments Act. It was submitted that the circular by Ambassador Muthaura is what the court referred to as the mandatory provisions for all CEOs under the **State Corporations Act** to proceed on terminal leave six months prior to expiry of their contract of employment.

58. The 1st respondent submitted that the orders granted by the trial court were reasonable and did not violate the Universities Act, the Charter of Kenyatta University or any provision of law; that the said orders advance good governance and the rule of law.

59. In concluding his submissions, the 1st respondent urged this Court not to strike out the original Petition dated 21st October 2015 which has been amended and awaiting judgment by the trial court; that the two appeals in this case have both been overtaken by the following events: first, the 1st appellant has already vacated office and ceased being the Vice Chancellor of Kenyatta University. Second, the original Petition has been amended and the new Petition is dated 31st January 2016. Third, **Statute Law Miscellaneous Amendment Act** of 15th December 2015 amended ***Section 39 (1) (a)*** of the **Universities Act** necessitating amendment of the original Petition. Fourth, the amended Petition has been heard and judgment is due on 6th April 2016. Fifth, that no substantial loss or prejudice will be occasioned to the appellants if the prayers in the appeal are not granted. In view of these intervening overtaking events, the 1st respondent submitted that the instant appeal had been overtaken by events and urged this Court not to act in vain but to dismiss the appeal.

60. Learned Counsel for the 5th respondent adopted in entirety the submissions made by the 1st respondent.

ANALYSIS OF THE SUBSTANTIVE APPEALS

61. We have considered the grounds of appeal and submissions by counsel and the authorities cited. We take cognizant that this appeal arises from an interlocutory ruling and that Judgment in the main Petition is pending and is scheduled for delivery on 6th April 2016. We have examined the prayers in the amended Petition dated 31st January 2016; we note that some of the grounds urged in this appeal are issues for determination in the amended Petition; we have noted that some of the reliefs and prayers sought in the original Petition have been modified. In this context, we shall refrain from pronouncing ourselves and making determination on issues pending for determination in the amended Petition. We shall only deal with the grounds of appeal relevant to the determination of issues germane to the legality of the Ruling and orders delivered on 18th December 2015.

62. Being a first appeal, we are obliged to evaluate the evidence on record and arrive at our own

conclusions and determination.

63. One of the grounds of appeal relevant to the determination of this appeal is whether the trial court erred in granting both the main and alternative reliefs sought in the Notice of Motion dated 7th December 2015. The 1st respondent did not controvert the submission that the trial court granted interlocutory orders that were final and determinative of some aspects of the Petition. The respondent submitted that it is neither an error of law to grant both the main and alternative reliefs sought nor is it illegal to grant interlocutory orders that are final; he cited persuasive authorities from India to support the submission.

64. Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated. In the Indian case of **Deoraj -v- State of Maharashitra & others, Civil Appeal No. 2084 of 2004**, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the Indian case, it was stated that a court could grant such final interlocutory orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end, the court would not be able to vindicate the cause of justice. In the case of **Ashok Kumar Bajpai - v- Dr. (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88,** at paragraph 17 of the decision the Indian Court expressed as follows:

"…It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."

65. We have analyzed the ruling of the trial court delivered on 18th December 2015 and evaluated the same against the criteria in the persuasive dicta in the Indian decisions. Nowhere in the ruling does the trial judge give reasons for granting final orders at the interlocutory stage; no special circumstances have been explained to warrant the grant of final orders and the balance of convenience and question of irreparable injury have not been addressed. In our view, then, the ruling of 18th December 2015 does not pass the persuasive Indian threshold and criteria for grant of final orders at the interlocutory stage.

66. Applying the decisions of this Court in **Vivo Energy Kenya Limited -v- Maloba Petrol Station Limited & 3 Others (2015) eKLR** and **Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola (2009) eKLR** it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the prayers in the Petition dated 21st October 2015. The Ruling of 18th December 2015 effectively granted final prayers in paragraph 62 (c), (d) (f) (g) (h) and (j) of the Petition.

67. Guided by the dicta of this Court in the decisions of ***Vivo Energy Case (supra),*** we are

convinced and satisfied that the learned judge erred in law in granting final orders at the interlocutory stage when the main Petition had not been heard.

68. The next issue for our determination is whether the trial court erred in granting both the main and alternative reliefs sought in the Notice of Motion dated 7th December 2015. It is not in dispute that the trial court granted the main and alternative prayers in the Motion. The decision of this Court in **Alex Wainaina t/a John Commercial Agencies -v- Janson Mwangi Wanjihin (2015) eKLR,** is good law. This Court held there that "where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both cannot be granted in blanket form." The 1st respondent has not demonstrated to our satisfaction or at all that the principle in ***Alex Wainaina (supra)*** is bad law. We are inclined to follow the same and we hereby make a finding that in the Ruling delivered on 18th December 2015, the trial court erred in granting both the main and alternative prayers in the Motion.

