



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 1 OF 2016

IN THE MATTER OF A JUDICIAL REVIEW APPLICATION

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE JUDICATURE ACT (CHAPTER 8) LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT (CHAPTER 23) LAWS OF KENYA

IN THE MATTER OF EMPLOYMENT ACT. NO. 11 OF 2007

IN THE MATTER OF THE INDUSTRIAL COURT ACT 2011

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010

**IN THE MATTER OF AN APPLICATION BY PROFESSOR JAMES K. TUITOEK FOR LEAVE
TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

BETWEEN

PROFESSOR JAMES TUITOEK

APPLICANT

v

THE CHIEF OF STAFF AND HEAD OF

THE PUBLIC SERVICE

1ST RESPONDENT

EGERTON UNIVERSITY

2ND RESPONDENT

JUDGMENT

1. Professor James Tuitoek (applicant) was appointed by Egerton University (2nd Respondent) as Vice Chancellor through a letter of appointment dated 13 January 2006, on a 5 year renewable contract.
2. On 6 January 2011, the 2nd Respondent through a letter of even date renewed the contract for another term of 5 years, on similar terms to the expired contract.
3. Before this renewed contract came to an end, the 2nd Respondent, through a letter dated 16 September 2015 informed the applicant that pursuant to a Circular OP/SCAC. 1/12(11) dated 14 May 2015 issued by the Chief of Staff and Head of the Public Service, he would revert to his substantive appointment as a Full

Professor in the Department of Animal Sciences earning the remuneration of the substantive position (full professor).

4. The letter also informed the applicant that the *exit package* (to continue enjoying the salary and house allowance attached to the vice-chancellorship after expiry of contract), which had been negotiated with him was being set aside on the basis of the aforesaid Circular.

5. The applicant, in a reply dated 15 October 2015 to the 2nd Respondent's letter of 16 September 2015, challenged the decision taken by the said Respondent, and made reference to the 2nd Respondent's Terms and Conditions of Service, (2008), and the practice where other academic staff who had served as Deputy Vice Chancellors (administrative positions) had reverted to the academic positions but maintained remuneration enjoyed as administrators/Deputy Vice-Chancellors.

6. In a response dated 18 January 2016, the 2nd Respondent informed the applicant that his request to retain the remuneration he used to enjoy as Vice Chancellor had been rejected by the University Council.

7. The applicant appears to have been dissatisfied with the decision, and he sought and was granted leave to apply for judicial review orders of *certiorari*, *prohibition* and *mandamus* against the decision on 28 January 2016.

8. After the grant of leave, the applicant lodged the substantive motion on 8 February 2016 seeking

1. **THAT** an order of **CERTIORARI** do issue directed at the 1st Respondent to bring into the Employment and Labour Relations Court and quash the circular dated 14th May, 2015 under reference Number OP/SCAC.1/12/(11).

2. **THAT** an order of **PROHIBITION** do issue Prohibiting the 1st and 2nd Respondents from Amending Varying, Vacating or in any way interfering with the Applicants terms of Exit package set out in Clause 13 of the Terms and Conditions of Service revised and approved by the 2nd Respondent University Council on 27th February, 2008.

3. **THAT** an order of **MANDAMUS** do issue compelling the 1st and 2nd Respondent to effect the Applicants Remuneration in accordance with clause 13 of the Terms and Conditions of Service revised and approved by the 2nd Respondents University Council on 27th February 2008.

9. When the motion was placed before Court on 10 March 2016, the Court gave directions as to the filing of responses. The 1st Respondent did not comply with the timelines and on 5 April 2016, the Court set new timelines and set mention for 25 April 2016 to confirm compliance (2nd Respondent had filed a Replying Affidavit sworn by the Chairman of Council, Dr. Reardon Olubayo on 5 April 2016, out of time but the same was admitted).

10. When the motion was called out on 25 April 2016, it turned out that the 1st Respondent had not filed any response to the motion and he sought more time, and the Court allowed him up to 6 May 2016.

11. On 3 May 2016, the 2nd Respondent filed what it referred to as Grounds of Opposition.

12. By 6 May 2016, the 1st Respondent had not filed any documents, and the Court in agreement with a proposal by the applicant and 2nd Respondent, gave directions as to the filing and highlighting of submissions on 19 July 2016.

13. Come 19 July 2016, the timelines were not complied with and the Court vacated the earlier directives of 6 May 2016 and issued new timelines for filing of further affidavits and submissions. The Court also admitted a further affidavit which had been filed without leave by the applicant on 17 June 2016.

