



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 52 OF 2017

IN THE MATTER OF AN APPLICATION BY KISEMEI MUTISYA

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE APPOINTMENT OF PROFESSOR PHILIP

NYING'URO AS THE HEAD OF DEPARTMENT OF POLITICAL

SCIENCE AND PUBLIC ADMINISTRATION THE

UNIVERSITY OF NAIROBI.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

THE UNIVERSITY ACT, NO 42 OF 2012 LAWS OF KENYA

AND

THE UNIVERSITY OF NAIROBI CHARTER, 2013

AND

THE UNIVERSITY OF NAIROBI STATUTES

AND

UNIVERSITIES STANDARDS AND GUIDELINES, 2014

AND

THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

THE PUBLIC OFFICER ETHICS ACT, NO.4 OF 2003 LAWS OF KENYA.

AND

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

AND

THE VICE CHANCELLOR (U.O.N).....1ST RESPONDENT

UNIVERSITY ACADEMIC STAFF UNION

(UASU) (U.O.N).....2ND RESPONDENT

PRINCIPAL COLLEGE OF HUMANITIES AND

SOCIAL SCIENCES (U.O.N).....3RD RESPONDENT

DEAN, FACULTY OF ARTS (U.O.N)....4TH RESPONDENT

PROF. PHILIP NYING'URO.....5TH RESPONDENT

THE UNIVERSITY OF NAIROBI.....6TH RESPONDENT

EX-PARTE: KISEMEI MUTISYA

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 5th June, 2017 the *ex parte* applicant herein, **Kisemei Mutisya**, seeks the following orders:

1. That this honourable court do issue an order of Certiorari directed to the 1st respondent by itself, its servants and/or agents or any other officer acting under its authority to bring to the court for the purpose of being quashed the decision by them made sometime in mid-January 2017 to appoint the 5th respondent as Head of department of Political Science and Public Administration of the University of Nairobi.

2. That this court do issue an order of Prohibition directed to the 5th respondent, by itself, its servants and/or agents or any other officer acting under its authority to bring to the court for the purpose of prohibiting it from acting or purporting to act in the capacity of and continuing with the conduct and performance of the mandates and duties of, the office of the Head of Department of Political Science and Public Administration of the University of Nairobi in any manner whatsoever forthwith.

3. That this court do issue an order of Prohibition directed to the 1st, 3rd and 4th respondent through their lawful officers, agents and/or delegates to bring to the court for the purpose of prohibiting them from appointing or purporting to appoint the 5th respondent into office as the head of the Department of Political Science and Public Administration of the University of Nairobi or as head of any other department of the university presently or in the future or as this honourable court may deem fit.

4. That this court do issue an order of prohibition directed to the 1st, 3rd and 4th respondent through their lawful officers, agents and/or delegates to bring to the court for the purpose of prohibiting them from treating or in any other way holding out or according the 5th respondent any treatment as the head of the Department of Political Science and Public Administration of the University of Nairobi or as head of any other department of the university.

5. That this court do issue an order of Mandamus directed to the 1st, 3rd and 4th respondent through their lawful officers, agents and/or delegates to bring to the court for the purpose of compelling them do disclose and/or put in place and publicize proper mechanisms and procedures to be adhered to for the appointment of the University or any other positions as appropriate

6. That this court do issue an order of Mandamus directed to the 1st, 3rd and 4th respondent through their lawful officers, agents and/or delegates to bring to the court for the purpose of compelling them to institute a fresh process towards the

appointment of an appoint a new Head of Department of Political Science and Public Administration of the University of Nairobi through a properly developed mechanism that is fair, just, transparent and competitive within such reasonable time as this honourable court may deem fit to direct.

7. That the costs of and occasioned by this motion be the ex parte applicant's to be taxed and paid by the 6th respondent to the ex parte applicant.

Applicant's Case

2. According to the applicant, he is a lecture by profession and has practiced as such since 2003 currently lecturing at the United States International University in the Department on International Relations and at Catholic University of East Africa on a part-time basis. Prior to that the applicant averred that he was a lecturer at the University of Nairobi between the years of 2003 and 2006 at the Department of Political Science where he worked alongside the 5th Respondent herein who was the Head of the Department at the time.