69. The other pertinent ground of appeal is whether the trial court erred in directing the 2nd appellant on how to carry out its statutory mandate and the order to involve and consult stakeholders. In **Narok County Council -v- Transmara County Council (2000) 1 EA 161** and **Commissioner of Lands -v- Kunste Hotel Limited (1997) eKLR,** this Court stated that courts should not deal with matters which statute has directed should be done by another party. It is also trite that if Statute has provided for the procedure to do a certain act, that procedure must be followed.

70. The Petition filed on 21st October 2015 did not contain a prayer for stakeholder consultation. Be that as it may, the Employment and Labour Relations Court is not the Human Resource Department of any organization; the court is not charged with constitutional or statutory mandate to determine and oversee recruitment of individuals to any employment position. The order by the trial court directing the 2nd appellant to convene a meeting with stakeholders of Kenyatta University and chart the way forward was an order made in excess of jurisdiction of the trial court. The procedure and process for recruitment and recommendation of the individual to be appointed as Vice Chancellor of Kenyatta University is regulated by the Universities Act and the Charter of Kenyatta University. Stakeholder consultation is a procedure not provided for in the relevant Act and Charter. A trial court cannot impose its own procedure for recruitment of the Vice Chancellor and we find that the learned judge erred in law in formulating its own and new procedure for recruitment of the Vice Chancellor of Kenyatta University.

71. We have considered the ground of appeal that the trial court erred in imposing timelines for compliance with its orders. We have also considered the ground that the trial court's order was ambiguous and imprecise as to be incapable of compliance. These grounds of appeal have no merit. It is common practice for courts to impose timelines for doing certain acts. In principle, court orders take effect upon delivery of judgment and/or rulings; the effect of an order indicating timelines is to postpone immediate implementation of the ruling/orders made. We find that the trial court did not err in imposing timelines. Further, upon analysis of the orders and directions given by the trial court, we are of the view that they were neither ambiguous nor imprecise; the orders and directions were specific and succinctly indicated what needed to be done.

72. A ground of appeal urged in this matter is that the trial court erred in ordering and directing the 1st appellant to proceed on terminal leave. Stay order was granted by the trial court preventing implementation of this order and directive. The 1st appellant did not proceed on terminal leave and has since vacated office. In our view, this ground of appeal has been overtaken by events and this Court cannot act in vain in making a determination on the same.

73. We have considered the vital ground of appeal relating to the *locus standi* of the 1st respondent to file and maintain the Petition before the trial court. In our considered view, our pronouncement and determination of this ground of appeal shall have direct impact on the Petition pending before the trial court. For instance, if we were to hold that the 1st respondent has no locus, the legal consequence would be to terminate proceedings before the trial court and arrest the judgment now pending for delivery on 6th April 2015. Conversely, if we were to hold that the 1st respondent has *locus*, our decision will likewise impact on the proceedings and judgment on the Petition before the trial court. This being an interlocutory appeal, we are inclined not to make any findings and determination on *locus* that pre-empts and impacts on the final judgment of the trial court.

74. During the hearing of this appeal, the 1st respondent also questioned the *locus standi* of the 2nd appellant to maintain the instant appeal and or to participate in the Petition before the trial court. The 1st respondent submitted that the Council of the 2nd appellant, Kenyatta University, had been dissolved and the Council is to be competitively reconstituted; it was submitted that due to the dissolution of the Council, the 2nd appellant had neither the *locus standi* to main the instant appeal nor locus to participate in the main Petition before the trial court. The respondent asserted that whereas the Council of Kenyatta University may have had locus to defend the original Petition before the trial court, its locus was removed by the dissolution of the Council by the Cabinet Secretary on the basis that all Councils of public universities were not constituted in accordance with the law. In support, the 1st respondent cited the decision in **Joseph Mutuura Mbeeria & Another - v- The Cabinet Secretary for Education, Science and Technolgy & 2 Others**, **Industrial Court decision in Petition No. 33 of 2013***,* where the Employment Court held that the Council of Jomo Kenyatta University of Agriculture & Technology was not properly constituted. Citing the *defacto officer doctrine*, the 1st respondent submitted that the then Kenyatta University Council had *defacto* locus before its dissolution but now has neither *defacto nor dejure* locus upon dissolution. The *defacto officer doctrine* cited by the 1st respondent confers validity upon acts performed by a person acting under the colour of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient; that the doctrine seeks to protect the public by insuring the orderly functioning of the institutions despite technical defects in title to office. (See **Norton -v- Shelby County, 18 U.S. 425,4400;** see also **Ball -v- United States, 140 U.S. 118 (1891); McDowell -v- United States, 159 U.S.595 (1895).**