14. Because of the admission of the applicant's further affidavit, the Court granted the Respondents liberty to file further affidavits before 30 July 2016.

15. In this regard, the 2nd Respondent filed a Supplementary Replying Affidavit on 31 August 2016 (again outside the set timeline).

16. The applicant filed his submissions and List of Authorities on 19 July 2016, the 1st Respondent filed his on 19 July 2016, while the 2nd Respondent filed its submissions and List of Authorities on 7 September 2016 (out of time).

17. The submissions were orally highlighted on 9 September 2016.

Applicant's case

18. The applicant's case is rather straightforward.

19. He contends that the 2nd Respondent's decision to vary the remuneration he was to earn after lapse of his contract as Vice-Chancellor of Egerton University was illegal and irrational because the Circular by the 1st Respondent on which the decision was founded violated the express provisions of his terms and conditions of employment as embodied in the 2nd Respondent's Terms and Conditions of Service (2008), by purporting to amend or vary the terms to his disadvantage, and also as violating his right to fair labour practices as envisaged in Article 41 of the Constitution.

20. He further urged that the decision to vary the terms and conditions of service was discriminatory as other staff who had served in administrative positions with the 2nd Respondent had been allowed to revert to earlier (academic) positions but had maintained the remuneration earned as administrators.

21. He also asserted he had a legitimate expectation to retain the remuneration earned while serving as Vice Chancellor.

22. According to the applicant, the decision taken by the Respondents was not only arbitrary, but a *mala fide* use of power.

1st Respondent's case

23. The 1st Respondent did not file any affidavit despite being granted an opportunity more than once, but in his submissions, he took the position that the applicant's contract as Vice Chancellor was a distinct contract from the contract to serve as an academic, and the benefits appertaining thereto did not extend beyond the vice chancellorship.

24. In the view of this Respondent, the Court could not look at any extrinsic evidence, save the contract between the applicant and the 2nd Respondent, as such a course would amount to the Court rewriting the contract and the case of *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd* (2000) eKLR was cited.

25. According to the 1st Respondent, extending the benefits enjoyed by the applicant as a vice chancellor when he was no longer the vice-chancellor would be illegal and unjustified, as the applicant was no longer carrying out the duties of Vice Chancellor.

26. On whether the Terms and Conditions of Service (2008) applied to the applicant, the 1st Respondent opined that the terms did not apply because the applicant had not signed a copy of the *letter of offer* accepting the same.

27. Regarding the Circular sought to be quashed, the 1st Respondent submitted that Circular did not

purport to alter, vary or amend the applicant's terms and conditions of service or withdraw the applicant's *exit package*.

28. The 1st Respondent also urged the Court to take judicial notice of the fact that the applicant had not brought forth his claim in 2011, when his contract was renewed.

2nd Respondent's case

29. On the part of the 2nd Respondent, it was contended that it is the University Council which determines the terms and conditions of service of all academic administrative staff and other staff, and that in respect of the Vice Chancellor, such terms are approved after consultations between the Cabinet Secretary and the State Corporations Advisory Committee.

30. Further, the 2nd Respondent contended that the applicant had failed to sign an *offer of appointment letter* as required under the Terms and Conditions of Service (2008) and therefore could not benefit from the said terms and conditions of service.

31. The 2nd Respondent in addition contended that it had set aside the *exit package* in the Terms and Conditions of Service, (2008) on the strength of the 1st Respondent's Circular OP/SCAC.1/12(11) dated 14 May 2015.

32. As to the terms and conditions of service for academic staff who served at administrative positions but later reverted to previous (academic) substantive positions, the 2nd Respondent asserted that the remuneration applicable was that of that substantive position in terms of the advice/recommendations contained in the 1st Respondent's Circular.

33. According to the 2nd Respondent, the remuneration it had offered the applicant on reverting to the position of *full professor* was in congruence with the constitutional imperative of fair remuneration for work of equal value.

34. In the estimation of this Respondent, were the applicant to succeed, the pay burden occasioned would be an additional Kshs 4,626,600/- which would not be a prudent expenditure in terms of the national values and principles.

35. In the view of the 2nd Respondent, what the applicant was seeking was an unconscionable attempt at unjust enrichment.

36. As to whether *certiorari* was available, the 2nd Respondent maintained that it was not, because the Circular in contention had been in place for more than 6 months. The Court's attention was drawn to the cases of *Ako v Special District Commissioner Kisumu & Ar* (1989) eKLR and *Wilson Osolo v John Ojiambo Ochal & Ar* (1996) eKLR.

