REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)

PETITION NO. 43 OF 2018

—BETWEEN—

MOI UNIVERSITY.....APPELLANT

—AND—

OINDI ZAIPPELINE.....1ST RESPONDENT

KARATINA UNIVERSITY.....2ND RESPONDENT

(Being an appeal against the judgment and orders of the Court of Appeal in Nairobi (Visram, Koome & Otieno JJA) delivered on 14th April 2015)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] On 27th July, 2009 the 1st respondent herein Oindi Zaippeline, was admitted to the appellant University at its Central Kenya Campus located at Karatina, to pursue a three-year course leading to the award of a Bachelor's degree. Little did he know that well over ten years later he would still be trotting court corridors in an endeavour to ascertain the status of his degree. The 1st respondent (Oindi) and 39 others first approached the High Court in the year 2013. Oindi and his mates were not successful at the High Court. While the 39 others gave up their quest for justice, Oindi was unrelenting and so, alone, he appealed to the Court of Appeal. This time he was successful. That now brings the appellant before this Court.

[2] As the apex Court under the Constitution, 2010, we are mandated to settle any constitutional or legal controversies and develop rich jurisprudence taking into

account our own unique circumstances as a country. This is the import of section 3 of the Supreme Court Act.

[3] As we exercise the constitutional and statutory mandate in this matter, we note that there has been a proliferation of institutions of higher learning particularly in the last decade. Indeed, in the replying affidavit sworn on 10th May 2013 and filed before the High Court by the Registrar of the 2nd Respondent, one Duncan Njoroge, it is deponed at paragraph 15 that the 2nd respondent was one of the newly established public universities among 14 others that together brought all Public Universities in Kenya to 22.

[4] Of note is that University Campuses formed fertile grounds for elevation, first into constituent colleges of the existing Universities and thereafter to granting the Charter to operate as fully fledged Universities. It is no wonder that Central Kenya Campus of Moi University went through a similar process, first being elevated to a constituent college of Moi University before eventually being granted a full Charter as Karatina University, the 2nd respondent herein.

[5] At the heart of this transition and of reference to our determination is the place of students who were at various stages of their studies and about to conclude their studies. We remain mindful that the dispute may involve the clash between the regulators and the learning institutions during which the primary concern of the students ends up being relegated to the periphery with their concerns obfuscated in the process.

[6] The 1st respondent together with 39 others took exception when the 2nd respondent sought to graduate them instead of the appellant. To him, by virtue of his admission as a student of the appellant, his legitimate expectation was to be awarded and conferred a degree of the appellant. The 1st respondent and his fellow students at the time did not envisage themselves as alumni of the 2nd respondent, a relatively new and unknown institution compared to the appellant who had admitted them into learning. This sparked off the litigation at the High Court. The

39 others fell by the wayside leaving the 1st respondent to take the path through the resultant appellate process before the Court of Appeal and now before this Court.

[7] Before this Court is the petition of appeal dated 5th November 2018, challenging the judgment of the Court of Appeal at Nyeri (*Visram, Koome & Otieno, JJA*) dated 14th April 2015, in *Civil Appeal No.54 of 2014*. This appeal is founded on Article 163(4)(b) of the Constitution. This follows this Court's decision dated 5th October 2018, reviewing the Court of Appeal's decision declining to certify the matter as one involving general public importance. In that ruling, this Court delineated one issue as involving a matter of general public importance as follows:

> *"[8] Upon consideration of these rival submissions alongside the said principles governing the grant of certification to appeal to this Court, we find that* ***the issue of whether a university can award a degree to a student who was no longer registered with it and whom it did not examine is a matter of general public importance.*** *In the circumstances, we review the Court of Appeal's decision declining certification and grant the applicant leave to file his appeal under Article 163(4)(b) of the Constitution. The costs of this application shall abide the outcome of the intended appeal."*

[8] The appellant seeks to set aside in entirety the Court of Appeal's decision with an order reinstating the judgment of the High Court dated 5th September 2014.

B. BACKGROUND

[9] On 27th July 2009, the appellant admitted the 1st respondent into its Central Kenya Campus at Karatina in the former Central Province to pursue a three-year course leading to an award of a bachelor's degree. "Moi University Central Campus" at Karatina was part of "Chepkoilel University College" which was a constituent college of the appellant. "Chepkoilel University College" is now a fully-fledged university with its own Charter and has never been a party to these proceedings right from the High Court. On 1st October 2010, by **Legal Notice No.**

163 of 2010, the appellant's Central Kenya Campus was transformed into a constituent college known as Karatina University College. The 1st respondent was still undertaking his studies. On 1st March 2013, two months before the 1st respondent's graduation, a Charter for the said constituent college was granted transforming it into a full-fledged university known as Karatina University, the 2nd respondent, a new entity that had not existed before in fact and in law. On completion of his studies, the 1st respondent wished to be awarded a degree by the appellant and not by the new and relatively unknown Karatina University, the 2nd respondent. This inevitably led to the litigation before the courts.

C. LITIGATION HISTORY

i. At the High Court

[10] At the High Court, the 1st respondent and 39 others filed suit, by way of the Plaint dated 24th April 2013, being *Civil Case No. 13 of 2013* seeking, *inter alia,*: -

a) *A declaration that they are students of the (appellant) and are not legally transferable to the (2nd respondent).*
b) *A declaration that only the appellant can administer examinations and issue degree certificates to the (1st respondent) to the exclusion of the (2nd respondent).*
c) *A permanent injunction directed against the (2nd respondent) from purporting to arrogate to itself, either by itself or in collusion with the (appellant) the role of examining and issuing of degree certificates to the plaintiffs without their consent.*

[11] The suit was defended by both the appellant and the 2nd respondent who filed statements of defence on 28th May 2013 and 10th May 2013 respectively.