75. The issue of *locus standi* of the 2nd appellant was not an issue raised before the trial court; it is also not an issue raised in any ground of appeal and there is no cross appeal on the *locus* of the 2nd appellant in this matter, it cannot therefore be validly introduced through submissions, no matter how eloquent. In order not to pre-empt the judgment of the trial court; and for a smooth,

orderly and hierarchical determination of contested issues, and to avoid simultaneous and potentially conflicting determinations by the trial court and this Court, we hereby decline to pronounce ourselves on the issue of *locus standi* of the 1st respondent to apply and maintain the Petition before the trial court. Likewise, we do decline to determine the question of *defacto officer doctrine* and *locus standi* of the 2nd appellant to maintain the instant appeal and Petition before the trial court. Upon delivery of the judgment in the Petition as amended, any party shall, as always, be at liberty to institute an appeal against that judgment citing *locus standi* of either party as a ground of appeal if the same was in the pleading.

76. The final issue for our consideration emanates from the submission by the 1st respondent that the two appeals herein have been overtaken by events. All parties conceded that the 1st appellant is no longer the Vice Chancellor of Kenyatta University and that the original Petition dated 21st October 2015 has been amended and the Petition now before the trial court is the one dated 31st January 2016. It was the 1st respondent's submission that this Court should not act in vain by making orders in respect of matters that have been overtaken by events.

77. We agree that this Court should not make orders in vain. We reiterate that this appeal arises from an interlocutory ruling and it is trite law that any and all interlocutory orders lapse upon delivery of judgment after the full and final determination of a suit. In this matter, all counsel disclosed to this Court that judgment on the amended Petition is due for delivery on 6th April 2016. It is our considered view that upon delivery of judgment in the substantive Petition as amended, the interlocutory orders made on 18th December 2015 shall automatically lapse. The effective orders in this matter and Petition shall be as per the decree and orders made in the final judgment delivered by the trial court.

78. In totality, upon our consideration of the pertinent grounds of appeal as urged, we have come to the finding that the trial judge erred in granting final orders at the interlocutory stage; the court erred in granting both the main and alternative prayers; the court erred in acting in excess of jurisdiction in making an order for involvement of stakeholders and formulating its own procedure for recruitment of the Vice Chancellor for Kenyatta University. From the errors identified above, we find that these appeals have merit and are hereby allowed. We order that Ruling and orders made by the trial court dated and delivered on 18th December 2015 be and are hereby set aside in entirety.

DISPOSITIONS AND DETERMINATION OF CIVIL APPLICATIONS Nos. 310 AND 312 OF 2015

79. The appellants filed Civil Applications Nos. 310 and 312 of 2015 seeking orders for stay of execution of the Ruling and orders of the trial court dated 18th December 2015 pending the hearing and determination of the intended appeals. The intended appeals were filed as Civil Appeals Nos. 3 and 11 of 2016. The two appeals have been heard and determined as above. Consequently, we make a finding that the prayers in Civil Applications Nos. 310 and 312 of 2015 have been spent and are overtaken by events. We hereby mark the two applications as spent with no order as to costs.

FINAL CONSOLIDATED ORDERS

80. Upon hearing the two appeals, preliminary objections and the four interlocutory applications in this matter, the final orders of this Court are as follows:

a. *Civil Application No. 317 of 2015 be and is hereby dismissed with costs in the appeal.*

b. *Civil Application No. 318 of 2015 be and is hereby dismissed with costs in the appeal.*

c. *The Notice of Preliminary Objection dated 29th December 2015 filed by the 1st respondent be and is hereby dismissed with no order as to costs.*

d. *Civil Application No. 310 of 2015 be and is hereby marked as spent with no order as to costs.*

e. *Civil Application No. 312 of 2015 be and is hereby marked as spent with no order as to costs.*

f. *Civil Appeal No. 3 of 2016 has merit and is hereby allowed.*

g. *Civil Appeal No. 11 of 2016 has merit and is hereby allowed.*

h. *The ruling of the trial court dated 18th December 2015 be and is hereby set aside in entirety with no order as to costs.*

COSTS

81. The two appeals in this matter have been successful. Ordinarily costs follow the event. However, in this appeal, we are of the view that the parties were not pursuing personal but public interest. Accordingly we order that each party shall bear its/his/her own costs in this appeal.

Dated and delivered at Nairobi this 5th day of April, 2016.

P. M. MWILU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

REGISTRAR