



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 6 OF 2015

**IN THE MATTER OF ARTICLES 10, 73, 75, 80, 201 & 232 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF CHAPTER 6 OF THE CONSTITUTION OF
KENYA**

AND

IN THE MATTER OF THE UNIVERSITY OF ELDORET CHARTER AND STATUTES OF 2013

BETWEEN

CHERARGEI KIPROTICH.....PETITIONER

VERSUS

THE COUNCIL OF THE UNIVERSITY OF ELDORET.....1ST RESPONDENT

PROFESSOR TERESA AKENGA.....2ND RESPONDENT

AND

PROFESSOR JAMES OLE KIYIAPI.....INTERESTED PARTY

JUDGMENT

[1] This Petition was filed on **29 April 2015** by the Petitioner herein, **Cherargei Kiprotich**, in his capacity as a resident of Uasin Gishu County and an interested party for purposes of **Article 22** of the Constitution of Kenya. His contention is that the Respondents, as public officers at the **University of Eldoret**, are in contravention of **Chapter 6** of the Constitution of Kenya on integrity and leadership, as well as **Article 232** on the management of public resources. In particular, the Petitioner complained that the 2nd Respondent appointed **Prof. Julius O. Ochuodho** and **Prof. Kapil Mohan Khanna** to hold the

office of Champions in the Directorate of Resource Mobilization and Strategic Initiatives; which position does not fall within the structure of the University. He further averred that, in abuse of the institution's resources, the allowances of the appointees were increased by **Kshs. 50,000/=** each over and above their normal salaries and allowances.

[2] It was further the contention of the Petitioner that the difference of salary of some 5 administration police who were appointed by the Respondents and that of the 2nd Respondent's body guard, assigned to her by the **National Police Service Commission**, had not been explained. He complained that these disparities and irregularities had the effect of bestowing double pay to the said officers with effect from **November 2014** when they were deployed, and therefore amounted to abuse of office; in addition to some **Kshs. 552,000/=** that was paid as allowances to administration police officers who were on public duty at the University.

[3] The Petitioner also complained that the 2nd Respondent, on behalf of the Council, reinstated the Interested Party, **Prof. James Ole Kiyiapi**, vide a letter dated **13 January 2014**; yet the Interested Party had resigned from his employment in **2012**, as an Associate Professor in the School of National Resources Management, to join politics. According to the Petitioner, the Interested Party was employed without a competitive process being followed and therefore is a clear demonstration of abuse of public office and resources.

[4] In the premises, the Petition prayed for the following orders:

[a] A declaration that the Respondents are not fit to hold public office hence should step down;

[b] A declaration that the decision of the Council appointing five administration police and **Prof. James Ole Kiyiapi** is illegal and an abuse of public resources;

[c] A declaration that the decision by the 2nd Respondent in approving allowances for the officers who provided security to the institution is exaggerated and amount to an abuse of public resources.

[5] In the Verifying Affidavit filed with the Petition, the Petitioner averred that, as a Kenyan Citizen and a tax payer, he is entitled by the Constitution to demand fair administrative action and accountability from public office holders; and that it was on that basis that he filed this Petition.

[6] The Respondents opposed the Petition; their first ground being that the Court lacks the jurisdiction to entertain the Petition since the Constitution and the relevant statutes have specifically and expressly prescribed procedures for handling grievances such as the Petitioner's. In particular, the Respondents cited the **Universities Act, No. 42 of 2012** and the **Ethics and Anti-Corruption Commission Act, No. 22 of 2011** as some of the statutes in point. The Respondents also took issue with the joinder of the Council as the 1st Respondent, contending that it is not a legal entity but simply an organ of governance within the University structures; hence lacking the capacity to sue or be sued. For that reason, the Respondents posited that the Petition is fatally defective and ought to be struck out as against the 1st Respondent. In respect of the 2nd Respondent, a plea of immunity under **Section 66** of the **Universities Act** was raised. It was averred that the 2nd Respondent was only discharging her statutory functions as required by the **Universities Act** and other statutes of the University; and therefore that no cause of action can reasonably lie against her personally. It was similarly urged by the 2nd Respondent that the Petition be struck out on that account.