37. The 2nd Respondent also urged the Court not to look at any extrinsic documents to determine the applicant's case as such would be contrary to the express provisions of section 97(1) of the Evidence Act.

38. In the 2nd Respondent's view, such course would lead to the Court rewriting a contract and the cases of *Nicholas Mbuya & 4 Ors v Alice Gesare Moninda* (2015) eKLR, *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Ors* (2014) eKLR and *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* (2014) eKLR were cited.

39. On the threshold to be met by an applicant seeking orders of judicial review, this Respondent, taking solace from the case of *R v Kenya Power & Lighting Co. Ltd* (2013) eKLR urged that the applicant had not pinpointed the *sins* committed by the Respondents to warrant grant of the orders.

40. In the aforesaid case, it was held that it is not enough for an applicant to claim a body had acted illegally, unreasonably or in breach of the rules of natural justice and that the actual *sins* of the body had to be demonstrated.

41. Further, it was submitted that orders of judicial review ought not to be made lightly, and the authority for that submission was stated to be Nairobi High Court Misc. Application No. 168 of 2015, *R v Principal Secretary, Ministry of Agriculture, Livestock & Fisheries & 2 Ors* (unreported).

42. In the view of the 2nd Respondent, there were also contested issues of fact which could not be resolved through affidavits.

43. Having outlined in brief the respective parties' contentions, it now behoves the Court to examine whether the applicant has met the test for grant of the orders sought.

Applicable law

44. For a long time in this jurisdiction, the primary anchor for applications for judicial review has been the Law Reform Act and Order 53 of the Civil Procedure Rules.

45. As to the contours, extent and scope of judicial review, the same have been delineated in cases such as *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*, Civil Appeal No. 185 of 2001 thus Judicial review is concerned with the decision making process, not the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, *whether the persons affected by the decision were heard before it was made* (my emphasis) and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

46. Odunga J in *R v Principal Secretary Agriculture, Livestock & Fisheries & Ors ex parte Douglas M. Barasa & 3 Ors* (2015) eKLR was of the view that Judicial review by its very nature is not the procedure by which contested matters of facts are to be resolved

47. Other cases include *R v Kenya Revenue Authority ex parte Yaya Towers Ltd* (2008) eKLR and *R v Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282.

48. As to the grounds upon the Court would exercise its discretion, it was long ago held in the case of *Council of Civil Unions v Minister for Civil Service* (1985) AC 2 that in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission..... *Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards the one affected by the decision....*(my emphasis).

Evaluation

Contested facts/whether Terms and Conditions of Service (2008) applied to applicant

49. The Respondents contended that there were contested facts in the present case, and the Court wishes to address that issue as a preliminary issue.

50. According to the Respondents, the disputed fact was whether the Terms and Conditions of Service (Revised 27 February 2008) applied to the applicant.

51. The relevant and material provision in the said Terms is located at clause 13 to wit

Re-Appointment of Senior Management Staff after leave of absence

Senior Management staff who have successfully served as Vice-Chancellor, Deputy Vice Chancellor and Principals of a Campus College in Egerton University and resume their substantive academic positions at the University will continue to earn their basic salary and house allowance of the previous positions. This will be personal to themselves. The salary and house allowance will remain fixed until the salary and house allowance of their substantive academic appointments equals what they are earning.

52. Clause 29 of the Terms and Conditions of Service (2008) on the other hand provided that

ACCEPTANCE

Acceptance of the terms and conditions will be *signified by signing the offer letter* (my emphasis) a copy of which will return to the Chairman of the Council.

53. The Respondents contended that the applicant did not sign the Terms and Conditions of Service (2008), and therefore he could not launch legal proceedings anchored on the same.

54. The applicant executed the initial contract dated 13 January 2006 on 20 January 2006. Clause 26 of the contract provided that the contract was subject to the Employment Act, Egerton University Act, University Statutes and *the University Staff Rules and Regulations as issued and/or amended from time to time* (my emphasis again).

55. The contract was renewed through a letter dated 6 January 2011 and it indicated that the applicant's renewed contractual terms and conditions of service remained the same.

56. The applicant accepted the renewal on 10 January 2011.

57. What is material is that the Respondents did not suggest or demonstrate that when the Terms and Conditions of Service (2008) came into effect, the applicant had been requested to signify acceptance of the same but declined or failed.