3. According to the applicant, during that period, he, together with other staff members of the said department, were the object of constant harassment and intimidation by the 5th respondent who enjoyed unwarranted security and undue influence from the fact that he came from the preferred ethnic tribe of the then V.C of the institution. It was deposed by the applicant that on numerous occasions, the 5th respondent claimed monies from Module II programme designated for compensation of lecturers from the office of UNES body with the pretext of giving it to the proper persons only to fail to remit the same to the respective lecturers and staff members, the applicant included, and pocketing all proceeds something which raises serious questions as to his integrity and appropriateness as a leader.

4. It was averred by the applicant that the said 5th respondent was well known to the applicant as a person who is condescending, conceited and overbearing, unreachable to students and persons in need of public service and who constantly employed his authority and influence to intimidate other people and settle scores. Despite this complaints to the then V.C against the said 5th respondent yielded no results due to the cronyism and nepotism that existed in the institution characterized by ethnicity where almost all positions of the university were reserved for one ethnic tribe preferred by the V.C.

5. According to the applicant, due to the constant wrangles and intimidation by the 5th respondent, and lack of proper, fair and just dispute resolution mechanisms, majority of the staff members of the department resigned from their positions and were forced to leave the institution, a clear indication of lack of leadership qualities on the part of the 5th respondents. It was disclosed that in 2006 the demeanour and mannerisms of the 5th respondent had reached at an all high intolerable level that all staff members of the university approached the then V.C to unanimously call for his removal from office as head of the department but due to the existing political climate of the institution, these efforts bore no fruits. The same year together with one **Isaac Mbeche**, the then Principal of college of Humanities and Social Sciences, with no lawful course whatsoever, raided the applicant's office and confiscated his office equipment necessary for the performance of his work with the intention of forcing him to leave the institution in what could be termed as elimination of a threat amounting to abuse of office.

6. Pursuant to the foregoing the applicant instituted civil proceedings, CMCC 1468 of 2007 Milimani Commercial Law Courts at Nairobi against the 5th respondent and the said **Isaac Mbeche** together with others for their unlawful actions which for inexplicable reasons has been pending before court for almost 10 years now but was scheduled for hearing on the 2nd of February 2017.

7. In light of the foregoing, it was the applicant's honest belief, that the 5th respondent is utterly unfit and unsuitable to serve in the said office or in any other public office whatsoever and his re-appointment as the current head of the department ought to be quashed by his honourable court. The applicant further believed, based on legal advice, that a person holding the position such as one held by the 5th respondent should only serve for a maximum of two-terms of three years each and not more. In this case the 5th respondent had already served in that position for a total of nine (9) years between the years of 2003 and 2012 and hence his re-appointment was therefore unlawful and *ultra vires*.

8. It was the applicant's case that the 1st respondent together with the 2nd, 3rd and 4th respondent who are charged with the mandate to appoint a head of department have a duty to ensure that persons appointed to the position meet the integrity standards befitting of such an office and hence ought to be compelled to appoint another person to hold the office other than the 5th respondent. It was therefore contended that the appointment of the 5th respondent in spite of and in total disregard of his previous track record leaks (sic) of political involvement and consideration of other extraneous motives other than to serve the interests of justice which is unlawful and untenable in law rendering the said action void *ab initio*.

9. The applicant further averred that it was not clear the criteria adopted by the 1st respondent in appointing the 5th respondent as the process was marred by uncertainty and ambiguity the resultant of which was the appointment of persons who do not meet the minimum threshold as envisaged by Chapter six of the Constitution of Kenya hence it is only fair and just that the 1st, 2nd, 3rd and 4th respondents be compelled to disclose and/or put in place a proper mechanism and procedures that ought to be followed in appointing heads of department and other relevant positions at the university.

10. In the applicant's view, being the head of department is also a requirement for any person to be appointed to other important positions at the university including but not limited to the position of the Dean of the faculty, dean of students, Principal of the College and other administrative positions hence retaining one individual in such a position for so long only serves to lock out qualified and competent individuals from ascending to other positions of the institution. In light of the foregoing, the appointment of the 5th respondent by the 1st respondent is a clear indication of bias, irrationality, unreasonable, oppressiveness which decision ought to be quashed by this Court.

11. The applicant's case was that the process of re-appointing the 5th respondent has been conducted in bad faith, is unfair, oppressive,

irrational, unreasonable, discriminatory and have been commenced without any or any fair, reasonable, impartial and/or proper mechanisms on the said procedure and amounts to an abuse of power. Further, the 1st, 2nd, 3rd and 4th respondents' actions are *ultra vires*, unlawful, malicious, capricious, unreasonable, selective and in bad faith as no proper process was followed in arriving at the said appointment.

12. It was further contended that the 1st, 2nd, 3rd and 4th respondents misdirected themselves by not following a proper mechanism in appointing the 5th respondent in light on the new **Universities Act** and relevant subsidiary legislation and failing to take into account relevant factors thereby arriving at an unlawful and legally untenable decision to appoint the 5th respondent and unreasonable decision. The 1st, 2nd, 3rd and 4th respondents were therefore accused of having acted capriciously, maliciously and in total disregard of the laid down provisions of the law by appointing the 5th respondent into office without conducting any or any proper process at all and thereby arrived at an irrational and unreasonable decision.

13. In view of the foregoing, it was the applicant's case that it is only fair and just that this Court does issue an order of Certiorari thereby quashing the decision of the 1st respondent to appoint the 5th respondent as the head of department of Political Science and Public Administration of the University of Nairobi. He also prayed that this Court do issue an order of prohibition prohibiting the 5th respondent from acting or purporting to act in the capacity of, and continuing with the conduct and performance of the mandates and duties of, the office of the Head of Department of Political Science and Public Administration of the University of Nairobi in any manner whatsoever forthwith.

14. The applicant therefore prayed for the orders sought hereinabove.

15. In the applicant's view, this application has been brought to serve the general interest of the public.

The Respondents' Case

16. The application was opposed by the Respondents through replying affidavits sworn by the 3rd and the 5th Respondents.

17. According to the 3rd Respondent, the *ex-parte* Applicant is a former part time lecturer at The University who abandoned his duties after which he sued the University in the Chief Magistrates Court which case was pending judgment by the time he filed this application but which has been determined dismissing his claim with costs.

18. According to the 3rd Respondent, the applicant has no interest whatsoever in the Affairs of the University and is a busy body without *locus standi*. In his view the 5th Respondent, **Professor Philip Nyinguro**, is qualified to be appointed Chairman, Department of Political Science as **Professor Nyinguro** has earlier served as Chairman of the same Department for two (2) terms between 2003 to 2009 and he is still eligible to serve as Chairman after a break as there is no rule which prohibits a past Chairman of Department from being re-appointed.

19. The 3rd Respondent confirmed that in accordance with the statute, the University Vice-Chancellor consulted him on the appointment of **Professor Philip Nyinguro** as Chairman of Department as required hence there is no merit in the *ex-parte* Applicant's case.

20. According to the 5th Respondent, he was duly appointed to serve as Chairman of the Department of the University on 27th September, 2003 by the then Vice Chancellor **Prof. Crispus M. Kiamba** for a period of three (3) years effective from 28th September, 2003 to 27th September, 2006. Subsequently, his 3 (three) year tenure was renewed in accordance with the regulations effective from 29th July, 2005 to 27th September, 2008 by the then Vice Chancellor **Prof. George A. Magoha**. Upon completion of his tenure, a Staff Performance Appraisal exercise was conducted where his overall performance, including student evaluation exceeded expectation.

21. The 5th Respondent averred that sometime in the year 2009, **Professor Peter Wayande** was duly appointed to take over the Department effective from 21st October, 2009 up to and including 20th October, 2012.

22. It was therefore the 5th Respondent's case that the allegations that he has served as Chair of Department for (9) years is false, unfounded and factually misleading.

23. The 5th Respondent however deposed that for one to be appointed as Chairman of the Department, one must be at least a Senior Lecturer of the University and that it is a tradition that the appointment for Chairman of the Department by the Vice Chancellor is ratified by the Council in consultation with the 3rd and or 4th Respondents in accordance with the Statute. In accordance with the aforesaid regulations and having acquired a Senior lecturer status in 2000, he was duly appointed as the Chairman on 27th September, 2003 as aforementioned.

24. It was the 5th Respondent's case that having a proven track record, being an Associate Professor in the Department for 6 (six) years since 2011 and there being no law barring his appointment, he was duly appointed to the position on 11th January, 2017 which he duly accepted on 12th January, 2017. It was therefore his case that it is untrue that the said decision was done in an opaque manner and without following due procedure as alluded to by the *ex-parte* Applicant. According to him, **Prof. Peter Wayande** was re-appointed as Chairman after having served his 1st tenure seven years before the said re-appointment and the late **Dr. Odhiambo Mbai** (deceased) served only the 1st year of his 1st term within which he passed on.

25. The 5th Respondent disclosed that the applicant was a former lecturer at the 6th Respondent working at the Department, having been employed as a part-time lecturer sometime in the year 2003 and during the 5th Respondent's tenure as Chair of the Department, he personally worked with and supervised the *ex-parte* Applicant among other staff until he left the 6th Respondent's employment sometime in the year 2006 in a dishonorable manner. The 5th Respondent averred that the *ex parte* applicant was a person who deserted his duties and having left

its employment has no interest in the affairs of the University and or is a busy body without *locus standi*.

26. The 5th Respondent admitted that owing to the foregoing the *ex-parte* applicant sued the 6th Respondent at the Chief Magistrates Court at Milimani in Civil Suit No. 1468 of 2007 seeking damages of Kshs. 225,000.00 among other reliefs and having been the *ex-parte* Applicant's supervisor, the 5th Respondent was the University's witness against the applicant and judgment was delivered on 31st July 2017 in favor of the 6th Respondent dismissing the *ex-parte* Applicant's suit.

27. It was therefore the 5th Respondent's case that the *ex-parte* applicant's application is borne out of malice, as he has an axe to grind with the 5th Respondent on account of his testimony against the applicant.

28. It was the Respondent's belief based on legal advice that judicial review is concerned with the procedure and not the merits of the case and he asserted that his appointment was done in accordance with the laid down procedure and the *ex-parte* applicant is a busy body and his application ought to be dismissed forthwith with costs to the Respondents.

Determinations

29. I have considered the application, the affidavit filed in support of and in opposition to the application, the submissions filed and the authorities relied on.

30. The substratum of the applicant's case is that the 5th Respondent ought not to have been reappointed as the head of department of Political Science and Public Administration of the University of Nairobi on the two grounds.

31. The first ground was that the conduct of the 5th Respondent did not warrant his re-appointment to the said position. The second ground was that a person holding the position such as one held by the 5th respondent should only serve for a maximum of two-terms of three years each and not more. In this case the 5th respondent had already served in that position for a total of nine (9) years between the years of 2003 and 2012 and hence his re-appointment was therefore unlawful and *ultra vires*.

32. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

33. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60*.

34. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285*.

35. The broad grounds, though not exhaustive, on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

36. Therefore, in this application we are not concerned with the merits of the decision to reappoint the 5th Respondent to the said position but the process of his reappointment.

37. In judicial review it is important to note that all the factual background in support of the application ought to be contained in the verifying affidavit. In this case apart from citing the legal provisions allegedly contravened in the process of the 5th Respondent's re-appointment, the verifying affidavit is largely silent on the facts that constituted the 5th Respondent's ineligibility for reappointment. The averments to the effect that the 5th Respondent had served his term out were controverted by the Respondents and no further affidavits were filed by the ex parte applicant. Judicial review by its very nature is not the procedure by which contested matters of facts are to be resolved. In light of such conflicting averments, this Court cannot in these kinds of proceedings resolve the same.

38. In order for this Court to make findings on the conduct of the 5th Respondent the applicant ought to file civil proceedings in which specific findings in respect thereof can be made preferably before the Employment and Labour Relations Court. In this case, the applicant's case against the 6th Respondent was dismissed and with that went his allegations against the 6th Respondent.

39. In this case, though, no provision was cited by the applicant to support the contention that the 5th Respondent was ineligible for reappointment. In absence of such limiting provision there is no basis upon which this Court can find that the 5th Respondent was ineligible for reappointment. In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

40. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

41. It may well be that 5th Respondent is not the best suitable person for the position but that does not justify this Court in interfering with his reappointment as long as the same is lawful and the due process was adhered to by the person or entity whose decision is under challenge. In this case there is simply no sufficient material on the basis of which I can arrive at such a finding.

42. In the premises I find that this application is unmerited.

43. The applicant contended that these proceedings were instituted in the public interest. In its article ***“Advancing Human Rights and Equality Through Public Interest Litigation”*** accessed at <http://www.pilsni.org/about-public-interest-litigation> on 28th September, 2016, the PILS Project states that:

“Public interest litigation, or PIL, is defined as the use of litigation, or legal action, which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raises issues of broad public concern. It is a way of using the law strategically to effect social change. Despite the range of equality and human rights protection available in Northern Ireland, the reality is that not everyone has equal access to those rights and not everyone has the resources or capacity to challenge an abuse of their rights through the courts. By taking cases that can benefit disadvantaged groups or minorities rather than just one person, PIL can be used to provide access to justice to those who are most in need of it yet who find themselves furthest from it.”

44. As to what amounts to public interest for the purposes of costs I associate myself with the position adopted by **Gikonyo, J** in **John Wekesa Khaoya vs. Attorney General [2013] eKLR** at para 15 that:

“The Constitution treats this subject as quite substantive, and its undiminished significance is seen in the constitutional requirement that the Chief Justice shall make express rules which should satisfy the criteria that no fees may be charged for commencing a proceeding under Article 22, and public interest litigation is one such proceeding. From the available judicial material, procedures and constitutional provisions, it seems that the acceptable constitutional bounds which will be used in determining this application should be that the litigation must:-

- a) Be public interest litigation,
- b) Be brought to advance a legitimate public interest,
- c) Be one that will contribute to a proper understanding of the law; and
- d) Not be aimed at giving the applicant a personal gain.

.... Let me emphasize that where an application for exemption is premised on the fact that the matter is to promote public

interest, then two issues must be established, to wit, 1) the intended suit must be public litigation and 2) should not be aimed at deriving any personal gain to the applicant...Moreover, for purposes of an application of this nature, the prospective Petitioner on behalf of public interest under Article 22(2)(c), as sign of good faith, should satisfy the court that the intended suit is not aimed at giving personal gain to the applicant. By that requirement, the court gives effect to unhindered access to justice and legitimate efforts to protect public interest, but also prevents abuse by private litigants who may wish to take advantage of the Article for selfish, parochial and private gains. The court reckons that not all suits filed and styled as constitutional applications are public interest litigation.”

45. In this case it is clear that part of the claim was informed by what the applicant considered the manner in which the 5th Respondent and one **Prof Mbeche** treated him while he was at the 6th Respondent. In **Okiya Omtatah Okiti vs. Communications Authority of Kenya & 14 Others [2015] eKLR, Lenaola, J** (as he then was) expressed himself as hereunder:

“In my view, this Court has a duty to protect the noble motive of public interest litigation from those who file claims out of mischief and less than genuine interest in the guise of protecting a public interest. The filing of false and frivolous public interest litigation which risk diverting the Court’s attention from genuine cases will not be entertained.”

46. I am not satisfied that this application meets the threshold of public interest litigation.

Order

47. Consequently, this application fails and is dismissed with costs to the Respondents.

48. It is so ordered.

Dated at Nairobi this 13th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mutisya, the exparte applicant present in person

MissLitoro for Mr Lutta for the Respondent

CA Ooko