[7] The Respondents also averred, in their Reply to Petition, that the Petition does not meet the threshold for a constitutional petition hence the same is incompetent and ought to be struck out. It was pointed out, for instance, that although in paragraphs 7 to 10 of the Supporting Affidavit, the payment of lunch allowances to police officers is questioned, it was not shown how the same amounted to abuse of office or resources. The same averment was made in respect of the allegations in connection with the appointment of **Prof. Julius Odhiambo**, **Prof. Kapil Khanna** and **Prof. Ole Kiyiapi**. Thus, the contention of the

Respondents was that the issues raised in the Petition are so insubstantial and so attenuated that a court of law properly directing itself to the issues cannot fashion an appropriate remedy in the circumstances. It was therefore posited that the Petition was only filed for political mischief and to entrench ethnicity within the University; which ought not to be countenanced by the Court.

[8] On behalf of the Interested Party, an Answer was filed herein on **15 October 2015** by **M/s Chemoiyai & Co. Advocates**. According to the Interested Party, he has always been a *bona fide* employee of the **University of Eldoret**; and that, as he never resigned, it cannot be true that he was reinstated or re-absorbed as alleged by the Petitioner. He averred that the Petition lacks merit and therefore ought to be dismissed with costs. He also averred the Petitioner lacks the requisite *locus standi* to file the Petition as he was certainly not acting in the public interest, but in pursuit of a personal political agenda.

[9] Directions were thereafter given herein on **10 May 2016** that the Petition be disposed of by way of written submissions. Consequently, the parties filed their respective written submissions which were thereafter highlighted on **2 April 2019**. In her written submissions, learned Counsel for the Petitioner, **Ms. Karuga**, proposed the following issues for determination and fashioned her submissions along those lines:

[a] Whether the Petitioner has *locus standi* to file this Petition;

[b] Whether the Court has jurisdiction to hear this Petition:

[c] Whether the Respondents were in breach of the legal provisions cited by the Petitioner;

[d] Whether the Respondents are immune to prosecution;

[e] Whether there is misjoinder of the University Council.

[10] Ms. Karuga relied on the cases of **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR** and the **Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1** to support her submissions that the Petition is well-founded and that the Court has the jurisdiction to entertain it. Counsel then addressed each of the grounds relied on in the light of the pertinent constitutional provisions and urged the Court to find that, in each respect, the Respondents failed to adhere to the constitutional imperatives for good governance; especially in terms of management of public funds. She relied on **Benson Riitho Mureithi vs. J.W. Wakhungu & 2 Others [2014] eKLR** and urged the Court to find that the acts of the Respondents amount to a violation of the Constitution and therefore that the Petition goes far much beyond the tribal and political differences alluded to by the Respondents.

[11] The Respondents' written submissions were to the effect that the dispute herein is actually not premised on abuse of office by the Respondents but a witch-hunt against the 2nd Respondent, on the grounds that the seat of the Vice Chancellor ought to have been given to a member of the local community and not the Respondent who is from the Luhya Community; and that the 2nd Respondent being a woman is not deserving of the position of Vice Chancellor, especially as viewed from the lenses of the local community, which is patriarchal in nature. Counsel urged the Court to take judicial notice of the dispute over the appointment of 2nd Respondent, granted that it has never been discreet but was published widely on print and electronic media. Accordingly, Counsel relied on **James Kugocha vs. Chief County Officer, Department of Infrastructure [2018] eKLR** in urging the Court to find that the Petitioner lacks the requisite *locus standi* herein, as this is a classic example of a person motivated by political considerations.