[12] The appellant's case before the High Court was that the metamorphosis of its hitherto constituent college to a fully-fledged university rendered the prayers sought by the 1st respondent overtaken by events. That the Council of the appellant had powers to, *inter alia*, designate a place as a Campus and deriving its powers from the then Moi University Act (now repealed by the Universities Act 2012) and

in creating the Central Kenya Campus, the appellant did not have the intention of having it metamorphose into a fully-fledged public university but its elevation was a creature of statute, a legal as well as executive policy formulation process which the appellant had absolutely no control. Moreover, this transition was not unique as it had been the case with other institutions including Maseno University, Chepkoilel Campus, Masinde Muliro University of Science and Technology and Kabianga University, all of which were initially colleges of the appellant but are now fully fledged public universities.

[13] The 2nd respondent in its defence contended that Karatina University College established pursuant to Legal Notice No.163 of 2010 to succeed Central Kenya Campus of Moi University was the one that managed and administered all courses and examinations undertaken by the students. The role of the appellant was to monitor and oversee. Further, that Karatina University College was established with a separate legal personality from the appellant and it was the University College that applied for the award of the Charter as contemplated under the Legal Notice No.163 of 2010.

[14] The trial Court (*Wakiaga, J.)* vide a judgment dated 9th May 2014, dismissed the suit with orders that each party bear its costs. The court held that the 1st respondent was a former student of Karatina University College eligible under Paragraph 33 of the Charter to be conferred a degree of Karatina University. The court further held that if the 1st respondent had any legitimate expectation to be conferred a degree by the appellant, the same was extinguished by operation of law. These findings provoked the appeal to the Court of Appeal by the 1st respondent.

ii. At the Court of Appeal

[15] The 1st respondent filed an appeal based on seven grounds that:

i. *The learned Judge erred in law and in fact in misconstruing, a charter to be granting any rights and privileges under the law thereby arriving*

at the wrong conclusion in law thereby occasioning miscarriage of justice.

ii. *The learned Judge erred in law in failing to note that education in Kenya, being voluntary at the university level no order or charter could override the express provision of the mother Act and as such, Article 33 in the Karatina University charter was inapplicable to the appellants herein.*

iii. *The learned Judge fell into error in law in failing to note that the 1st appellant herein was never a student of Karatina University thereby leading to miscarriage of justice.*

iv. *The learned Judge erred in granting a judgment whose effect would be to crystalize academic dishonesty and fraud where a university purports to grant degree certificates for students it never taught.*

v. *The learned Judge erred in law and in fact in being openly biased in his conclusions without affording the plaintiffs' case any consideration.*

vi. *The learned Judge erred in law and in fact in holding that the plaintiff had sued the wrong parties.*

vii. *The learned Judge erred in law by granting a judgment against the weight of the evidence.*

[16] In its decision, the appellate court identified five issues for determination -

a. *What was the nature of the relationship between the appellant and each of the respondents at all material times;*

b. *Did the 1st respondent have an enforceable legitimate expectation to graduate as a student of Moi University?*

c. *Was the 1st respondent's constitutional right to education violated by the appellant and the 2nd respondent?*

d. *Did the grant of a Charter to Karatina University frustrate or annul the relationship between the 1st respondent and the appellant?*

e. *Save for honorary and posthumous awards, can a university confer a degree to a person it has neither taught nor examined?*

The gravamen in the appeal pertained to the interpretation and application of the transitional provisions to the 1st respondent.

[17] In allowing the appeal, the learned Judges of appeal held that the 1st respondent had no contractual and legal relationship with the 2nd respondent in so far as it related to the award and conferment of its degree to him and that relationship lay with the appellant. The appellate court also held that the doctrine of legitimate expectation was inapplicable to the relationship between the 1st and 2nd respondents and that the appellant could perform the contract between itself and the 1st respondent. This finding is on the basis that the subject matter of contract between the appellant and the 1st respondent is still in existence; that there was no dissolution or intervening incapacity of either party; and that there was no supervening illegality or change in law or method to make it impossible for the appellant to discharge its obligation, among others.

[18] As regards paragraph 5(1) of the Legal Notice No. 163 of 2010, the appellate court determined that it was explicit that the degree to be conferred to the 1st respondent by Karatina University College (a constituent college of Moi University) was the degree of Moi University. The appellate court therefore faulted the trial court's interpretation and application of the applicable law on transitional provisions relating to students at Moi University and the doctrines of estoppel and legitimate expectation. Consequently, the appellate court ordered that the 1st respondent be granted a degree of Moi University in accordance with his contract with the said university. Expectedly, the appellant was dissatisfied and moved to this Court, invoking its jurisdiction under Article 163(4)(b) of the Constitution.

D. PROCEEDINGS BEFORE THE SUPREME COURT

i. Appellant's case

[19] The petition of appeal was filed on 5th November 2018 and is supported by an affidavit of Petronila Chepkwony, its legal officer. In summary, the appellant faults the Court of Appeal in the following respects:

a) Failing to find that a university cannot award a degree to a student who is no longer registered with it and whom it has neither taught nor examined;
b) Failing to find that the statutory relationship, created by operation of law between the appellant and the 1st respondent was terminated by the award of the Charter to the 2nd respondent under the Universities Act;
c) Failing to find that there existed a statutory relationship between the 1st and 2nd respondent;
d) Failing to find that the 1st respondent's legitimate expectation could not override the provisions of the Charter issued under statute;
e) Misconstruing paragraph 33 of the Karatina University Charter and purporting to read into it provisions conspicuously absent;
f) Venturing into and assuming jurisdiction over matters of policy and academia which are largely non-justiciable.

