



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 280 OF 2013

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY FOR

EDUCATION, SCIENCE & TECHNOLOGY1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

PROF MABEL IMBUGA.....1ST INTERESTED PARTY

THE COUNCIL, JOMO KENYATTA UNIVERSITY OF

AGRICULTURE & TECHNOLOGY2ND INTERESTED PARTY

EX-PARTE

NAFTALY RUGARA MUIGA

JUDGEMENT

Naftaly Rugara Muiga, the ex-parte Applicant ('the Applicant') is a lecturer at Jomo Kenya University of Agriculture and Technology (JKUAT) and also the Assistant Secretary General of the University Academic Staff Union, JKUAT Chapter. The 1st Respondent is the Cabinet Secretary for Education, Science and Technology ('the Cabinet Secretary') and is among other things responsible for matters relating to university education. The 2nd Respondent is the Attorney General of the Republic of Kenya. Prof Mabel Imbuga, the 1st Interested Party, is the Vice Chancellor of JKUAT. The University Council, JKUAT ('the Council') is the 2nd Interested Party. The functions of the council of a university as set out in section 35(1) of the Universities Act, 2012 ('the Act') includes recommending for appointment the Vice-Chancellor, Deputy Vice-Chancellors and principals of constituent colleges.

The 1st Interested Party was appointed the Vice-Chancellor of JKUAT with effect from 1st August, 2008 for a term of five years. The said term expired on 31st July, 2013. On 24th July, 2013 through an internal memo posted on JKUAT's notice boards, it was disclosed to the University fraternity that the Cabinet Secretary had appointed the 1st Interested Party as the Vice-Chancellor of JKUAT for a period of five

years with effect from 1st August, 2013. The decision of the Cabinet Secretary was contained in a letter Ref. No. MHES/CONF/2/1/2 VOL. II (20) dated 11th July, 2013 addressed to the Interested Party by the Cabinet Secretary.

The Applicant being aggrieved by the decision of the Cabinet Secretary to re-appoint the Interested Party the Vice-Chancellor of JKUAT moved to this Court and obtained leave to commence these judicial review proceedings.

Through the Notice of Motion dated 5th August, 2013, the Applicant therefore seeks an order of certiorari quashing the 1st Interested Party's re-appointment and an order of prohibition prohibiting the Cabinet Secretary from re-appointing the 1st Interested Party or any other person as the Vice-Chancellor of JKUAT without adhering to the provisions of the Act. The Applicant also prays for an order of mandamus compelling the Cabinet Secretary to commence the recruitment process for the holder of the position of Vice-Chancellor of JKUAT through a competitive process and in accordance with the Act.

The application is supported by a verifying affidavit sworn by the Applicant on 29th July, 2013 and the statutory statement filed with the chamber summons application for leave. It is also supported by a supplementary affidavit sworn by the Applicant on 5th August, 2013 and filed with the above stated Notice of Motion and a further affidavit of the Applicant filed on 3rd September, 2013.

According to the statutory statement the grounds upon which relief is sought are:

“10. Failure by the 1st Respondent to fill the position of the Vice Chancellor of JKUAT competitively as required by the law (Universities Act, 2012) is discriminatory as it denies other qualified Kenyans a chance to apply and be considered for the said position.

11. That the failure by the 1st respondent to subject the interested party to the provisions of the transition clauses of the Universities Act, 2012 is a blatant abuse of his office and unreasonable.

12. That the 1st Respondent exceeded his powers by purporting to invoke Article 39(3) of the Universities Act, 2012 as the option was not available in the case of the interested party as she was appointed with effect from 1st August, 2008 and not under the Universities Act, 2012, and thus could only be appointed to the position of the Vice Chancellor after successfully going through a competitive process of recruitment.

13. The actions of the 1st Respondent are *ultra vires* his statutory powers under the Universities Act, 2012 and mandate as he has no powers to re-appoint the interested party to the position of Vice Chancellor of JKUAT until and unless she has gone through a competitive recruitment process.

14. The 1st Respondent in failing to follow the statutory provisions of the law as well as the principles and values set out in the Constitution of Kenya has breached the applicant's legitimate expectation that the law would be followed in recruiting the next Vice Chancellor of JKUAT after the term of the interested party expires on 31st July, 2013.

15. The applicant by virtue of Section 29(2) of the Universities Act, 2012 is entitled to raise any issue as regards the University and therefore has the *locus standi* to bring this application to Court.

16. Section 39(1) of the Universities Act, 2012 provides that the Vice Chancellor of a public university shall be appointed competitively by the Cabinet Secretary in charge of university education upon recommendation by the university council. The purported re-appointment of the Interested Party was not competitive as the position was not advertised.