[12] The Respondents also submitted that the Petition does not meet the threshold set by **Rule 10(2)** of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Rules** and the case of **Anarita Karimi Njeru vs. The Republic [1976-1980] KLR 1272** in that the Petitioner did not set out his grounds of complaint with a reasonable degree of precision as is required. Regarding the allegations of abuse of office, the submission of the Respondents was that the same were not proved to the requisite

standard, they being in the nature of criminal offences. The case of **Martin Nyaga Wambora & Others vs. Speaker of the Senate & 6 Others [2014] eKLR** was cited in support of this argument. Counsel, thus, urged the Court to dismiss this Petition and award costs thereof to the Respondents.

[13] On behalf of the Interested Party, who was adversely mentioned in the Petition as one of those to whom the Respondents unlawfully conferred a benefit, **Mr. Chemoiyai** submitted that the Petition was premised on the mistaken view that the Interested Party had resigned as an employee of the University. He reiterated the position of the Interested Party that he had taken leave of absence pursuant to the Collective Bargaining Agreement between the University and the University Academic Staff Union (UASU); and that the said leave was renewable up to six years. Counsel accordingly submitted that the Interested Party has been adversely mentioned herein by the Petitioner without any lawful cause or basis; and therefore that the Petition ought to be dismissed with costs to the Interested Party.

[14] I have given careful consideration to the Petition, the responses thereto, as well as the written and oral submissions made herein by learned Counsel for the parties. A couple of preliminary points were taken which I propose to deal with upfront; namely, the question of jurisdiction, *locus standi* and whether the Petition meets the threshold set by **Rule 10(2)** of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Rules**.

[15] The Respondent's argument that the Court lacks the jurisdiction to entertain the Petition was hinged on the premise that since the Constitution and the relevant statutes have specifically and expressly prescribed procedures for handling grievances such as the Petitioner's, those procedures ought to have been exhausted first. In particular, the Respondents cited the **Universities Act** and the **Ethics and Anti-Corruption Commission Act** as some of the statutes that make specific provision for the complaints raised by the Petitioner herein.

[16] There is no gainsaying that jurisdiction is everything; and that without it a court of law can make no valid step in a matter placed before it; a point aptly expressed in the **Owners of Motor Vessel "Lillian S" Case** (supra) thus:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[17] And in the work, **The Major Law Lexicon, Volume 4**, jurisdiction is defined thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[18] Hence, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court made the point that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction

of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[19] In the light of the foregoing, it cannot be validly argued that the Court lacks the jurisdiction to entertain this Petition, granted the provisions of **Article 165(3)** of the **Constitution**. It would have been a different matter altogether had the Respondents expressly invoked the doctrine of exhaustion as opposed to a lack of jurisdiction. Accordingly, without belabouring the point, it is my finding that the Court has the jurisdiction to entertain the Petition.

[20] On *locus standi*, the Respondents were of the position that the Petitioner has no genuine interest in the Petition and that he simply filed it to further his ulterior ethno-political interests. However, the Respondents did not dispute the averments that the Petitioner, as a Kenyan Citizen and a tax payer, is entitled by the Constitution to demand fair administrative action and accountability from public office holders. Indeed, **Article 3(1)** of the **Constitution** is explicit that every person has an obligation to respect, uphold and defend this Constitution; and **Article 258** recognizes that that provides that:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

[21] In this Petition, it is alleged that the Respondents infringed the provisions of **Articles 10, 73, 75, 80, 201 and 232** of the **Constitution**. Accordingly, by dint of **Articles 3 and 258** aforesaid, the Petitioner was in his place to petition for relief in accordance with **Article 165(3)(d)(ii)** of the **Constitution**. Hence, I would take the view that the Petitioner has the requisite *locus standi* to present this Petition. I would, thus, adopt the position taken by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR that:

"...our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the *locus standi* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution."