58. Therefore, in the Court's view, the Terms and Conditions of Service (2008) became incorporated into the applicant's contract pursuant to the proviso in the initial offer that the contract was subject to *the University Staff Rules and Regulations as issued and/or amended from time to time*, which he signed and his acceptance of the offer for renewal of contract. The applicant signed both contracts to signify acceptance of the terms.

59. The Court is therefore unable to understand the factual, contractual or legal foundation upon which the Respondents asserted that the Terms and Conditions of Service (2008) did not apply to the applicant, when the applicant signified his acceptance to be bound by Rules and Regulations issued from time to time, in both in the initial offer and renewal letter.

60. The Court in this respect rejects the Respondents contention that there (are)/were disputed facts not capable of determination through judicial review proceedings.

61.61. The Court finds that the Terms and Conditions of Service (2008) applied to the applicant.

Procedural impropriety

62. The 2nd Respondent informed the applicant through a letter dated 16 September 2015 that relying on

the contents of a Circular Ref. No. OP/SCAC/1/12(II) of 14 May 2015 from the 1st Respondent, he would revert to his substantive (academic) appointment as a Full Professor on remuneration appertaining to the professorial (academic) appointment (without maintaining remuneration earned while serving as vice-chancellor).

63. This letter of 16 September 2015 forms the substratum of the present judicial review proceedings.

64. The action taken by the 2nd Respondent purportedly acting on the strength of the Circular by the 1st Respondent was taking away an employment entitlement which had accrued to the applicant when he accepted the initial offer to be bound by *the University Staff Rules and Regulations as issued and/or amended from time to time* and again accepted in the renewed contract.

The Respondents in effect were varying a contractual provision unilaterally without consulting the applicant. The variation was to the disadvantage of the applicant.

66. The variation was also, in the Court's view, inconsistent with the interpretation issued by the 1st Respondent in his letter dated 19 August 2015 to the Cabinet Secretary, Ministry of Education that the Circular of 14 May 2015 was one of general application and that it was not meant to apply retrospectively, or put another way, meant to disturb accrued or contingent rights.

67. The *exit package* in the Terms and Conditions of Service (2008) accrued to and applied to the applicant when the same came into effect in 2008 and also from 10 January 2011, when he signified acceptance of the renewed contract.

68. In the Court's view, the action or decision by the 2nd Respondent predicated on the Circular from the 1st Respondent was tainted with procedural impropriety because the applicant was not granted an opportunity to make representations or argue his case, in a case where an accrued entitlement was being removed through a variation of the terms of engagement.

69. Not only that, the unilateral variation would also have been unlawful under the common law where a long chain of authorities have held that for a variation to an employment contractual provision to pass legal muster, it must have the consent of both parties.

70. The general rule regarding variation of a term of a contract is clear. For any variation to be lawful, it must be mutually agreed between the employer and the employee. This Court has had the opportunity to review the case law (see *Jackson Berege v Maasai Mara University* (2015) eKLR, *Samuel Muchiri Gikonyo v Henkels Chemicals (EA) Ltd* (2014) eKLR, *Industrial Rubber Products v Gillon* (1977) IRLR 389 EAT, *Harlow v Artemis Ltd* (2008) IRLR 629, *Rigby v Ferodo Ltd* (1987) IRLR 516).

71. With the conclusion, it is the view of the Court that it would be a mere academic exercise to address the other issues brought forth by the parties.

72. Before concluding, the Court notes with regret the Respondents failure to comply with timelines for filing of process without any logical explanations.

Appropriate Orders

73. The applicant sought 3 orders.

Certiorari

74. Considering that the Circular of 14 May 2015 is one of general application, it would not be appropriate for the Court to disturb it or issue an order of certiorari. Such an order would be overbroad.

Prohibition and Mandamus

75. In the Court's view, orders of prohibition and mandamus would vindicate the applicant's right and restore whatever entitlements were taken away by the decision of the Respondents.

76. The Court would therefore issues orders of *prohibition* and *mandamus* as set out in paragraphs 2 and 3 of the Notice of Motion dated 8 February 2016.

77. Applicant to have costs.

Delivered, dated and signed in Nakuru on this 11th day of November 2016.

Radido Stephen

Judge

Appearances

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|--------------------------------|---|
| For applicant | Mr. Wena instructed by Miller & Co. Advocates |
| For 1 st Respondent | Mr. Mbaka, Litigation Counsel, Office of the Attorney General |
| For 2 nd Respondent | Mr. Wekesa instructed Wekesa & Simiyu Advocates |
| Court Assistant | Nixon |