17. The interested party's contract expires on 31st July, 2013 as the transitional clauses of the Universities Act, 2012, provided that any person holding the position of a Vice Chancellor before the commencement of the Act would remain in office for the remaining period of his or her term of office-(Section 76(2) of the Act).

18. Upon expiry of the term of the Interested Party in accordance with section 76(2) of the Universities Act, the recruitment of the Vice Chancellor of Jomo Kenyatta University of Agriculture and Technology (JKUAT) is supposed to be done competitively and in accordance with the law. The 1st respondent therefore does not have the powers to re-appoint the interested party as he has purported to do vide his decision contained in a letter dated 11th July, 2013 and communicated to the applicant among others the internal memo of Prof M. Njeruh dated 23rd July, 2013.

19. The cumulative effect of the errors, abuse of office acts and omissions of the respondents offends the rule of law and undermines the sanctity and intention of well laid down legal provisions of the law.”

The Applicant's case is crystallized by Paragraph 9 of his verifying affidavit in which he avers:

“9. That I am advised by my Advocates and verily believe the said advise to be sound that the 1st respondent has no powers under the Universities Act, 2012 to purport to re-appoint the interested party in the manner he did for the reasons *inter alia* that:

a. The interested party was appointed as the Vice Chancellor of JKUAT with effect from 1st August, 2008 and thus was not appointed under the Universities Act, 2012;

b. Under the Universities Act, 2012, the interested party was lawfully entitled to finish off the remainder of her term by virtue of the transition clauses under Section 76(2) of the Universities Act, consequently, her term as the Vice Chancellor, JKUAT expires on 31st July, 2013 and she can only legally hold that office after being subjected to a competitive recruitment process which is also open to other Kenyans;

c. Whereas section 39(3) of the Universities Act, 2012 states that a vice chancellor is eligible for re-appointment for a further term of five (5) years the said re-appointment must be through a competitive recruitment process as provided under section 39(1) of the same Act. The interested party is however not eligible for re-appointment under section 39(3) until she has been competitively recruited under the Universities Act, 2012 and has served her five year term.”

The 1st Interested Party opposed the application through her affidavits sworn on 7th August, 2013 and 28th August, 2013. The 2nd Interested Party/the Council opposed the application through affidavits sworn by its chairman Dr. Ekuru Aukot on 7th August, 2013 and 28th August, 2013. The interested parties contend that the re-appointment of the Applicant as the Vice-Chancellor of JKUAT for a term of five years was done in accordance with the provisions of the Act.

The respondents did not file any reply to the substantive notice of motion. They, however, filed submissions on the legal issues raised in the application.

In support of his case, the Applicant submitted that the appointment of vice-chancellors of public universities in Kenya is governed by the Constitution and the Act. The Applicant asserted that sections 35(1)(a)(v) and 39(1)(a) of the Act clearly provides that the appointment of a vice-chancellor of a public university should be conducted through a competitive process. The Applicant submitted that Section 76(2) of the Act did indeed save the Applicant's first term of office but for her to qualify for a second term she ought to have been recruited through a competitive process as contemplated by Section 39(1).

The Applicant argued that since the 1st Interested Party was not appointed under the Act, she could not have been re-appointed under Section 39(3) because that section only applies to persons appointed under the Act. It is the Applicant's case therefore that the Applicant exceeded his powers under the Act by purporting to re-appoint the 1st Interested Party under Section 39(3). The Applicant contends that a reading of Section 76(2) clearly shows that all the persons in the category of the 1st Interested Party were only supposed to complete their terms after which the provisions of Section 39(1) of the Act would take effect. The Applicant argued that the Act is clear that the appointment or re-appointment of a vice-chancellor must be done through competitive recruitment. The Applicant further submitted that the re-appointment of the 1st Interested Party was an abuse of power by the Cabinet Secretary since he was aware as indicated in his letter dated 17th July, 2013 that the appointment of other officers like deputy vice-chancellors required competitive recruitment.

The Applicant asserted that the re-appointment of the 1st Interested Party also offended the provisions of Articles 10, 73 and 232 of the Constitution. The Applicant submitted that the Constitution contemplates a situation where every person after the expiry of his/her term of office would be subjected to an open and competitive process before earning a second term in office. He argued that this is in accordance with the national values and principles of governance found in Article 10 which binds all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implement policy decisions. The Applicant pointed out that among these values and principles are the rule of law and inclusiveness.

The Applicant asserted that Article 73 of the Constitution provides that the authority assigned to a State officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution. Such exercise must demonstrate respect for the people; bring honour to the nation and dignity to the office; and promote public confidence in the office. It is the Applicant's submission that the 1st Respondent in re-appointing the 1st Interested Party failed to comply with this constitutional requirement.

The Applicant further submitted that Article 232 obligated the 1st Respondent to ensure that there was fair competition in the recruitment of the 1st Interested Party. The Applicant pointed out that one of the values and principles of public service is fair competition and merit as the basis of appointments and promotions. The Applicant asserted that Article 232(2) binds the 1st Respondent and the 2nd Interested Party.

The Applicant also contended that failure to recruit the 1st Interested Party through a competitive process was discriminatory, since it denied other qualified Kenyans the opportunity of applying for the post. The Applicant stated that he does not question the competence of the Applicant but the process used in her recruitment.

In support of his position the Applicant cited the decision of J. O. Abuodha, J in **ANNE KINYUA v NYAYO TEA ZONE DEVELOPMENT CORPORATION AND 3 OTHERS [2012] eKLR** in which the Learned Judge stated that:

“The court does not prohibit a competent and hardworking CEO as applicant appears to have demonstrated by securing the appointment and getting her contract renewed two other times by the Board, however in the light of the new constitutional dispensation such renewal ought to be in line with values and principles of public service as enshrined in the Constitution. In this respect and to the extent that these letters are inconsistent with the provisions of the Constitution the same are invalid.”

The Applicant urged the Court to find that the re-appointment of the 1st Interested Party was in blatant disregard of the law and that the orders sought should issue.

Ms Mbilo for the Attorney General took a stand that seems to vindicate the Applicant's case. She

submitted that according to the Universities Act, 2012 a vice-chancellor of a public university has to be appointed competitively. She argued that although a vice-chancellor is eligible to serve a further term of five years, the second term can only be gained through a competitive process.

The respondents contended that although the 1st Interested Party was eligible for re-appointment upon the expiry of her first term, that eligibility for re-appointment does not take away the requirement that the re-appointment process should be competitive. The Respondent further contended that the Constitution envisages a situation where any re-appointment must be subjected to a competitive process. Ms Mbilo urged this Court to follow the decision of Abuodha, J in **ANNE KINYUA v NYAYO TEA ZONE DEVELOPMENT CORPORATION AND 3 OTHERS [2012] eKLR**.

The interested parties strongly opposed the application and submitted that the first term served by Prof Imbuga from 1st August, 2008 to 31st July, 2013 should be considered a 'term' under the Act. They argued that her term was saved by Section 71(2) which in sub-section (1) had repealed the Jomo Kenyatta University of Agriculture and Technology Act No. 8 of 1994 under which she had been appointed in 2008. They further argued that her appointment should be deemed an appointment under the Act by virtue of Section 81(1) of the Act.

The interested parties contended that since the 1st term of Prof Imbuga was saved, then it follows that she was eligible for a further term of five years which would be her second and final term. The interested parties submitted that the re-appointment of Prof Imbuga was not arbitrary since the Council took into account the criteria provided by the Kenyan Constitution before recommending her re-appointment to the Cabinet Secretary who then proceeded to re-appoint her by virtue of Section 39(3) of the Act.

On the issue as to whether Prof Imbuga ought to have been taken through a competitive process before her re-appointment, the interested parties submitted that Section 39(3) of the Act is silent as to whether vice-chancellors eligible for re-appointment for a further five years should be subjected to competitive recruitment. They submitted that if the law required re-appointment to be done through a competitive process, then it should have stated so. They therefore argued that eligibility for a further term is based on the performance of the vice-chancellor. It is the interested parties' case that the Council having recommended the re-appointment of Prof Imbuga the Cabinet Secretary acted within the law by re-appointing her.

The interested parties finally submitted that this application is part of a wider scheme aimed at destabilizing the progress that they have achieved at the university in the last five years.

In my view, this application calls for the interpretation of Section 39 of the Act. Section 39(1) (a) requires the appointment of a vice-chancellor of a public university to be done through a competitive process. The recruitment is done by the council which then recommends the appointment to the Cabinet Secretary. Section 39(3) provides that the vice-chancellor of a public university shall hold office for a term of five years and shall be eligible for a further term of five years.

The Act saved the terms of the vice-chancellors in office through Section 76(2) which provides that:

“Any person who immediately before the commencement of this Act, is a vice-chancellor of a public university or principal of a constituent college of a public university, shall remain in office for the remaining period of his or her term of office.”

By virtue of Section 76(2), the 1st Interested Party's term of office at the time of the commencement of the Act was saved.

The Applicant argued that at the end of her term, the 1st Interested Party's replacement ought to have been recruited through a competitive process in line with Section 39(1)(a) of the Act.

The respondents and the interested parties are of the opinion that the 1st Interested Party was eligible for

another term of five years as per Section 39(3). The position of the respondents and the interested parties prevails. The Act in Part X deals with **Repeals and Transitional Provisions**. Section 71(1) repeals various Acts among them the Jomo Kenyatta University of Agriculture and Technology Act No. 8 of 1994 under which the 1st Interested Party was appointed as a Vice-Chancellor. Section 71(2) of the Act provides that:

“Notwithstanding subsection (1), the following transitional provisions set out in this Part shall apply.”

Section 81 provides for general savings and at sub-section (1) it provides that:

“81. (1) All acts, directions, orders, appointments, requirements, authorizations or other things given, taken or done under, and all funds, assets and other property acquired by virtue of the repealed Acts shall, so far as they are not inconsistent with this Act, be deemed to have been given, taken, done or acquired under this Act.”

By virtue of Section 81, any act that was done under the repealed Act and which is consistent with the Act is deemed to have been done under the Act. The 1st Interested Party through her affidavit demonstrated that she was recruited through a competitive process in 2008 and she is therefore eligible for another term of five years as per Section 39(3) of the Act. The 2nd Interested Party supports this position and so do the respondents. I agree with the respondents and the interested parties that the 1st Interested Party is eligible for a further term of five years since her term of office was saved by sections 76 and 81 of the Act. Her initial appointment was done through a competitive process as required by the Act.

The question would then be whether her re-appointment for a further term of five years was done in accordance with the Act and the Constitution. The Applicant and the respondents are of the view that the re-appointment of the 1st Interested Party was not conducted in accordance with the Act and the Constitution. The interested parties are of the view that the re-appointment was in accordance with Section 39(3) of the Act.

According to **BLACK LAW’S DICTIONARY, 9TH EDITION** at page 597 the term eligible is defined as:

“Fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status.”

A relevant definition given to the same term at page 450 of **MACMILLIAN ENGLISH DICTIONARY FOR ADVANCED LEARNERS, INTERNATIONAL STUDENT EDITION** is **“allowed by rules or laws to do something or receive something.”**

In accordance with the cited definition, the 1st Interested Party was fit and qualified to be appointed as a vice-chancellor of JKUAT for a second and final term. The question would then be whether there was need to take her through competitive recruitment. The law is not clear on this. The body responsible for the recruitment of the Vice-Chancellor of JKUAT conducted an assessment on the performance of the 1st Interested Party and found her deserving of a second term. Thereafter the Council recommended that she be re-appointed for a further five years and the Cabinet Secretary acted accordingly. I do not think that the drafters of the Constitution expected that any person eligible for re-appointment to a public office ought to be taken through a competitive process. One cannot compare the appointment to a public office to an electoral process in which the incumbent seeking another term should submit himself/herself to an election. The competitive process, in my view, only kicks in when a person is being recruited for the first time. When it comes to re-appointment for a further term the body responsible for re-appointment assesses the person and makes a decision whether to re-appoint the incumbent or open up the position for competition.

I do not find any illegality in the actions of the 2nd Interested Party and the 1st Respondent. Had the 2nd

Interested Party found the performance of the 1st Interested Party below par, it was at liberty to advertise her position and the 1st Interested Party would have been entitled to submit her application like every other qualified citizen. With respect to the advocates for the Applicant and the respondents, I must state that the decision in the **ANNE KINYUA v NYAYO TEA ZONE DEVELOPMENT CORPORATION & 3 OTHERS [2012] eKLR** is not applicable to the facts of this case. In that case, the Permanent Secretary of Agriculture rejected the Board's recommendation that the Anne Kinyua be re-appointed the Chief Executive Officer of Nyayo Tea Zone Corporation for a fourth term on the ground that there was no competitive recruitment. The Ministry of Agriculture was the parent Ministry of the Corporation. The Court agreed with him.

The **ANNE KINYUA** case, supra, is different from the case before me since in that case the Court was considering guidelines issued by the Head of Public Service concerning the procedure to be followed in the re-appointment of chief executive officers of state corporations. As for the case before me the law clearly provides for re-appointment for a further term. It does not state that the re-appointment should be conducted through a competitive process. It was therefore sufficient for the Council to recommend the re-appointment of the 1st Interested Party after carrying out an appraisal of her performance. The re-appointment of the 1st Interested Party did not in any way offend the constitutional provisions cited by the Applicant. The 1st Interested Party's initial appointment had been done through a competitive process and the requirements of the Constitution were met. There is no evidence that at the time of her re-appointment the 1st Interested Party was not fit to hold the office of the vice-chancellor of a public university.

Before I conclude, I will commend on the circular dated 17th July, 2013 from the Principal Secretary, Ministry of Education, Science and Technology. I do not know under what circumstances the said circular was issued but it is important to note that the letter re-appointing the 1st Interested Party was written on 11th July, 2013. The re-appointment letter was therefore written prior to the issuance of the circular and the contents of the circular should have no bearing on the re-appointment of the 1st Interested Party.

In summary, I find that the application before this Court has no merit. The same is therefore dismissed with costs to the respondents and the interested parties.

Dated, signed and delivered at Nairobi this 21st day of February, 2014

W. K. KORIR,

JUDGE OF THE HIGH COURT