[22] The Respondents also raised the issue that the Petition was not pleaded with the requisite specificity and therefore does not accord with **Rule 10(2)** of the **Mutunga Rules** or the **Anarita Karimi Njeru Case**. In that case, it was held that:

"...if a person is seeking redress from the High Court on a matter which involves a reference

to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

[23] A perusal of the Petition does reveal that that the facts relied on by the Petitioner have been set out in paragraphs 5 to 18 thereof. The injuries complained of have also been set out as well as the reliefs sought. Likewise, the constitutional provisions relied on have also been set out in the body of the Petition, the same particulars were duly set out in the body of the Petition to furnish the basis for complaint. I would, thus, take the view that the Petition does meet the minimum threshold set for it. In the same vein, I find no merit in the the Respondents argument as to the joinder of the Council as the 1st Respondent, granted the nature of the orders sought by the Petitioner. In this respect, I am in full agreement with the position taken by **Hon. Odunga, J.** in **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another** (supra) that:

“On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

[24] Turning now to the merits of the Petition, the basic contention of the Petitioner, as I understand it, is that the Respondents acted in abuse of office, and therefore in contravention of the provisions of **Articles 10, 201 and 232** of the **Constitution**, in the four instances set out in the Petition, namely:

[a] In the appointment of **Prof. Julius O. Ochuodho** and **Prof. Kapil Mohan Khanna** as Resource Champions in the Directorate of Resource Mobilization and Strategic Initiatives;

[b] In the re-deployment of five administration police officers to the institution;

[c] In the approval and payment of allowances to administration police officers amounting to **Kshs. 552,000/=**;

[d] In the re-engagement of **Prof. James Ole Kiyiapi** as an Associate Professor in the School of National Resources Management.

[25] The issue for my determination therefore is whether indeed, the Respondents infringed the provisions of the Constitution in the four instances alleged.

[a] On the Appointment of Prof. Julius O. Ochuodho and Prof. Kapil Mohan Khanna as Resource Champions:

[26] In paragraphs 6 and 7 of the Petition, the Petitioner complained that, on **5 December 2014**, the 2nd Respondent appointed **Prof. Julius O. Ochuodho** and **Prof. Kapil Mohan Khanna** to hold the office of Champions in the Directorate of Resource Mobilization and Strategic Initiatives; and yet the position does not fall within the structure of the University. However, in its detailed response to the Petition, the Respondents presented documents as annexures to the Affidavit in Support of the Answer to Petition, sworn by the 2nd Respondent, to demonstrate that, in its strategic plan for the years 2014 to 2019, the

need for aggressive resource mobilization was noted by the University to enable it implement the various projects and programs detailed in the strategic plan. It was further the evidence of the 2nd Respondent that the strategic plan was a product of consultation with all stakeholders including the Government and the general community before its adoption by the Management and Council of the University.

[27] Hence, at paragraphs 31-34 of the 2nd Respondent's affidavit, she averred that, upon the adoption of the Strategic Plan 2014-2019, the University Management Board with the approval of the Senate and the Council of the University, duly established the Directorate of Resource Mobilization and Strategic Initiatives to champion all its initiatives aimed at mobilizing resources for implementation of the University's programs. It was therefore asserted that the Directorate of Resource Mobilization and Strategic Initiatives fits perfectly within the University Structure; and that, by dint of Statutes XV, XVI and XXIV of the University of Eldoret, the institution had the power and mandate to make the appointments of Resource Champions as it did.

[28] The Respondents relied on a copy of the Minutes showing the deliberations leading to the appointment of the Champions as **Annexure PTA/6**; as well as a copy of the Resource Mobilization Strategy developed and approved as required by the University Statutes, as **Annexure PTA/7**; and **Annexure PTA/7** states thus, at paragraph 9.3 in respect of the Champions of Resource Mobilization:

“These are positions to be held by Senior Academics of the University on appointment by University Council. To be appointed one has to show their ability and capacity to network and show success in certain areas of RM. They will assist the University/Directorate by enhancing search for resources, leveraging their knowledge, skills and experience. Each Champion will be issued with a specific TOR for focus but is free to engage in whatever areas available to him/her. The Champion shall be entitled to a special duty allowance as those of Directors/Deans and reviews shall be determined by the University Council from time to time.”

