**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PETITION NO. EOO3 OF 2020**

**IN THE MATTER OF ARTICLES 1,2, 3(1),19,20,21,22,23,258 AND 259 OF**

**THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 10, 28, 29,43,47,48 AND 50 OF**

**THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF THE UNIVERSITIES ACT, ACT NO.52 OF 2012**

**AND**

**IN THE MATTER OF SECTION 22 OF THE STATUTORY INSTRUMENTS ACT,**

**ACT NO.23 OF 2013**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,**

**ACT NO.4 OF 2015**

**BETWEEN**

**KEPHA OMWENGA ORINA.....PETITIONER**

**VERSUS**

**EGERTON UNIVERSITY.....1ST RESPONDENT**

**THE VICE-CHANCELLOR, EGERTON UNIVERSITY ... 2ND RESPONDENT**

**RULING**

1. In **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** the court of appeal stated:

> *1. …It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?*
>
> *2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."*

2. It is for the above reason that I must deal with the Preliminary objection dated 21st October 2020 in opposition to the Petition herein. In that Preliminary Objection the respondents contends that this court does not have the jurisdiction to entertain and /or deal with the matter herein, and that that the matter is an abuse of the court process and in any event it is *res judicata.*

3. The parties agreed, through their counsel Mr. Konosi for the Petitioner and Mr. Kisilah for the respondents that they file submissions addressing the Preliminary Objection and the Petition so that the court would deal with the issues all at once.

4. A ***Preliminary objection*** was defined in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Limited (1969)EA 696** in the following terms:

> ***"…A Preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration……***
>
> ***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."***

5. Should I find that I do not have jurisdiction to deal with this matter then it will not be necessary to go into the other issues.

6. The petitioner herein lodged a petition dated 30th September 2020. He alleges violation of **articles 10, 28,29,43,47 and 48 of the Constitution.**

7. At Paragraph 33 of the Petition the Petitioner avers he was employed by the 1st respondent as an Administrative Assistant in January 1995 and while so employed he enrolled for the 1st Respondent's Masters of Business Administration (Human Resource Management) Degree under Registration Number CM11/00170/04. That he pursued the said academic programme between 2004 and 2007, resat the MBAD 681 course and passed with grade C and 1st respondent conferred on him the Masters of Business Administration (Human Resource Management) Degree on 10th August 2007 at its 18th graduation ceremony and consequently he was promoted to the position of Assistant Registrar.

8. That sometimes in 2019 the 1st respondent received an anonymous complaint that he was conferred the degree without satisfying the Board of Examiners in the MBAD 681 Course. This led to the launch of an investigation by the Integrity Promotion Committee.

9. As a result of this investigation, he learnt, on the 3rd of October 2019 through a verbal information from the 2nd respondent that the Vice Chancellor Administration Planning & Development had been instructed to remove his name from the list of those who were to be interviewed for review and promotion to the grade of Senior Assistance Registrar.

10. The following day on the 4th of October 2019, he demanded to be granted access to his academic records. When this was not forthcoming, he filed the Petition **Nakuru High Court Petition No. 28 of 2019 Kepha Omwenga Orina vs Egerton University & Anor** seeking declarations *inter alia* that his rights under **Articles 35(1)(a) and (b) of the Constitution** had been violated, and sought orders compelling the respondents to give him the access he was seeking.

11. In January 2020 he learnt that he had been excluded from interviews for review and promotion and upon complaining the respondents told him that the investigations were still ongoing and that his promotion interview would await the outcome of the investigations. The respondents then proceeded to conduct the interviews in the exclusion of the petitioner.