[20] The appellant filed submissions on 17th September 2020. The submissions reiterate the grounds set out in the petition of appeal.

[21] Briefly, the appellant submits that the 1st respondent and 39 others were aware that the University College would transit into a fully-fledged university and they continued to register, take courses and pay fees to the University College. This amounted to acquiescence and the 1st respondent is estopped from challenging the process or award to him of the 2nd respondent's degree certificate. The appellant further submits that the 1st respondent should have exhausted an existing remedy under **Rule 23** *of the University (Establishment of Universities) (Standardization, Accreditation and Supervision) Rules, 1989* which provides for appeals to the Minister. The appellant also reiterates that the 1st respondent

became eligible for the award of degree by the 2nd respondent by operation of law which is involuntary. The appellant faults the Court of Appeal for categorizing students into those admitted prior to publication of Legal Notice No.163 of 2010 and those admitted after the Legal Notice and argues that the Court fell into error in descending into policy making.

ii. Respondents' case

[22] The 1st respondent filed submissions on 7th December 2020 albeit through the online portal without the attendant hard copy as required under **Rule 12** of the Supreme Court Rules 2020. Without in any way condoning the partial filing against our rules, we have nevertheless considered the submissions owing to the general public importance nature of the appeal, having certified it as such. In any event, the 1st respondent does not depart from the position he has previously adopted before the superior courts.

[23] The 1st respondent posits that the 2nd respondent was awarded a charter on 1st March 2003 by which time the 1st respondent had two months to complete his studies at Moi University. The 1st respondent contends that the appeal herein concerns the correct legal interpretation of the effects of a charter on **section 79** of the Universities Act and that the Court is under a duty to give guidance to ensure probity and honesty in our education system especially the right to grant students degree certificates from universities, understanding the high esteem some of the universities such as University of Dar es Salaam and the University of Nairobi enjoy in the human resource market.

[24] He urges that he was a student at Moi University at its Central Campus which was later elevated into a constituent college of Moi University before the transition to Karatina University. That therefore, the transition of the Central Campus to Karatina University did not affect the kind of degree that he would receive. In his view, the appeal lacks merit and should be dismissed.

[25] The 2nd respondent filed its response on 22nd November 2020. It associates itself with the appellant's issues, facts, grounds and arguments supporting the petition of appeal. In addition, the 2nd respondent states that the Court of Appeal erred in law and fact in finding that the 1st respondent had legitimate expectation to be graduated by the appellant by disregarding the notice given to the 1st respondent vide paragraph 24(2) of the Karatina University College Legal Order made via legal Notice No.163 of 2010. Further, that it is just to allow the petition as prayed.

[26] In response to the relief sought by the appellant on costs, the 2nd respondent has jointly with the appellant borne costs arising from the decision of the Court of Appeal dated 14th April 2015.

E. ISSUES FOR DETERMINATION AND ANALYSIS

[27] As noted earlier, the matter having been certified as one involving general public importance, this Court delineated the issue *whether a university can award a degree to a student who was no longer registered with it and whom it did not examine is a matter of general public importance.* From the petition of appeal, the appellant raises the following questions for determination:

a) Whether a university can award a degree to a student who is no longer registered with it and whom it neither taught nor examined;
b) Whether the 1st respondent was to be graduated by the appellant or 2nd respondent in light of the current legal regime;
c) Whether the 1st respondent's legitimate expectation could override the clear provisions of law;
d) Who bears the costs of the appeal?

[28] In its written submissions, the appellant frames the following four issues for determination which it proceeds to address:

a) Whether the 1st respondent was a student of the appellant or the 2nd respondent for purposes of the award of the degree;

b) Whether there is alternative remedy for the 1st respondent and acquiescence on his part;
c) Whether the 1st respondent's legitimate expectation could override the clear provisions of the law;
d) Whether the 1st respondent was deserving of the orders sought;
e) Who bears the cost of this appeal.

[29] It is apparent that the appellant extrapolated the issue as framed by this Court in raising further issues beyond that which was set out. As we affirmed the words of Lord Tucker of the House of Lords in ***Attorney-General for Northern Ireland v. Gallagher*** [1963]AC 349 in our decision in ***Dhanjal Investments Limited v Kenindia Assurance Company Limited*** SC Petition No. 7 of 2016 [2018] eKLR**,** it will always be a matter for the exercise of the Court's discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that the appellant can as a matter of right raise any such point.

[30] Examining the issues raised by the appellant, we expected that the submissions would at the very least narrow down or mirror the issues raised in the petition of appeal. It has turned otherwise. We do discern that though the additional issues raised by the appellant are connected with the certified issues, the additional issues may as well be answered as part of or as a consequence of the determination of the certified issue, including as part of reliefs available to the parties before us, if any.

[31] From the foregoing, it is our view that in addressing the stated issue for determination, we bear in mind that these issues are not being raised for the first time before this Court. However, it is the first time the Court is properly seized of them. We aptly captured the present predicament in ***Martin Wanderi & 106 others v Engineers Registration Board & 10 others*** [2018] eKLR (***Martin Wanderi case)*** when we observed as follows:

"*[158] The scenario unfolding in this case brings to the fore the challenges that come with transitions for such institutions of higher learning. The case lays bare the predicaments of students who find themselves victims of policy decisions undertaken without a pragmatic consideration of all the relevant ramifications. This case should be an eye-opener to all stakeholders in the education sector who are charged with overseeing such activities as commissioning and granting of charters to new universities, especially 'upgrade' of constituent colleges to fully chartered universities. The intentions may be noble but the same should not be at the expense of the students affected by such intentions.*"

[32] We also bear in mind that this is a case that we are determining a decade after the cause of action arose. While the law may have since been streamlined to address the predicament, that was not the case at the time this litigation was initiated.