[29] Further to the foregoing, the 2nd Respondent averred that the appointments of **Prof. Julius Ochuodho** and **Prof. Kapil Mohan Khanna** was done through a consultative process from within the University and that they have so far done commendable work in their respective assignments, including securing a partnership between the University and SNV Kenya/Netherlands Development Organization. A copy of the Memorandum of Understanding was marked as **Annexure PTA/8** to the Supporting Affidavit to buttress the averment.

[30] It is noteworthy that all these averments in defence of the appointment of the two Champions, who were described at paragraph 34 of the 2nd Respondent's affidavit as eminent and distinguished persons, were not refuted by the Petitioner. Indeed, the Petitioner opted to rely on their Letters of Appointment in which it was expressly acknowledged that the appointments followed the establishment of the Directorate of Resource Mobilization and Strategic Initiatives; a clear indication that the position had been created prior to the appointment. Moreover, in her submissions before the Court, Counsel for the Petitioner conceded that:

“...on the issue of the existence of the office of Resource Mobilization, the Respondents have brought to the attention of this court the adoption of the Resource Mobilization Strategy Plan 2014-2019 (exhibit PTA 7) by the University to help in its development process and mobilization of its resources. The membership of the office of Champions is set out in part 9.3 of the same...”

[31] In the premises, the allegation that the Respondents acted in breach of the Constitution by appointing Champions to non-existent positions is completely devoid of merit. It is likewise evident that the appointments were done in accordance with the provisions set out in the University's instruments of governance; and therefore that no fault can be attributed to the Respondents in the circumstances.

[32] In respect of the two Champions, the Petitioner also complained that, in abuse of the institution's resources, the allowances of the appointees were increased by **Kshs. 50,000/=** each over and above their

normal salaries and allowances. In response, the 2nd Respondent explained that by dint of the Collective Bargaining Agreement ratified by the University and UASU, all professors who are charged with extra workload are entitled to compensation to facilitate the execution of the extra responsibilities. She explained that it was for that reason that an allowance of **Kshs. 50,000/=** was approved for the Resource Mobilization Champions, computed as follows:

[a] Responsibility Allowance Kshs. 15,000/=

[b] Entertainment Allowance Kshs. 15,000/=

[c] Car Allowance Kshs. 15,000/=

[d] Telephone Allowance Kshs. 5,000/=

[33] As has been pointed out herein above, the payment of the special duty allowance to the Champions at the rate applicable to Directors/Deans of the University was provided for in the governance and policy instruments; and in particular in paragraph 9.3 of the **Resource Mobilization Strategy, 2014-2019**. There is no evidence presented herein by the Petitioner to show that the allowance was in excess of that envisaged under paragraph 9.3 aforementioned. I accordingly find no wrongdoing in the payment of the sum of **Kshs. 50,000/=** to the Champions as their special duty allowance.

[b] On the secondment of five administration police officers to the institution:

[34] While the Petitioner did not seem to dispute that there was need to enhance security at the University, he took issue with the fact that the salary of the 5 administration police officers who were appointed by the Respondents was different from that of the 2nd Respondent's body guard, assigned to her by the **National Police Service Commission**. He complained that these disparities and irregularities had the effect of bestowing double pay to the said officers with effect from **November 2014** when they were deployed, and therefore amounted to abuse of office. The 2nd Respondent answered the allegations by explaining the circumstances that led to the secondment. She explained that sometime in the month of **January 2015**, the University security received intelligence reports of an impending invasion of the institution at the instance of individuals who wanted her out of office; upon which the University informed the relevant Government Security agencies. She added that indeed, on **12 February 2015**, the University was invaded by a rowdy group led by the local leaders who stormed into the University thereby causing chaos and destruction of property within the University; and that the situation recurred on **18 February 2015** and **19 February 2015**; whereupon the University was closed indefinitely.