12. Out of a replying affidavit filed in the above Petition **Nakuru High Court Petition No. 28 of 2019 Kepha Omwenga Orina vs Egerton University & Another** sworn by one *Samwel Mwangi Kariuki* dated 27th November 2019 he learnt of the process that had led to his exclusion from the promotion interviews. The reason was that the investigations had been carried out by an *ad hoc* committee appointed by the 2nd respondent which had made its report, tabled it before the Senate of the 1st respondent and which Senate had adopted the report, together with its recommendations to wit: that he be given a chance to clear the "F" in the MBAD 681 course, redo the unit in which he was given a credit transfer since there is no provision for Credit Transfer (CT) at the Master level for candidates under direct admission, and after doing this his case would be determined. In the meantime his Master's Degree Certificate would be withdrawn, and investigations would be launched with respect to the whole 2004 cohort which the Petitioner six other students belonged. The Committee would present their report to the Senate after three (3) months on 12th June 2020, for further action.

13. It was the Petitioner's position that all these actions were irrational, unreasonable, illegal and unconstitutional, and were causing him irreparable loss and damage, which this court had the power to stop through the following orders;

> *(a) A Declaration that the 1st Respondent's Charter dated 19 March 2013 and statutes made thereunder are unlawful, illegal, null and void by reason of not having been gazetted as required by the mandatory provisions of sections 21 and 23 of the Universities Act, 2012 and section 22 of the Statutory Instruments Act, 2013.*
>
> *(b) A Declaration be issued that the existence and operation of the 1st Respondent is illegal and unlawful and all its actions taken from the year 2013 be declared unlawful, illegal, null and void by reason of operating under a Charter and Statutes which have not been gazetted as required by the mandatory provisions of section 21 and 23 of the Universities Act, 2012 and section 22 of the Statutory Instruments Act, 2013.*

*(c) A Declaration that the 2nd Respondent has no powers to appoint any Ad hoc Subcommittee of the 1stRespondent's Senate without its express permission and authority.*

*(d) A Declaration that the investigations and report of the Corruption Prevention Committee relating to the Petitioner are unlawful, illegal, irregular, ultra vires, null and void and against the rules of natural justice*

*(e) A Declaration that the investigations and report of the Ad hoc Senate Subcommittee appointed by the 2nd Respondent on 27th November 2019 and the entire proceedings of the 1st Respondent's 509th special senate held on 10th March 2020 relating to the Petitioner are unlawful, illegal, irregular, ultra vires, null and void and against the rules of natural justice.*

*(f) A Declaration that the Respondents have violated the Petitioner's rights under Articles 10, 28, 29(d), 43(1), 47 and 50(1) of the Constitution.*

*(g) An order of certiorari be issued to bring into this court for purposes of washing and to quash the reports of the 1st Respondent's Corruption Prevention Committee and Ad Hoc Senate Committee and the decision contained in minute 981/2020 of the 1st Respondent's 50th special senate held on 10th March 2020 to the effect that:*

***(i)** The Petitioner be given a chance to clear the "F" in MBAD 681*

***(ii)** The Petitioner plans to redo the unit in which he was given a credit transfer since there is no provision for Credit Transfer (CT) at the Master level for candidates under direct admission*

***(iii)** After the Petitioner satisfies i) and ii) above the determination of his case can be made.*

***(iv)** The Petitioner's Master's Degree certificate be withdrawn*

***(v)** The committee investigates the whole 2004 cohort which the Petitioner and the six (6) students belonged, and present a report to the senate after three (3) months i.e. 12th June 2020, for further action*

***(vi)** The committee to Co-opt Dr. Patricia Wambugu, the Director, Quality*

*(h) An order of prohibition, prohibiting the Respondents from withdrawing the Petitioner's Master of Business Administration (Human Resource Management) Degree or subjecting the Petitioner to any proceedings which may lead to the withdrawal of the said degree.*

*(i) An order that the Respondents pay the Petitioner damages for violation of his rights under Articles 10, 28, 29(d), 43(1), 47 and 50(1) of the Constitution.*

*(j) Costs of the Petition.*

*(k) Such orders as this Honourable Court may deem fit to grant.*

14. In their submissions on the Preliminary Objection Counsel made submissions on the issue whether this court has the jurisdiction to deal with this matter. The respondent cited the Court Of Appeal case of **Gabriel Mutava & 2 Others vs. Managing Director Kenya Ports Authority & Anor. (2016) eKLR,** an appeal from the Judgment of *Makau J* where the court observed:

> ***Makau, J. isolated the issue for determination as being whether the termination of the appellants' employment was unconstitutional and therefore null and void for breaching the Regulations and rules of natural justice. His verdict after considering the pleadings, the rival submissions and the law was that the decision by the respondents to retire the appellants in the public interest was in breach of the Regulations and indeed, the rules of natural justice. However, he proceeded not to grant any remedies sought by the appellants in the Petitions by holding that their remedy lay not in constitutional agitation. Rather the appellants should have approached the court by way of a plaint to enforce their rights under the contract of employment which was basically codified in the Regulations.***

The Court of Appeal was of the view that;

> ***"Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation."***

**15.** The court having cited **Harrikissoon v Attorney General [1980] AC 265**, Re Application by **Bahadur [1986] LRC (Const) 297**, a case from **Trinidad & Tobago**, and the South African case of **SA Naptosa & Others v Minister of Education Western Cape & others [2001] BLLR 338 at 395 went on to state:**

> **"Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the**

**constitutional rights. In the case of Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, this Court observed:-**

**"……Citing the case of Alphonse Mwangemi Munga & Others vs African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference.**

**Having heard counsel submit on this issue of jurisdiction and also having gone over the nature of the pleadings as placed before the High Court as well as the manner in which that court found and determined the reference, we do not discern any fault on the part of the learned judge. We say so because the drafting, tenor and substance of the reference before her was essentially on breach of terms of employment. All this shines through the quotations (above) from the petition as regards the orders, and prayers stated. The appellant was hired by the 1st respondent as Deputy Vice Chancellor according to the Kenyatta University Act. In alleged breach of that employment contract, the 1st respondent allegedly sent him on compulsory leave, suspended him from duty and stopped his emoluments before finally firing him. So the appellant had gone before the High Court for declarations/orders that the compulsory leave was void, terminating his employment should be halted and he should be paid compensation. To my mind, this petition was essentially an employment claim that should have gone to the Industrial Court in accordance with Article 162 (2) (a) above, and the learned judge rightly declined jurisdiction over it…."**

Then there is the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR,** where this Court again emphasized:-

**"…In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.…"**

16. In the light of the foregoing the respondents submitted that the petition raises no constitutional issues. That there was a procedure for redress of petitioner's grievance prescribed by the law, and by virtue of the Petitioner still being an employee of the 1st Respondent since January 1995 to date, it was evident that the dispute herein was primarily resultant of the existing employer-employee relationship it ought to draw the jurisdiction of the Employment and Labour Relations Court.

17. It was the Petitioner's submission that whether or not this dispute arose within the context of employee employer relationship was a question of fact that would require the adducing of evidence. That the respondent's submissions, that this court did not have jurisdiction because the claim was that this was an employer employee relationship which ought to be dealt with by the ELRC was untenable. That he was seeking declarations and an order of *certiorari* to quash the decisions and reports of the Corruption Prevention Committee, the *Ad Hoc* Committee and the 1st respondent's Senate with regard to the Petitioner. In his view the investigations and reports were about his MBA Degree and had nothing to do with his employment but everything to do with his student relationship with the respondents. He argued that this court was bestowed with jurisdiction by **article 23 (1) and 165(3) (b) of the Constitution**.

18. I have carefully considered the entire petition, the rival affidavits and the submissions. I have also considered the same with regard to the question at hand whether the court is clothed with the jurisdiction to handle this matter. It is not in dispute that the Petitioner is an employee of the 1st respondent, and that it was as such that he joined the 1st respondent's MBA class.

19. It is also not in dispute that the issue of the MBA Degree is woven to the position the Petitioner holds as an employee of the 1st respondent.

20. It is the Petitioner's case that his exclusion from the promotion interviews was a direct result of the investigations related to the credibility and or legitimacy of his MBA degree meaning that the employment status and promotions were either unmerited or at risk or both. It is noted that he was employed as an administrative assistant. Following his attaining the master's degree he was promoted to the position of Assistant Registrar. At the time of the anonymous complaint and the investigations by Integrity Promotion Committee, he was due for review and promotion for the position of Senior Assistant Registrar. This is very clear from the letter dated 4th October 2019 from his advocate to the 2nd respondent. It states :

*"Our client views the chain of events as geared towards ensuring that he is left out of those who should be interviewed for promotion. The purpose of this of this letter is to request you which we hereby do that you confirm to us in writing that you have indeed requested the DVC AP&D to remove our client's name from those who are scheduled to be interviewed for review and promotion.*

21. In another letter dated 15th January 2020 from his advocates to the 2nd respondent, reference was made to a letter dated 29th October 2019 in which the Respondents had stated that the Petitioner's name had not been excluded as alleged. The petitioner expressed concern that others had been called for the interviews by way of short message texts to attend the interview while he had not been invited. according to his advocates the purpose of the letter was;

*" …to demand from you, which we hereby do, that you include our client in the list of those to be interviewed, formally invite him to attend the interviews and consider his eligibility for review and promotion on merit."*

22. Counsel for the applicant made it clear that failure to comply would result in a suit to protect the petitioner's rights.

23. This letter drew a response from the Respondents counsel calling for the petitioner's patience to await the investigations and to the effect that there was an internal investigation of the credibility and validity of the petitioner's MBA degree that it was within the mandate of the Respondents to conduct such investigations for the public good and in any event the investigation was still live. That letter pointed out that petitioner's

> *"…qualification and possession of the master's degree incidentally is one of the indispensable requirements for the position for which he was to be interviewed. It is therefore only logical that his interview awaits the outcome of the investigation…to the extent that one of the key qualifications for his promotion is in question, he would certainly not meet the criteria…it would be subversive of university processes."*

24. In response the Petitioner's counsel wrote on 21st January 2020 raising the legality of the process undertaken by the Integrity Promotion Committee. He took the position that only the Senate or a Committee constituted by the Senate could investigate academic issues. That the Petitioner had a valid degree issued by the Senate;

> *"…and until it is recalled or revoked by the Senate it remains a valid document... the best your client could have done is to give our client a chance to appear before the interviews (sic) and if at all the allegations against him are found to be meritorious, your client would be free to take any action including demoting him if he passes the interview''*

25. A response to this letter returned dated 22nd January 2020. Counsel for the Respondents pointed out that the petitioner could not demand to be interviewed. That the petitioner's counsel had indeed conceded that the Senate was the body mandated to inquire into the validity of academic degrees conferred by the University which power included the power of recall in appropriate cases. That the petitioner had not been presumed guilty by the respondents and that was the reason he was still performing his duties pending the investigations.

26. All these facts are set out by the Petitioner in his petition.

27. I have set these facts out to demonstrate why my understanding of the matter is that the reason for this petition is the Respondent's action of omitting the Petitioner's name from the list of those who were to be interviewed for promotion. This action, of omitting the petitioner from the list of those to be interviewed for promotion was predicated on the respondents' internal investigative mechanisms with respect to the petitioner as their employee and not as their student.

28. Based on the foregoing conclusion I am therefore certain that the dispute herein is between an employee and employer.

29. While an employee has certain entitlements including upward motion within the organization through promotion interviews the employer is entitled to question the eligibility of that employee to occupy certain positions and if an employee's papers are questioned, I do not see any violation or threat to violation of a constitutional right. Where the employee feels that the said questioning of his credentials is unfair for one reason or other there exists other mechanisms to address that without calling for a constitutional edict to deal with that dispute. One of those is the Employment and Labour Relations Court (ELRC) where all employment related disputes are to be placed for determination.

