



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 56 OF 2016**

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA  
SECTIONS 8 AND 9**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47 AND 49**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF EDUCATION.....RESPONDENT**

**AND**

**THE ATTORNEY GENERAL.....INTERESTED PARTY**

**EX PARTE: THADAYO OBANDA**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 12<sup>th</sup> February, 2016, the *ex parte* applicant herein, **Thadayo Obanda**, seek the following orders:

**1. An order of Certiorari to quash the decision of the respondent dated 16<sup>th</sup> January, 2016 and communicated through the Daily Nation Newspaper to purportedly reconstitute the governing council of the University of Nairobi.**

**2. An order of Certiorari to quash the decision of the respondent date 16<sup>th</sup> December, 2015 preventing the governing council of the university of Nairobi from discharging its statutory mandate.**

**3. An order of Prohibition directed at the respondent prohibiting him from interfering or in way whatsoever meddling with the composition of the governing council of the University of Nairobi.**

4. **An order of Prohibition directed at the respondent prohibiting him from interfering or in way whatsoever meddling in the composition of the management of the University of Nairobi.**

5. **Costs of this application and the entire proceedings be awarded to the ex parte applicant.**

### **Ex Parte Applicants' Case**

2. According to the applicant, the respondent Cabinet Secretary, **Dr. Fredrick Okeng'o Matiang'i** was transferred, in November 2015 from the Ministry of Information Communication and Technology to head the Ministry of Education, Science and Technology and since then, the respondent minister has been deliberately interfering with the Management of the University of Nairobi by seeking to disband the governing council and frustrating its mandate.

3. It was averred that on 16<sup>th</sup> December, 2015, the respondent, while applying wrong provisions of the law, to wit, provisions that govern the running of the commission for university education purported to instruct the governing council of the University of Nairobi not to transact any business. It was further contended that on 16<sup>th</sup> January, 2016 the respondent placed an advertisement in the *Daily Nation* Newspaper of the said date purporting to invite members of the public to apply for membership of the governing council of the University of Nairobi.

4. According to the applicant, notwithstanding the legal advice of the Attorney General advising the respondent not to interfere in the affairs of the governing council of the University of Nairobi, which was widely reported in the media, the respondent crippled the university's operations by failing to lift the said ban on council's operations.

5. It was contended that it was in the public domain, especially in social and mainstream media that the respondent minister was sacked from the Literature Department of the University of Nairobi for absconding classes and failing to examine two students on time. It was therefore the applicant's case that the purported reconstitution of the governing council of the University of Nairobi by the respondent is actuated by malice as the respective terms of members of the said governing council is yet to lapse. Based on the said contention, it was averred that the Respondent cannot fairly and reasonably reconstitute the Council hence the purported reconstitution of the governing council of the University of Nairobi is a smoke screen to enable the respondent settle scores with the governing council of the University of Nairobi for having sacked him.

6. The applicant's position was therefore that the respondent should not be allowed to frustrate a premier institution such as the University of Nairobi to settle personal scores.

7. It was submitted on behalf of the applicant that the Respondent can only take administrative actions touching on the University of Nairobi under the provisions of the relevant legal instruments such as the **Universities Act**, No. 42 of 2012, **The State Corporations Act, Cap 446**, Laws of Kenya and the **Letter of Interim Authority and the University of Nairobi Charter, 2012**. It was however submitted that there is no provision for the removal of a member of the council, or the entire council as the Respondent purported to do though the Charter prescribes circumstances under which there may arise a vacancy in the office of a member of the council and this is through resignation, inability to exercise his duties due to physical or mental infirmity or death.

8. It was submitted that the University being a State Corporation, governed by the **State Corporations Act**, resort also had to be had to section 7 of the said Act, which empowers the President to "revoke the appointment of any member of the board" or he may "constitute a new board for such period as he shall, in consultation with the committee, determine." It was therefore submitted that the Respondent in taking action that, administratively, he is not empowered to, did not have the power to reconstitute the board as this power, which is donated by section 6(2) of the **State Corporations Act**, is limited as prescribed under that section.

9. It was therefore submitted that the Respondent's motivation was personal and was intended to settle

scores informed by the termination of his employment by the University hence amounted to misuse of power on his part.

10. In support of his submissions the applicant relied on **Council for Civil Service Unions vs. Minister for Civil Service [1985] AC 374 at 401D**, **Mark Ole Karbolo & 4 Others vs. Ag. Minister for Industrialisation & Another HC Misc. Appl. No. 337 of 2011** and **Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270** and submitted that the actions by the Respondent were not supported by the law.

### **Respondents' Case**

11. On behalf of the Respondent and the interested party, only submissions were filed. The said Respondents submitted that prayer 2 in the motion was overtaken by events when the Cabinet Secretary (hereinafter referred to as "the CS") rescinded the letter dated 16<sup>th</sup> December, 2015 hence the governing council is in the office performing its business as usual.