[35] The 2nd Respondent further averred that, given the need to ensure the security of both the students, staff and the University property, the Management of the University requested its Council to allow the Management Board to seek additional security officers from the National Police Service; which request was approved, with the direction that the police officers were to be on duty within the University on secondment terms. The matter was followed up by Management and the National Police Service released the officers on the terms set out in the documents marked **Annexures PTA/16(a-e)**, which terms were accepted by the said officers. According to her, it was not the responsibility of the University to go into the question of which officers would be seconded to it; or to see to it that the National Police Service ceased payment of salaries and allowances to the said officers. The Respondents also exhibited a letter from the AP Commander (**Annexure PTA/17**) to confirm that the officers were on secondment and that they would receive their salaries and allowances from the University.

[36] Further to the foregoing, the 2nd Respondent explained that, upon deliberations with the security team, it was resolved that the security officers be paid allowances by the University instead of salaries; and the irregularly received salaries be recovered from them. Thereupon she wrote the letters marked **Annexure PTA/18(a-e)** and authorized the Finance Officer to implement the recovery of the irregularly received salaries from the police officers.

[37] The letter marked **Annexure PTA/17** confirms that 5 officers were released from the Administration Police Service to the University in **November 2014**; namely: **Fredrick Abuga, Nelson Munywoki, Rosemary Wnjiku, Julius Kirui and Hedwick Munialo**. In that letter, attributed to the AP Commander, Uasin Gishu, it was expressly stated that:

“This is therefore to confirm that the officers shall get their pay from your end as per the secondment terms as from the respective dates they reported for their duties. The payments, including salaries and other allowances shall be from your end forthwith until the time their secondment periods will end.”

[38] Similarly, the letters marked **Annexures PTA/16(a-e)** clearly support the averments of the 2nd Respondent to the effect that the University issued independent letters of appointment to the five officers on the basis of secondment. Each of the letters is explicit that the seconded officers would be deployed as Security Officers in the Department of Security and Safety from **3 November 2014** until further notice, and that:

“...This appointment is subject to your relinquishing the salary and other benefits that you receive from your current employer...”

[39] In the premises, it was the responsibility of the Administration Police Service, from which the officers were seconded, to ensure cessation of salary payment in respect of the seconded officers in tune with their letter dated **20 November 2014**; and therefore that the Respondents cannot be accused of abuse of office in the circumstances. It matters not that the terms of engagement and payment of the officers were revised later vide the letters marked **Annexures PTA/8(a-e)** as any overpayments/underpayments from the standpoint of the University were set for recovery in terms of the documents marked Annexure PTA/19 and PTA/20; all indications being that the payment were made, not out of deliberation, but on the basis of clear and unequivocal communication from the National Police Service.

[c] In the approval and payment of allowances to administration police officers amounting to Kshs. 552,000/=:

[40] The Petitioner took issue with the fact that the University paid some **Kshs. 552,000/=** as allowances to administration police officers who were on public duty at the University. There appears to be no controversy that a good number of police officers were deployed to the University to quell the riots that rocked the institution in 2015. According to the Respondents, a total of 123 police officers were deployed for a period of 4 days to keep peace at the institution. That subsequently, the National Police Service wrote to the University claiming lunch allowances for the said officers, upon which the payment was made. There being no specific demonstration by the Petitioner that the police officers were not entitled to lunch allowance, I find no merit in the contention that the funds were misused.

[d] On the re-engagement of Prof. James Ole Kiyiapi as an Associate Professor in the School of Natural Resources Management.

[41] The Petitioner complained that the 2nd Respondent, on behalf of the Council, reinstated the Interested Party, **Prof. James Ole Kiyiapi**, the Interested Party herein, vide a letter dated **13 January 2014**; yet the Interested Party had resigned from his employment in **2012**, as an Associate Professor in the School of Natural Resources Management, to join politics. According to the Petitioner, the Interested Party was re-employed without a competitive process being followed and therefore this is a clear demonstration of abuse of public office and resources.