30. Pursuant to **Article 162 of the Constitution** Parliament enacted the Employment and Labour Relations Court Act establishing a court to hear and determine employment and labour related matters. The jurisdiction of the Court is set out in **section 12** as follows:

> *"(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —*
>
> *(a) disputes relating to or arising out of employment between an employer and an employee;*
>
> *(b) disputes between an employer and a trade union;*
>
> *(c) disputes between an employers' organisation and a trade unions organisation;*
>
> *(d) disputes between trade unions;*
>
> *(e) disputes between employer organizations;*
>
> *(f) disputes between an employers' organisation and a trade union;*
>
> *(g) disputes between a trade union and a member thereof;*
>
> *(h) disputes between an employer's organisation or a federation and a member thereof;*
>
> *(i) disputes concerning the registration and election of trade union officials; and*

*(j) disputes relating to the registration and enforcement of collective agreements."*

31. In the case of **Sollo Nzuki vs Salaries and Remuneration Commission & 2 others [2019] eKLR** the *Hon Odunga J* analysed the jurisdiction of the High Court vis a vis that of the ELRC with regard to claims related to violation of fundamental rights arising out of an employment and labour relationship. He said;

> *"43. The High Court has variously dealt with the powers of the Employment and Labour Relations Court (the ELRC). In* **Cabinet Secretary, Ministry of Mining & Another vs. National Environment Management Authority & 3 Others Ex-Parte Cortex Mining Kenya Limited, JR Misc. Appl. No. 298 of 2013** *this Court expressed itself as follows:*
>
> *"The High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. Therefore it is my view that such High Court Divisions cannot be equated to the Courts established pursuant to the provisions of Article 162(2) of the Constitution. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts."*

32. The petitioner has argued that his Petition is brought under **Articles 22 and 23 of the Constitution** and this court is conferred with the jurisdiction to grant the reliefs he seeks. In **Sollo Nzuki** above *Odunga J* dealt with the question which courts have the powers to issue reliefs under **Article 23 of the Constitution.** Citing **Article 22(2) of the Constitution** which provides that: ***Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill*** he held;

> **" In my view a court that has jurisdiction to deal with Article 22, whether it is the High Court or any other Court must necessarily have the powers to issue the reliefs under Article 23(3) thereof.**

33. Citing the holding of *(Okwengu, JA)* at paragraphs 39 to 44 in **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR; United States International University (USIU) vs. Attorney General [2012] eKLR** where it was held that*:*

> **"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court."**

34. The learned Judge further stated that the position above was adopted by the Court of Appeal's dicta in **Daniel N. Mugendi vs. Kenyatta University & 3 Others CACA No. 6/2012[2013] eKLR**, where the said Court expressed itself as hereunder:

> **"…the industrial court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the environment and land court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects…**

35. From the foregoing he drew the conclusion, which I agree with, that;

> **"Therefore, in United States International University –v- Attorney General (supra), Daniel Mugendi vs. Kenyatta University (supra) and Judicial Service Commission vs. Gladys Boss Shollei & Another (supra) the courts returned the verdict that the High Court could not deal with and determine matters where a purely labour and industrial dispute also had constitutional issues arising. ( emphasis mine)**

36. I agree with this position which speaks loudly to the Petitioner's case herein. The petitioner's case is clearly first an employee employer dispute. The alleged constitutional issues arise from that dispute.

37. It is my view therefore that the court seized with this jurisdiction is the Employment and Labour relations court.

38. This position that I have taken is further supported by the passage in **Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & another [2016] eKLR**

> **"Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance."**

39. I find and hold that this court does not have the jurisdiction to deal with this petition for the reasons set out herein above.

40. In the interests of justice, instead of a striking out order I order that the Petition be transferred to the Employment and Labour Relations Court for hearing and determination.

41. Costs to the Respondents.

**DATED AT NAKURU THIS 24TH DAY OF JUNE 2021**

**MUMBUA T MATHEKA**

**JUDGE**

**SIGNED AND DELIVERED VIA Z00M THIS 28TH DAY OF JUNE 2021.**

**MUMBUA T MATHEKA**

**JUDGE**

CA Edna

Konosi & Co Advocates for the Petitioner

konosiadvocates@gmail.com

Sheth & Wathigo Advocates for the Respondents

conveyance.shethwathigo@gmail.com

info@shethwathigoadvocates.co.ke