12. It was submitted that the decision of the CS declaring vacancies was in line with process for reconstitution of Councils of Public Universities and University Colleges and reliance was placed on section 36(1) of the ***Universities Act***. Whereas section 36(1)(d) provides that the CS shall appoint five members of the Council through an open process, it was submitted that the Universities including the University of Nairobi do not meet this requirements as the open process was not done and none of the members of the council meet this requirement.

13. It was therefore submitted that the declaration of the announcement in the advert constituted sufficient notice to serving members of the Council as per Article 47 of the Constitution as read with the provisions of the Fair Administrative Action Act and that this information had been given to Public Universities and Colleges.

14. It was therefore submitted that the CS acted within the law and within his mandate under the ***Universities Act*** as the serving members were given sufficient notice and the reconstitution was in accordance with the law. It was submitted that this decision was guided by the decision in **Joseph Mbeeria Mutuura & Another vs. Cabinet Secretary Ministry of Education, Science and Technology & 2 Others [2014] KLR** in which the CS was compelled via an order of mandamus to commence the reconstitution process of Jomo Kenyatta University of Science and Technology in which the Court in granting the said orders was persuaded by the argument that section 36(1)(d) of the ***Universities Act*** had not been followed.

15. It was therefore submitted that the CS sought to reconstitute all governing Councils of all Public Universities and University Colleges to bring them in line with the law by advertising for the applications and publishing the same in the local dailies. The Respondent relied on section 36(1)(a) and (g) of the ***Universities Act*** as providing for the role of the CS in the appointment of the chairperson and members of the Councils of the Universities hence in exercising that mandate the CS cannot be said or accused of meddling in the management of the University or malice without any evidence.

16. It was submitted that as the applicant is not a member of the University Council, it has not been shown how the right under Article 47 of the Constitution has been violated as the CS does not owe him any administrative action in the meaning of that Article.

17. It was therefore the Respondent's case that the orders sought herein are undeserved.

### **Determination**

18. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed. As the Respondents did not swear any affidavit, the factual averments deposed to by the applicants remain wholly uncontroverted.

19. The law in matters such as the present one is now well established. In the exercise of executive action, the executive is required to justify its action on some legally recognised provision, positive law or policy. Executive power must therefore be properly exercised within the lawful bounds or parameters and ought not to be misused or abused. According to **Prof Sir William Wade** in his learned work *Administrative Law*:

**“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”**

20. It is trite that an executive body or authority has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

21. It is therefore clear that the powers of an executive authority must be conferred by the Statute under which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

22. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

23. Where an executive authority operates outside its sphere, the Court would be entitled to intervene.

24. Since the Respondent relied on section 36(1) of the **Universities Act** (hereinafter referred to as “the Act”) as the basis for his decision, it is important to interrogate the said provision. The said provision provides that:

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

***(a) chairperson;***

***(b) the Principal Secretary in the Ministry for the time being responsible for the university education;***

***(c) the Principal Secretary in the Ministry for the time being responsible for Finance;***

***(d) five members appointed by the Cabinet Secretary through an open process; and***

***(e) the Vice-Chancellor who shall be an ex officio member of the Council.***

25. It is therefore clear that the CS has the power to appoint members of the Council. That provision does not however expressly confer upon him the powers to disband and reconstitute an existing Council. Section 51 of the **Interpretation and General Provisions Act**, Cap 2 Laws of Kenya however provides as follows:

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

26. Whereas the above provision states the general law, the same is subject to the existence of a contrary intention. As the applicant contends, there is a provision for the removal of a member of the council under **Letter of Interim Authority and the University of Nairobi Charter, 2012**. The circumstances under which there may arise a vacancy in the office of a member of the council, according to paragraph 18(3) of the said Charter are resignation, inability to exercise his duties due to physical or mental infirmity or death. In this case section 6(2) of the **State Corporations Act** provides as follows:

***Every appointment under subsection (1)(a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of three years or for such shorter period as may be specified***

*in the notice, but shall cease if the appointee-*

*(a) Serves the Minister with written notice of resignation; or*

*(b) Is absent, without the permission of the Minister notified to the Board, from three consecutive meetings; or*

*(c) Is convicted of an offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding two thousand shillings; or*

*(d) Is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board; or*

*(e) Conducts himself in a manner deemed by the Minister, in consultation with the Committee, to be inconsistent with membership of the Board.*

27. As the CS did not respond to the factual averments by the applicant, there is no material upon which this Court can find that the CS had proper reasons for making the decision in the manner he did. In other words there is no evidence that the above circumstances existed in order to trigger the action by the CS. In the absence of such evidence one can only conclude that the CS acted arbitrarily. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** it was appreciated that:

**“...judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure...and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”**

28. It is trite that power ought to be properly exercised and ought not to be misused or abused. To deliberately set out and purport to exercise a power not properly conferred by the law is an abuse of power. According to **Prof Sir William Wade in his Book *Administrative Law***:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

29. Since section 36(1) of the Universities Act which the applicant relied upon does not confer power upon the CS to reconstitute the Council in the manner it did, the CS clearly acted without or in excess of his power as was properly opined by the Attorney General. In *Republic vs. County Council of Murang'a ex parte Makuyu Transporters Self Help Group & Others Nyeri HCMCA No. 40 of 2009* Serگون, J held that since the Respondent purported to exercise discretion under the wrong provisions of the law, it had

no jurisdiction to do so and therefore acted outside the law. The Court noted that best thing the respondent could have done was to withdraw the gazette notice but it opted to soldier on. Consequently on this account alone the motion was found to be merited.