[42] In response, the 2nd Respondent averred that the Interested Party was an Associate Professor in the School of Natural Resource Management of Moi University; that he took leave of absence in 1999 to serve in the public service; and that he wrote a letter dated **10 July 2013** to the Vice Chancellor of Moi University, the then Host University for the school, seeking to resume his duties as an Associate Professor. The 2nd Respondent further averred that, since the School of Natural Resource Management had been transferred to the University of Eldoret upon getting its Charter, the Moi University Chancellor

forwarded the Interested Party's letter to her office for consideration. She then initiated correspondence with the relevant authorities including the University Council; which approved the resumption of duties by the Interested Party in the 7th Special Meeting held on **2 December 2013**. The 2nd Respondent further explained that the approval by the Council came after clearance had been obtained from the then Secretary to the Cabinet vide a letter dated **19 August 2013**. In support of the Respondents' posturing copies of the relevant correspondence and Minutes were annexed to the 2nd Respondent's affidavit and marked **Annexures PTA/10 to PTA/13**).

[43] The Interested Party also filed his own Answer to the Petition, dated **15 October 2015**, contending that the question of his reinstatement did not arise, since he has always been a *bona fide* employee of the University of Eldoret, formerly Moi University Chepkoilel Campus. He further averred that he applied for leave of absence without pay to take up an appointment as a Permanent Secretary; which leave was granted. He asserted that he never resigned from the employment of the University of Eldoret to join politics, since the leave of absence stated in clause 5 was still in force; and therefore that he was never appointed as alleged by the Petitioner. The Interested Party deposed to the foregoing facts in his Supporting Affidavit filed with his Answer to the Petition and annexed thereto copies of the supporting documents, including his application letter for unpaid leave dated **18 January 2007**; the University's letter in response, granting his request for unpaid leave, and requests for extension of leave of absence. The documents were marked **Annexures JLK1-3**.

[44] The Interested Party also annexed to his affidavit documents to demonstrate that although he resigned from his position as a Permanent Secretary to join politics, his attempt was not successful; hence his assertion that all the while, up to the point of resumption of duty, he remained a *bona fide* employee of the University. He annexed copies of the pay slips while serving as Permanent Secretary to show that he continued to make contributions to the Moi University Pension Scheme; and added that, after his political objectives failed, he went back to Moi University, Chepkoilel Campus (now the University of Eldoret) to resume his duties after exhausting his unpaid leave.

[45] That explanation was not refuted or dislodged by the Petitioner; and therefore his allegations that the Interested Party was unlawfully appointed by the Respondents is completely without basis. A plausible explanation was also furnished as to why he was placed on the salary level that was set out in the 1st Respondent's letter dated **13 January 2014**. The Interested Party relied on a letter dated **1 December 2010** to the Vice Chancellor, Moi University by **Amb. Francis K. Muthaura**, the then Permanent Secretary, Secretary to the Cabinet and Head of the Public Service. The letter states as follows in part:

“The Government has in the recent years strived to both enhance and diversify its skills base, especially in the top level of the Service through hiring specialized personnel from the private sector, the academia and the Kenyan Diaspora. This approach has proved to be very rewarding for the performance of the Public Service, especially in the context of the mammoth reforms that are presently in progress.

The Permanent Secretaries listed below are among the category of senior officials drawn into the top management cadre of the Civil Service from your university:

Prof. John Krop Lonyangapuo, CBS

Prof. James L. Ole Kiyiapi, CBS

In consideration of the very positive contribution of these academicians in the improvement of the performance of the Civil Service as well as the added practical knowledge that they have gained in policy making and implementation, the Government has decided that they will maintain their levels of earning for basic salary and House Allowance in the Civil Service upon return to academic duties at the University...”

[46] In the premises, it is manifest that, overall, the Petition is completely devoid of merits; such that it would be pointless considering the outstanding issues such as immunity of the Respondents. Accordingly,

the Petition is for dismissal and it is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE