



**Republic v Cabinet Secretary, Ministry of Education Science & Technology & another;
Karatina University & 2 others (Interested Parties); Omutata (Exparte) (Application
350 of 2019) [2022] KEHC 18058 (KLR) (Judicial Review) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 18058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 350 OF 2019
J NGAAH, J
SEPTEMBER 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**CABINET SECRETARY, MINISTRY OF EDUCATION SCIENCE &
TECHNOLOGY 1ST RESPONDENT**

HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

KARATINA UNIVERSITY INTERESTED PARTY

AND

OKIYA OMUTATA EXPARTE

AND

PROF. LOUIS M. MUMERIA INTERESTED PARTY

DR. JOHN KOBIA ATAYA INTERESTED PARTY

JUDGMENT

- 1 Vide a gazette notice no 10762 dated November 8, 2019, the Cabinet Secretary for education appointed Prof Louis M Mumeria to be the chairperson of Karatina University Council for a period of three years with effect from November 8, 2019. In the same gazette notice, the appointment of Dr Julius Kobia who was then the chairman of the University Council was revoked with immediate effect.



- 2 While appointing the new chairperson and revoking the appointment of the existing chairperson of the University Council, the Cabinet Secretary for Education stated in the Gazette notice that he was exercising powers conferred upon him by section 36(1)(a) of the Universities Act, 2012.
- 3 The present suit questions the legality of this gazette notice and, in particular, the appointment of the new chairperson and revocation of the appointment of the previous chairperson of Karatina University Council.
- 4 The suit is by way of a motion dated 23 December 2019 and filed in this Honourable Court on January 10, 2020. It is brought under Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules; sections 8 and 9 of the Law Reform Act, Cap 26. It seeks the orders of prohibition, *certiorari* and mandamus against the impugned Gazette notice. The prayers for these orders have been couched as follows:
1. That an order of prohibition do (sic) issue, prohibiting the respondent herein, and any person acting under its (sic) behest or direction, in purported enforcement of the 1st respondent's decision, vide the issuance on November 15, 2019 of Gazette Notice No 10762 dated November 8, 2019, appointing Prof Louis M Mumeria to be the chairperson of Karatina University Council, for a period of three (3) years, with effect from November 8, 2019, and simultaneously revoking the appointment of Dr John Kobia Ataya was (sic) appointed to the office vide Gazette Notice No 2336, dated March 10, 2017.
 2. That an order of *certiorari* do (sic) issue, to bring into this Honourable Court for purposes of being quashed, and to be quashed, the 1st respondent's Gazette Notice No 10762 dated November 8, 2019, and published in the Kenya Gazette on 15th November, 2019, appointing Prof Louis M Mumeria to be the chairperson of Karatina University Council, for a period of three (3) years, with effect from November 8, 2019, and simultaneously revoking the appointment of Dr. John Kobia Ataya was (sic) appointed to the office vide Gazette Notice No 2336, dated March 10, 2017.
 3. That an order of mandamus do (sic) issue, to compel the respondent to reinstate Dr John Kobia Ataya as the chairperson of Karatina University Council.”
- 5 The application was based on the statutory statement dated December 9, 2019 and the verifying affidavit sworn by the applicant on even date.
- 6 The statement and the verifying affidavit are relatively lengthy but the applicant's case is fairly simple: that Gazette Notice No 10762 dated November 8, 2019 is *ultra vires* the Universities Act and various provisions of the Constitution.
- 7 The undisputed evidence is that vide a gazette notice no 2336, dated March 10, 2017 the Cabinet Secretary for Education, in exercise of powers conferred upon him under section 36 (1)(a) of the universities Act, 2012 appointed Dr John Kobia Ataya as the chairperson of the council for Karatina University. The appointment was for a period of 3 years with effect from March 10, 2017. Other members appointed to the council together with Dr Ataya were named as David Nguri Nguchu, Rose Chebeda Ouko and Okatch Felix Owaga. Others were Doris N. Mutta and John Kanyakiri.
- 8 It is also not in dispute that by a subsequent Gazette Notice No 10762 dated November 8, 2019, the cabinet secretary revoked the appointment of Dr John Kobia and replaced him with Prof Louis M Mumeria as the chairman of the University Council.
- 9 Indeed, the 1st respondent admits these facts and the only point raised in the replying affidavit sworn on January 18, 2021 by Ambassador Simon Nabukwesi in response to the application is that according



to section 51 of the *Interpretation and General Provisions Act*, cap an appointing authority has power to revoke the appointment.

- 10 I must hasten to say that this is more or less a legal question which ought to be addressed as such in submissions and not as evidence in an affidavit.
- 11 Perhaps, the only crucial point in this affidavit is that notwithstanding the impugned gazette notice, Dr John Kobia served his full term which expired on March 9, 2020 courtesy of the order obtained from this Honourable Court staying the implementation of the impugned gazette notice, pending the hearing and determination of this suit.
- 12 The only other replying affidavit on record is by Prof Louis Mumera who also does not dispute the material facts relating to his appointment as the chairman of the University Council and the revocation of appointment of Dr John Kobia Ataya.
- 13 His case is simply that he responded applied for the position of the chairperson of the University Council after it had been advertised in the Government media. He was appointed to this position after what he described as ‘a vigorous and competitive’ interview. However, he could not assume office because he was served with a court order suspending his appointment. The term of his would-be predecessor lapsed on March 9, 2020.
- 14 He also made what, in my humble view, is a curious deposition, that the move to revoke the appointment of Dr Kobia as the chairperson of the council before the expiry of his term was informed by the fact that Dr Kobia had secured an alternative job at Great Lakes Regional University in Uganda and that the absence of a substantive holder of the office of chairperson of the University Council would have had a negative impact on the running of the institution.
- 15 I have considered the application together with the submissions filed by the applicant, the respondent and the 3rd interested party on the positions they have adopted in support of their respective cases.
- 16 Going by gazette notice no 2336, dated March 10, 2017 under which Dr John Kobia Ataya was appointed for period of three years, his term of office expired on March 9, 2020. He served his full term and to this extent, the gazette notice no 10762 dated November 8, 2019 which purported to revoke his appointment was rendered of no consequence.
- 17 It follows that when the parties appeared before me for the first time on June 16, 2021 to confirm that they had filed their submissions, this suit was as good as moot. Once Dr Kobia served his full and the impugned gazette notice rendered ineffective, the appropriate course the applicant ought to have taken is to have the suit withdrawn.
- 18 Any further deliberation on this suit would be for academic purposes and even if the orders sought were to be granted, they would be rendered futile.
- 19 Everything else being equal, it is a suit that would have succeeded because section 36 (1)(a) of the Public *Universities Act* which the cabinet secretary invoked in revocation of the appointment of the 2nd interested party does not give him that power. That section only authorises the cabinet secretary to appoint and not to revoke appointment made. The entire section 36 (1) which would be relevant to the question at hand reads as follows:

36. Council of a public university

- (1) The council of a public university or constituent college of such a university shall consist of nine persons appointed by the Cabinet Secretary as follows—



- (a) chairperson;
- (b) the Principal Secretary in the Ministry for the time being responsible for the university education;
- (c) the Principal Secretary in the Ministry for the time being responsible for Finance;
- (d) five members appointed by the Cabinet Secretary through an open process in such a manner as may be prescribed in guidelines issued by the Cabinet Secretary; and
- (e) the Vice-Chancellor or, in the case of a constituent college, the Principal of such college who shall be an ex officio member of the Council.

20 The powers of the cabinet secretary under this section do not extend to revocation of appointment or appointments already made. For the avoidance of doubt, circumstances under which a member of the university council may leave the council are captured under section 8 of the *Universities Act*. That section reads as follows:

8. Vacancy of office

- (1) Subject to the provisions of this Act, the office of a member of the Commission shall become vacant if the member—
 - (a) resigns by notice in writing addressed to the Cabinet Secretary;
 - (aa) is absent from three consecutive meetings of the Commission without the permission of the Chairperson, or, in the case of the Chairperson, the permission of the Cabinet Secretary;
 - (b) is unable to perform the functions of office by reason of prolonged physical or mental incapacity;
 - (c) is adjudged bankrupt by a court of competent jurisdiction or enters into a composition or scheme of arrangement for the benefit of creditors;
 - (d) is guilty of gross misconduct;
 - (e) fails to meet the requirements of Chapter Six of the *Constitution*; or
 - (f) is convicted of an offence and sentenced to imprisonment for a period of six months or more.
- (2) Where the office of a member of the Commission becomes vacant, the Cabinet Secretary may, subject to the provisions of this Act, appoint another person to fill the vacancy for the remainder of the term of such member.
- (3) Notwithstanding the generality of the foregoing, any member of the Commission suspected of having contravened Chapters 6 or 13 of the *Constitution* shall vacate office to pave way for investigations.
- (4) Where a person who has vacated office under subsection (3) is not found culpable of any unlawful act by a competent legal authority, the person shall be reinstated to the position of a Commissioner.



(5) The First Schedule shall apply with respect to the conduct of the business and affairs of the Commission.

21 The commission referred to here is the Commission for University Education established under section 4 of the Act but these provisions apply mutatis mutandis to the office of the University Council by virtue of section 36(4) which states that “the provisions of section (8) relating to the vacancy of office of the chairperson and members of the Commission shall apply with necessary modifications to the chairperson and members appointed under subsection (1) (a) and (d). 36(4) of the Act.”

22 It is quite clear from this section, in particular section 8(2), that the cabinet secretary may only intervene when the office of a member becomes vacant in which event the cabinet secretary may appoint a replacement to serve the remainder of the term.

23 Although the Honourable Attorney General has urged that section 51 of the *Interpretation and General Provisions Act* would apply in the absence of an express provision in the *Universities Act* giving the cabinet secretary the power to revoke an appointment of a council member, or a chairperson of the University Council for that matter, I am not persuaded that the cabinet secretary would have such drastic powers without express provisions to that effect. That section reads as follows:

Power to appoint to include power to suspend, dismiss, etc., and to reappoint, etc.

1 Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.

2 Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears be exercisable only upon that recommendation or subject to that approval or consent. (Emphasis added).

24 The power of a person to revoke an appointment under this section is qualified where it is clear that there is a contrary intention. A contrary intention in this case would be that if the legislature intended the cabinet secretary to revoke the appointment of a chairman of a University Council, it would have clearly stated so.

25 A fortiori, the appointment to the University Council is a culmination of what I understood the 3rd interested party to say is a rigorous interview. Membership to the Council and the position of the chair are competitive positions and those appointed to the council must either prove their worth or that their appointment is by virtue of the positions they hold in particular government departments.

26 It follows that it cannot have been the intention of Parliament that members of the Council would be recruited competitively only for the cabinet secretary to revoke their appointment arbitrarily.

27 It is also worth remembering that according to section 4 of the *Fair Administrative Action Act*, No 4 of 2015, the 2nd interested was entitled to explanation and the reasons, at the very least, for the administrative action taken against him by the cabinet secretary. That section reads as follows:



4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action. (Emphasis added).

28 It cannot be doubted that the revocation of the appointment of the 2nd interested party affected him or, at least, was bound to affect him adversely. And, therefore, under section 4(2) and (3) of the *Fair Administrative Action Act*, he was entitled to be given written reasons for the administrative action taken against him. Since the action also affected his right to employment and to a livelihood, the cabinet secretary was under obligation to comply with the conditions laid out in section 4(3) of the Act.

29 But for the application having been overtaken by events, I am persuaded that the applicant had made out a case warranting the judicial review orders sought. The impugned gazette notice was tainted by illegality, irrationality and procedural impropriety.

30 I will dismiss the application not because it is want of merit but because the grant of orders sought would be in vain. A court of law does not issue vain orders. Parties will bear their respective costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 23 SEPTEMBER, 2022

NGAAH JAIRUS

JUDGE