30. In this case the Court was informed vide submissions that upon the Attorney General giving his opinion in the matter, the CS beat a hasty retreat and rescinded the letter dated 16<sup>th</sup> December, 2015. If this indeed happened it would be a move in the right direction as this was the position taken by Nyamu, J (as he then was) in *Midland Finance & Securities Globetel Inc vs. Attorney General and Another* [2008] KLR 650 in which the Learned Judge cited with approval the decision *Bank of Uganda vs. Banco Arabe Espanol* [2007] EA 333 that:

**“The opinion of the Attorney General as authenticated by his own hand and signature regarding the laws...and their effect or binding nature or any agreement contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents...It is improper and untenable for the Government...or any other public institution or body in which the Government...has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interest of 3<sup>rd</sup> parties. As a country we must have and maintain an acceptable measure or standard of public morality and the Attorney General should be held to his bargain, both on the ground of public morality and on the principle of good faith (*pacta sunt servanda*).”**

31. It is therefore highly advisable for public servants and government and institutions to seek the legal opinion of the Attorney General in areas where they are not sure of their action or propose action and abide by the same in order to avoid rushing in decision which may well turn out to be reckless and unlawful hence subject the tax payer to unnecessary costs. In this case however there was no affidavit and therefore the communication purportedly rescinding the impugned decision was not properly placed before the Court.

32. The other ground upon which the CS based its decision was the decision in **Joseph Mutuura Mbeeria & another v Cabinet Secretary for Education, Science & Technology & 2 others** [2014] eKLR. In that case the Court issued an order of *mandamus* directing the 1<sup>st</sup> Respondent (Cabinet Secretary for Education, Science and Technology) to commence the recruitment process of members of JKUAT Council in accordance with the law. The University of Nairobi was not a party to those proceedings and no order was directed at the said University. Accordingly, the said decision could not bind the University of Nairobi unless it was directed to all public universities and constituent colleges which was not the case.

33. The applicant further contended that the Respondent’s motivation in making the impugned decision was personal and was intended to settle scores informed by the termination of his employment by the University of Nairobi hence amounted to misuse of power on his part. In support of this contention the applicant exhibited a copy of the letter dated 23<sup>rd</sup> November, 2009 addressed to **Dr. Okeng’o M. Matiang’i** and signed by **Prof. Peter M. F. Mbithi**, the Deputy Vice-Chancellor (Administration & Finance) in which the addressee’s services were terminated. Though the existence of this letter was not controverted by the CS, based on the material placed before me I am not satisfied that the decision made by the CS was driven by the desire to settle scores with the University of Nairobi.

34. It was contended that the applicant had no business instituting these proceedings. Article 258 of the Constitution which provides as follows:

***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.***

35. Article 3(1) of the Constitution obliges every person to respect, uphold and defend the Constitution. Accordingly where a person is of the bona fide view that a provision of the Constitution has been violated or is threatened, the person is not only entitled to but is enjoined to bring an action to protect the Constitution. One of the values and principles of governance under Article 10 of the Constitution is the rule of law. In my view where a person reasonably feels that one of the national values and principles of governance is being violated, such as the rule of law, that person not only has the right but the constitutional obligation to move this Court for appropriate remedies.

36. I am therefore unable to accede to the Respondent's position that the applicant had no business instituting these proceedings.

37. Having considered the issues raised herein it is my view and I do find merit in the Notice of Motion dated 12<sup>th</sup> February, 2016.

### **Order**

38. In the premises I issue the following orders:

**1) An order of Certiorari removing into this Court for the purposes of being quashed the decision of the respondent dated 16<sup>th</sup> January, 2016 and communicated through the Daily Nation Newspaper to purportedly reconstituting the governing council of the University of Nairobi which decision is hereby quashed.**

**2) An order of Certiorari removing into this Court for the purposes of being quashed the decision of the respondent dated 16<sup>th</sup> December, 2015 preventing the governing council of the university of Nairobi from discharging its statutory mandate which decision is hereby quashed.**

**3) An order of Prohibition directed at the respondent prohibiting him from unlawfully interfering or in way whatsoever meddling with the composition of the governing council of the University of Nairobi.**

**4) An order of Prohibition directed at the respondent prohibiting him from unlawfully interfering or in way whatsoever meddling in the composition of the management of the University of Nairobi.**

**4) Half the costs of this application are be awarded to the ex parte applicant.**

39. It is so ordered.

**Dated at Nairobi this 3<sup>rd</sup> day of March, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties.***

**CA Mwangi**