[33] In our view, this matter is best settled upon careful consideration of the statutory provisions as against the prevailing facts at the time. We hasten to add that while the matter may have commenced with the participation of the 1st respondent and 39 others, the subsequent withdrawal of the 39 others renders it unnecessary for us to delve into their respective cases leading us to focus solely on the 1st respondent who is the only one still before the Court.

[34] To contextualize the appeal, a chronological approach suffices. In its decision, the Court of Appeal was mindful of this position and accordingly set out the relevant background facts. We have also set out the background facts in this judgment. From the said facts, it is undisputed that the 1st respondent was admitted to the appellant and placed at its Central Campus based at Karatina, at the time a campus of Chepkoilel University, a constituent college of the appellant. Upon admission, the 1st respondent was a *bona fide* student of Moi University. This is confirmed by a copy of the admission letter dated 14th May 2009 issued by the appellant to the 1st respondent. As per the admission letter, the 1st respondent was

to pursue a course leading to the degree of Bachelor of Science (B.Sc) which would commence on Monday 27th July 2009 as a 1st year student. This brings into perspective the nature of the relationship between the parties.

a) The nature of the relationship between the appellant and the respondents

[35] The nature of the relationship between the respective parties is the foundation of the dispute in this matter. This relationship commenced between the appellant and the 1st respondent with the admission letter issued by the appellant to the 1st respondent. The admission letter was framed as an offer as it contained statements such as "I am pleased to offer you a place in the School of Science," "This offer is on the basis of the statement of your qualifications," "This offer is subject to the satisfactory verification of these qualifications" and "This offer is also subject to the following conditions." The offer for admission was open for acceptance by the 1st respondent in the following words:

> "*If you accept admission under these conditions, then you are requested to sign the enclosed form MUJI/1A*."

[36] The 1st respondent accepted the offer and was admitted to pursue the indicated course. At this juncture, we do not see any difficulty in construing a contractual relationship between the appellant and the 1st respondent. The 2nd respondent was not yet in existence and cannot therefore have been in any relationship with the appellant. Thus, the consideration of the 2nd respondent in whatever manner in relation to the appellant cannot arise. This position is buttressed by the fact that as earlier noted, the appellant had no intention of ever converting its Central Campus to a fully-fledged University. Of course it is not lost to us that a University such as the appellant is established by Statute which sets out the governance and other operational structures as we shall deal with in this matter.

[37] It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as

was observed by **Harris JA** in ***Garvey v Richards*** [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:

> *"[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."*

In terms of the evidentiary value of the contract, section 97(1) of the *Evidence Act* which provides that*:*

> "*When the terms of a contract or a grant or any other disposition of property have been reduced to the form of a document, and in all other cases which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act*,"

suffices.

[38] We are therefore satisfied that indeed the relationship between the 1st respondent and the appellant was contractual. The 2nd respondent was not existing at the time. As noted by the Court of Appeal, the contract cannot exist in a vacuum as education and matters learning institutions are regulated by statutes.

b) The import of LN 163/ 2010

[39] Did the contractual position between the appellant and the 1st respondent change with the publication in the Kenya Gazette of Legal Notice No.163 of 2010

as amended by Legal Notice No.107 of 2011 dated 26th August 2011? What is certain is that the Legal Notice did elevate the hitherto Central Campus into a constituent college of the appellant known as Karatina University College. In his affidavit deposition, Duncan Njoroge while urging the 2nd respondent's position, stated that the conversion of the campus to a constituent college granted the Karatina University College separate legal status independent from the appellant. According to paragraph 5 of the Karatina University College Order, the degrees conferred by the University College were expressly stated to be those of the appellant. In the said affidavit, Duncan Njoroge further deposed that the role of the appellant was to oversee the administration of programes and courses run by Karatina University College. This function was carried out through senate of the appellant mainly for purposes of quality control to safeguard the use of its name on the degrees offered by the constituent college.

[40] The pertinent question that arises from the foregoing is, what then happens to the students? The 1st respondent is adamant that the conversion of the campus into a constituent college did not alter the status of the students in so far as the degrees to be awarded still belonged to the appellant and that the admission and training for the said courses was undertaken by the appellant. In any case, the 1st respondent maintains that he was never issued with any other admission letter, admission number or any other correspondence to warrant any concern as concerns changes to his degree program. On its part, the 2nd respondent postulates that students voluntarily acquiesced to be students of the constituent college within the meaning of the establishing Legal Order by continuing to undertake courses offered by the college, payment of fees and the funding requests made by the students that facilitated the Higher Education Loans Board to directly remit funds to Karatina University and not the appellant. Moreover, the said Legal Notice contained a notice under **paragraph 24(2)** to the students of the intention to obtain a charter converting the College to a University.

[41] The appellant agrees with the 2nd respondent and adds that **section 3** of the Order provided that the University College shall be a successor to the appellant and all rights, liabilities and assets held by anybody on behalf of the appellant's Central Kenya Campus, existing at the commencement of the Order shall be automatically and fully transferred to the University College. To the appellant, the creation of a separate entity with the ultimate intention of making it a chartered university divested it of any further responsibilities and any grievance by the students lay in **Rule 23** of the *University (Establishment of Universities) (Standardization, Accreditation and Supervision) Rules 1989.*

[42] Back to the students, and in particular the 1st respondent. We have considered the record and a perusal of correspondence authored by the constituent college reveals reference to the college as a constituent college of the appellant as part of the official letterhead. In the same breadth, as at 29th September 2011, for instance, when the 1st respondent registered for courses in the academic year 2011/2012 for his third year of study, the first semester (*as per page 233 of the Record*), we note that the application was submitted to the Karatina University College, a constituent college of Moi University.

[43] This discounts the argument that the 2nd respondent independently taught or examined the 1st respondent. Even though the 1st respondent was physically premised at the 2nd respondent's institution, all the circumstances point to the training and examination being done at the behest and/or supervision of the appellant. As already pointed out, the 1st respondent did not have any difficulty with this development since the degree to be conferred upon him would still be that of Moi University, both the Campus and the Constituent College not having been totally unshackled from the appellant's grip.

[44] Surprisingly, it turns out that the undergraduate transcripts issued to the 1st respondent for his first to 3rd year of study (*at pages 197 to 199 of the Record*) were issued by the 2nd Respondent. This is manifestly improper on several fronts. Firstly, the 2nd respondent did not exist in fact and in law prior to the year 2013,

secondly, the 1st respondent did not ever apply to register courses under the 2nd respondent, as aptly demonstrated by the application form alluded to above and thirdly, the Charter establishing the 2nd respondent made no reference to the transition of the students. Paragraph 3 of the Charter only made reference to the 2nd respondent being a successor to Karatina University College and the transfer of all rights, liabilities and assets held on behalf of the College fully transferred to the 2nd respondent. The Court of Appeal in our view appropriately dealt with this issue and we see no reason to disturb the appellate court's sound reasoning.

[45] Did all the students including the 1st respondent automatically become students of Karatina University College? From the above circumstances, we are not persuaded that the establishment of the Constituent College out of the Central Campus automatically affected the status of the students. This is because, the degrees offered to the students would still be those of the appellant notwithstanding that the University College now had a separate legal standing. The contractual engagement between the 1st respondent and the appellant still remained, there never having been a breach, rescission or frustration thereof. The fact that the students were now based in a constituent college of the appellant did not and does not strip them of their status as the appellant's students. This also applies to the payment of fees and processing of Higher Education Loans Board for the public sponsored students which were in any event available to the 1st respondent on the basis of his original and only admission letter.

[46] Counsel for the appellant sought to convince us that registration as a student as contemplated in the Legal Notice is a continuous process manifested in the registration of courses, payment of fees and so on and so forth. He distinguished this from admission which is a one off occurrence. While we may agree with that distinction, we add that the starting point for any student in any institution of learning is admission. Once one is admitted to the institution, there arise the other procedural processes from time to time in the course of the studies. In the present case, it has been sufficiently demonstrated that the 1st respondent was admitted to

only the appellant - initially at its Central Campus then to the constituent college, Karatina University College. Counsel's argument therefore does not come to the aid of the appellant or the 2nd respondent.

c) Charter establishing the 2nd respondent

[47] The promotion of the Constituent College to a University is the fulcrum of the contention in this matter. The appellant maintains that the transition being an operation of law, it is no longer in a position to graduate the 1st respondent as that mandate was yielded to the 2nd respondent. The 1st respondent reiterates that he was still contracted to the appellant. The 2nd respondent is adamant that it already graduated the appellant as it had full legal capacity to do so and submitted a copy of the degree certificate issued on 21st November 2014 to the 1st respondent. From these competing arguments, let us start by looking at the charter.

[48] The Legal Order establishing the constituent college made a transitional provision that the Constituent College would initiate mechanisms to ensure that the charter was granted. Paragraph 32 of the Karatina University Charter revoked Legal Notice No. 163 of 2010. Paragraph 3 of the Charter only made reference to transfer of rights assets and liabilities. As the Court of Appeal rightly interpreted, the transition provision failed to take into account the different categories of students. To understand the effect of the Charter in revoking the University College, **Section 23** of the *Interpretation and General Provisions Act*, (Cap 2 of the Laws of Kenya) is instructive. ***Section 23(3)*** provides as follows: -

> *"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not:*
>
> "23(3)
>
> *a. ...*
>
> b.

c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.

d. ...

e. affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation and such legal proceedings or remedy may be instituted, continued or enforced as if the repealing written law had not been made."

From the above, and the rights of the 1st respondent as a student of the appellant having crystalized and being of a continuing nature, we cannot fathom how the revocation of the College automatically conferred a new status on the 1st respondent. This position is exacerbated by the lack of the definition of the term "student" and the Charter containing inadequate transitional provisions.

[49] Why do we say so? First, a charter resulted into a new status of the institution in form of a University. A charter to a University is granted pursuant to **Sections 19 & 21** of the *Universities Act (2012)*. **Section 19** of the *Universities Act* stipulate, *inter alia,* that the Cabinet Secretary shall recommend to the President the grant of a Charter and under **section 21** of the Act, the Cabinet Secretary shall by notice in the Gazette, publish the Charter granted under **Section 19**. While we agree that the Charter, just like the Legal Notices, is a legal instrument by way of subsidiary legislation, the Charter establishing the 2nd respondent equated the 2nd respondent to the appellant while completing the detachment of the appellant from the 2nd respondent. This is compounded by the fact that pursuant to the grant of Charter, the President appointed a Chancellor and Council members to govern the 2nd respondent.

[50] Second, the Charter did not consider that there were students who were undergoing training in the different courses at different stages of their academic programs. There needed to be a clear mechanism put in place. While the *Universities Act (2012)* defines a *student* as *any person registered in the*

university or an institute offering university education, this definition does not automatically cover the 1st respondent in regard to the 2nd respondent. He was neither admitted nor registered to the 2nd respondent. In fact, the 2nd respondent never existed in fact and law until March 2013 when the 1st respondent was about to sit his final examinations and complete his studies, otherwise under the appellant directly or through its supervision.

[51] Thirdly, in the absence of transition mechanism either in the Universities Act or the Charter establishing the 2nd respondent, we cannot infer an intention to apply the law retrospectively. It is a known legal tenet that for a law to apply retrospectively, the legislative instrument must expressly state so. Applying the principles set out in ***Genrec MEI (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry & Others*** [1994] ZASCA 143; 1995 (1) SA 563 (A) at 572E-F), *Mativo J* in ***Republic v Registrar of Companies & 2 others; Ex Parte Schindler Limited*** [2020] eKLR stated as follows:

> "*22. The general rule is that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation. A further reason for its existence is that the creation of new obligation or an imposition of new duties by the Legislature is not lightly assumed. Thus a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation. Unless a contrary intention appears from new legislation which repeals previous legislation, it is presumed that no repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed.*"

We settled this issue in the case of ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others*** SC Application No. 2 of 2011 [2012] eKLR where we held:

> "*As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature.*"

[52] The argument by the appellant and 2nd respondent that the 1st respondent became a student by operation of law does not hold in the present circumstances, the Charter establishing the respondent not having a retrospective operation clause. **Section 23(3)(c)&(e)** of *Interpretation and General Provisions Act* is explicit that a right, privilege or liability acquired, accrued or incurred is not repealed. In the present case and as was aptly put by the Court of Appeal, the status of students admitted by the appellant could not be automatically conferred to the 2nd respondent.

[53] Even if we were to agree with the suggestion that the 1st respondent was a student of the College and now of the University, how was that achieved from the facts and law before us? There was no new admission letter, admission number or even information shared. The appellant and 2nd respondent submit that the grant of Charter suffices – what they otherwise referred to as operation of law. To the contrary, there is evidence on record that the 1st respondent sought clarification of this status and the status of his education the first time this issue was brought to his attention and no concrete answer was forthcoming other than the imposition of the 2nd respondent on the 1st respondent and his fellow students. Not to mention, the timing of the grant of Charter as it relates to the 1st respondent who had barely two months to the completion of his degree.

[54] As earlier stated, the plight of students caught up in these transitions is always ignored. It only takes the bravest, persistent and most patient of them to

engage in litigation to assert or clarify their legal rights. Some of the matters that have resulted in litigation before the Courts include a ruling delivered at Mombasa High Court by *Kasango, J.* on 25th June 2014, in ***Daniel Muthoka Munyao & 9 others (All Suing for and on behalf of themselves and on behalf of 119 others) v Technical University of Mombasa & 3 others*** [2014] eKLR. In that case the learned judge while observing that Jomo Kenyatta University of Agriculture and Technology was arguing that the petitioners in that matter did not belong to it found that justice demands that the petitioners be placed on the Jomo Kenyatta University of Agriculture and Technology's graduation list despite the fact that Technical University of Mombasa had obtained a Charter.

[55] In ***Jesse Waweru Wahome & others vs. Kenya Engineers Registration Board and Egerton University & Others*** **[2012] eKLR,** *Majanja J.* observed as follows -

> *"102. In a country like ours where citizens place a premium on university education, it is not right to leave graduates in a suspended state where they do not know their fate especially where parents have made sacrifices to educate their children, students have taken out loans from the Higher Education Loan Board and are expected to re-pay these loans and the State has invested tax payers money . . . This is a situation that cries out for justice."*

The appellate court considered and was persuaded by these two cases. We think that they were correctly guided.

[56] A similar situation also arose before us in ***Martin Wanderi case*** in which students were on the verge of losing out on their professional career as a result of transition which led to their respective universities not being readily accredited for the engineering courses that they had been undertaking. In the more recent case before *Korir J.* in ***Victor Andollah Obock & 74 others v Attorney General & 5 others*** [2021] eKLR in which the Court granted a declaration that the petitioners were valid students of the University of Nairobi having been enrolled

at Kenya Polytechnic University College which was a constituent college of the University of Nairobi. A further order was issued nullifying the degree certificates issued to the petitioners by the Technical University of Kenya.

[57] Under the circumstances, in the instant case, we have to agree with the Court of Appeal in its holding that at all times the contractual relationship between the appellant and the 1st respondent subsisted and that there was none in place between the 1st and 2nd respondent.

d) Rule 23 of the University (Establishment of Universities) (Standardization, Accreditation and Supervision) Rules, 1989 and the alternative remedy

[58] The trial Court held that the 1st respondent had recourse under Rule 23 once they were put on notice of the transition by the Legal Order establishing the Constituent College. This is an argument that has been fully embraced by the appellant and the 2nd respondent. However, the Court of Appeal was of a contrary view as it faulted the trial Court for having failed to contextualize the dispute between the parties in this case. The appellate court considered that the dispute in issue revolves around the interpretation and administrative application of the provisions of paragraph 5 of the Legal Notice No. 163 of 2010 and the implementation of the transitional provision in Paragraph 33 of the Charter, there being no grievance relating to the decision by the Commission to grant a Charter to the 2nd respondent.

[59] How then do we resolve this issue? The appellant rightly notes that there is need for exhaustion of existing avenues provided for in statute. This is a principle we have reiterated in ***Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** SC Petition No. 3 of 2016 [2019] eKLR in stating that:

*"[116] The foregoing verdict also finds support in an adage principle in administrative law of "**Exhaustion of Administrative Remedies**" and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance."*

[60] Having said so, what then is the nature of the dispute and what was the existing administrative remedy at hand? ***Rule 23 (1)*** *of the University (Establishment of Universities) (Standardization, Accreditation and Supervision) Rules, 1989* provides that:

"*any person or institution who or which is aggrieved by an act or decision of the Commission taken in accordance with any of the provisions of the rules who desires to question that act or decision or any part of it may within 30 days of the date of such act or decision appeal to the Minister who may give such orders or instructions as he may consider necessary.*"

[61] A plain reading of this rule reveals that the grievance must be against the decision of the Commission. What bothered the 1st respondent? Is it the decision of the Commission to grant the Charter? We do not think so. The 1st respondent was only preoccupied with the institution that would award him the degree and at all times was keen that the same be done by the appellant and not the 2nd respondent. He went ahead to seek clarification and since none was forthcoming he ended up in court. The declaratory reliefs sought before the High Court by the 1st respondent well espouse the protest on his part. In our view, this type of complaint did not lend itself to **Rule 23** as the 1st respondent was not open to appeal to the Minister. At any rate, the Commission for University Education is not a party to the proceedings and no reliefs were sought against it.

[62] Moreover, the 1st respondent's disquiet only materialized upon the actual grant of the Charter establishing the 2nd respondent and only when it became apparent that the 2nd respondent was keen on awarding him a degree within three months of its establishment. As we have stated earlier, it is only the grant of this charter that totally disassociated the 2nd respondent from the appellant and the 1st respondent felt that he would not only be disadvantaged in the human resource market by being a graduate of a relatively new university but also that he had made a conscientious decision to undertake his course at the appellant. It is upon this background that the 1st respondent was not impressed by the possibility of not being associated with Moi University, the 2nd oldest public University in Kenya and instead be a graduate of Karatina University, an institution that had only come to existence months to the end of his degree course.

[63] It is not lost to us that society is replete with various alumni who boast of prestigious education from the ivy league. Locally, it is not uncommon to come across those who obtained their education from "The University of Nairobi" or "University of Dar es Salaam" or "Makerere University" expressing themselves in the elevated context of their institutions of higher learning. The 1st respondent is keen to have the appellant and not the 2nd respondent as his *alma mater*. That is his choice and whether it is far-fetched or not is not for our interrogation. Prestige aside, what is indisputable is the fact of the 1st respondent's rights to education from a university of choice based on a contractual relationship. The fact that we have had other universities established in similar manner and graduated students who did not challenge the same does not in itself validate the position. As the cases involving the other universities are not before us, we comment no further.

e) Justiciability of the present case

[64] As we conclude, we note that the appellant urged us, just as was the case before the superior courts below, not to descend into policy making. Like the superior courts, below we are aware of the legal position on non-justiciability of

matters involving issues of policy in academic matters and/or elsewhere, which are left to the bodies entrusted therewith by statute or regulations. In ***Martin Wanderi case*** we stated:

> "*[159] As a Court, we agree that when it comes to matters of policy formulation, we have a very minimal role to play, in matters education as especially professional training. However, we are cognizant of the fact that where such policy decisions affect the fundamental rights and freedoms protected by the Constitution, then those actions invite this Court and courts in general to intervene and safeguard those rights and freedoms.*"

[65] In ***Daniel Ingida Aluvaala & another v Council of Legal Education & another***, Petition No. 254 of 2017 [2017] eKLR, *Mativo J.* in dismissing the petition expressed himself on the issue as follows:

> "*23. I am also alive to the fact that truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. Therefore, as demonstrated by the authorities cited below, the guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned stands as at today undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies . . .*"

In our view therefore, the question that begs our response is whether the present appeal calls for our intervention for purposes of safeguarding fundamental rights and freedoms protected by the constitution or is an administrative decision subject to judicial review. In responding to this question, we are also mindful that the 1st respondent, when he first approached the High Court, neither sought reliefs under the Constitution nor administrative review prayers. He simply sought very specific prayers.

[66] The distinguishing factor between the case at hand and the above legal principle can simply and easily be encapsulated in the nature of the dispute. The transition itself and establishment of the 2nd respondent do not form the gist of the dispute. Instead, the case portrays the predicaments of students who find themselves victims of policy decisions undertaken without a pragmatic consideration of all the relevant ramifications. The intentions may be noble but the same should not be at the expense of the affected students. While ***Martin Wanderi case*** was an eye-opener to all stakeholders in the education sector who are charged with overseeing such activities as commissioning and granting of charters to new universities, especially 'upgrade' of constituent colleges to fully chartered universities, the present case should put the matter to rest.

[67] We are persuaded that this matter falls within the limited contours warranting our intervention. The matter largely revolves around the transitional statutory and regulatory regime which is well within court intervention. We have not been called upon to interrogate the quality or qualification for the award of degree or to otherwise descend into policy making. As we understand the case before us, we are merely asked to determine who between the appellant and the 2nd respondent should award the degree to the 1st respondent and those in similar predicaments.

f) Appropriate relief

[68] The main issue on which relief is sought is whether a university can award a degree to a student who was no longer registered with it and whom it did not teach or examine.

[69] The appellant submits that the 1st respondent continued to be taught and examined in the year 2013 when he was in 4th year. To the appellant, Statute XXIII of Moi University at paragraph 1 provides that a candidate cannot be awarded with a Bachelor of Science in Horticultural Science unless the student has undertaken approved courses and satisfied the requirements of the University for at least three academic years. That the integrity and quality of a university degree will be watered

down, diluted and rendered questionable if the appellant was to award the degree by a fiat of a court order without the 1st respondent having been taught, examined and certified by the appellant's senate. To the appellant, this would go against public policy as the appellant's senate cannot ascertain that the 1st respondent had taken approved courses and satisfied the requirements of the appellant when he had been taught and examined by an independent 2nd respondent.

[70] The appellant refers us to our decision in the ***Martin Wanderi case*** and in particular to paragraph 161 where we quoted the High Court when it held:

> *"The position of Moi University in these proceedings is somewhat different. In this respect, I agree that once the students of the former Western Campus of Moi University were incorporated into MMUST by operation of law, Moi University ceased to have any responsibility for them. As I have found, the petitioners lawfully graduated from MMUST and Moi University cannot in law be responsible for their predicament. I therefore find and hold that there is no cause of action against Moi University*."

[71] With respect, we cannot agree with the appellant's assertion. A literal perusal of our own position in paragraph 161 of the ***Martin Wanderi case*** is that the issue of ordering the award of Moi University degrees to the petitioners therein was not properly before us for consideration. The quotation of the High Court decision was only one of the reasons for our holding as the issue had not been appealed to the Court of Appeal or even Supreme Court. We went further to give two other reasons in paragraph 162 and 163 including that the petitioners in that matter had already presented to the Engineers Registration Board their degree certificates from Masinde Muliro University of Science and Technology for registration. Consequently, the position expressed in ***Martin Wanderi case*** is distinguishable and inapplicable in the manner portrayed by the appellant.

[72] In the end, we have done more than enough to demonstrate who had taught and examined the 1st appellant. We need not rehash the same. As at 1st March 2013 when the 2nd respondent was operationalized and formally came into existence, the

appellant's senate was still seized of the academic program for those students physically based at the premises which now became the 2nd respondent. It is not practical that the 2nd respondent was in a position to teach, train and examine someone who was already in the final year of study with two or so months left.

[73] The mere fact that the 2nd respondent's senate was empowered under paragraph 24(4)(j) of the Charter establishing the 2nd respondent to approve the award of degrees, that function was not exclusively limited to approval of awards of degrees from the 2nd respondent. Paragraph 24(4)(k) of the Charter empowers the senate to determine which qualifications or credits from other Universities or institutions shall be acceptable as equivalent to particular qualifications of the University. This can be the only basis upon which the Degree Certificate was eventually issued to the 1st respondent on 21st November 2014 by the 2nd respondent. The 1st respondent has not acquiesced and never attended the graduation ceremony or took the certificate, unlike those students in Masinde Muliro University of Science and Technology referred to in the ***Martin Wanderi case***.

[74] Under the circumstances, should we impose the 2nd respondent's degree certificate on the 1st respondent? We do not think so. The appellant did not discharge its obligation towards its students by contract, operation of law or otherwise. None of the parties may have been at fault as all parties seem to have been caught up in the unraveling events. This highlights our initial rallying call to the stakeholders to be keen when undertaking the otherwise noble activities of expanding university education outreach through the commissioning and granting of charters to new universities, especially by way of upgrading of constituent colleges. There is such a thing as public participation as directed by Article 10 of our Constitution, 2010 which is not cosmetic.

[75] The greater good is served by upholding the sanctity of the appellant as weighed against condoning an academic status founded on unsound legal basis. The fact that the 2nd respondent had already issued the degree certificate to the 1st

respondent does not automatically validate the same. The 1st respondent is entitled to a degree from his contracted university, to wit, the appellant herein.

[76] Will our finding open floodgates as feared by the appellant and 2nd respondent? We do not think so. This finding is only limited to clarifying the legal position obtaining in regard to the 1st respondent and his fellow students at the time. Unlike the 1st respondent, the other affected students seem to have acquiesced to the award of their degrees by the 2nd respondent. Besides, the other affected students are not before this court. Further, it is over a decade since the universities were granted the charters. Any opener of the floodgates would have to surmount limitation of actions and laches considering the time lapsed.

[77] As for costs, the appellant prays for a refund of the costs paid as a result of the decision of the Court of Appeal. The appellant also prays that the 1st respondent bears the costs of this appeal. The 1st respondent prays for the appeal to be dismissed with costs. In response, the 2nd respondent indicates that it has jointly with the appellant borne costs arising out of the appeal. Considering that the nature of the proceedings is that involving general public importance and considering the need to clarify the issues in dispute, it does not serve any purpose to award any costs as against any of the parties. This is more so owing to the fact that no party may be at fault for the situation at hand.

[78] Before we conclude, we would like to appreciate all counsel herein for their industry in assisting the court by way of research, submissions and arguments made. Mr. Wekesa and Mr. Kisaka appeared for the appellant, Mr. Karweru for the 1st respondent and Ms. Mumbi for the 2nd respondent. You all did well.

F. DISPOSITION AND FINAL ORDERS

[79] In the end, the appeal herein fails with the result that we affirm the decision of the Court of Appeal rendered on 14th April 2015 at Nyeri in *Civil Appeal No.54 of 2014* in the following terms:

i) In the absence of a proper mechanism set out in the transition legislation to specifically address the fate of the students in a Campus of an existing Public University which transforms to a constituent college and eventually granted a Charter to a fully-fledged University, the students who were initially admitted by a University and posted to its Campus remain the students of that University and entitled to be graduated by the said University;

ii) The degree awarded to the 1st respondent by the 2nd respondent and issued on 21st November 2014 be and is hereby nullified;

iii) The appellant to award the 1st respondent the degree for which he was admitted to study, was trained on and qualified in;

iv) There shall be no order as to costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 17th **day of** June **2022**

..... **.....**

P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

..... **.....**

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR
SUPREME COURT OF KENYA