



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC APPLICATION NO. 232 OF 2012

REPUBLIC.....APPLICANT

VERSUS

THE PRESIDENT.....1ST RESPONDENT
THE ATTORNEY GENERAL..... 2ND RESPONDENT
THE COUNCIL, KENYATTA UNIVERSITY.....3RD RESPONDENT
THE CHANCELLOR, KENYATTA UNIVERSITY..4TH RESPONDENT
THE MINISTER FOR HIGHT EDUCATION,
SCIENCE AND TECHNOLOGY.....5TH RESPONDENT
PROF. OLIVE MWIHAKI MUGENDA.....1ST INTERSTED PARTY
ETHICS & ANTI-CORRUPTION
COMMISSION.....2ND INTERESTED PARTY
NATIONAL COHESION
& INTEGRATION COMMISSION.....3RD INTERESTED PARTY

-EX PARTE-

1. DR. WILFRIDA ITOLONDO

2. DR. MUMAH SOLOMON

3. DR. ELENA KORIR

4. MARTHA MIYANDAZI

5. FRED OBARE

RULING

1. By a Notice of Motion dated 24th July 2012, the ex parte applicants herein seek the following orders:

1. **An order of mandamus compelling the respondents to institute the process for appointment and to appoint the Vice Chancellor of Kenya University.**
2. **An Order of prohibition to prohibiting Prof. Olive Mwhaki Mugenda from acting or purporting to act as the Vice Chancellor of Kenya University unless appointed/reappointed as required by law.**
3. **That the Respondents be ordered to pay the Applicants the costs of this Application.**

2. The grounds upon which the said Motion is based are as follows:

1. **Kenyatta University (“the University”) is established under section 3 of the Kenyatta University Act, Chapter 210C of the Laws of Kenya (“the Act”).**
2. **Section 10 of the Act establishes the Office of the vice chancellor of the University and provides that the holder of the office is to be “appointed by the President after consultation with the Council, and with the chancellor if the President is not the chancellor.”**
3. **Under the said section 10 of the Act, the vice Chancellor is stated to be the academic and administrative head of the University.**
4. **Under Section 10(3) of the Act, the vice Chancellor of the University “shall hold office upon such terms and for such period as may be provided by the statutes” and is eligible for reappointment upon expiration of the period.**
5. **Under the statutes the Vice Chancellor, serves for a term of five (5) years effective from the appointment date and is eligible for reappointment upon expiration of the period.**
6. **Prof. Olive Mwhaki Mugenda was appointed Vice chancellor of the University effective 1st April, 2006. Under the laws relevant thereto herein above referred, the term of office of Prof. Olive Mwhaki Mugenda came to an end on 21st March, 2011.**
7. **The Office of the vice Chancellor of the University has been vacant, in law, since then; the process for appointment of a new vice chancellor, or the process leading to reappointment of Prof. Mugenda having not been instituted and undertaken.**
8. **The Petitioners now state that Prof. Olive Mwhaki Mugenda has unlawfully continued to purport to hold and exercise the powers vested in the office of the vice Chancellor of the university, long after the expiry of her term.**
9. **During her tenure of office, and more particularly during the period she has been in illegal occupation of the office of the vice chancellor following the expiry of her term in March, 2011, Prof. Olive Mwhaki Mugenda has entrenched high level financial mismanagement, corruption, embezzlement of funds, abuse of office and bad governance at the University.**
10. **During her tenure of office, and more particularly during the period she has been illegally purporting to be the Vice chancellor following the expiry of her term in March, 2011, Prof. Mugenda has entrenched tribalism, nepotism and cronyism contrary to the constitution and other relevant laws.**
11. **The Ethics and Anti-Corruption Commission has failed and/or refused to act on complaints lodged concerning financial mismanagement, corruption, embezzlement of funds, abuse of office and bad governance at the University during the period Prof. Olive Mwhaki Mugenda has served as the Vice chancellor of Kenyatta University.**
12. **The National Cohesion and Integration Commission has failed and/or refused to act on**

- complaints lodged concerning tribalism, nepotism and abuse of office and bad governance at the University during the period Prof. Olive Mwihi Mugenda has served as the vice Chancellor of Kenyatta University.
13. **The Auditor General has failed and/or refused to act on its findings confirming financial irregularities, financial mismanagement, corruption, embezzlement of funds, abuse of office and bad governance at the University during the period Prof. Olive Mwihi Mugenda has served as the Vice chancellor of Kenyatta University.**
 14. **The Petitioners are concerned that the bad governance of the University under the unlawful hold of Prof. Olive Mugenda has and continue to put the university under undue debt burden, is engendering unnecessary disharmony in the University and is exposing the University to the real risk of collapse.**
 15. **That the continued stay in office by Prof. Olive Mwihi Mugenda violate the provisions of section 10 of the Kenyatta University act, undermine the need for competitive recruitment of public offices, is consistent with the provisions of sections 232, 73, 75 and 10 of the constitution; is irregular, unlawful, unconstitutional and in consequence null and void.**
 16. **It is also necessary that Professor Olive Mwihi Mugenda be prohibited forthwith from masquerading or continuing to masquerade as the vice Chancellor of Kenyatta University.**
 17. **It is now necessary that the process for appointment of the Vice Chancellor of Kenyatta University be instituted and a Vice chancellor of the University be appointed to restore good governance which is currently lacking at the University.**
 18. **It is only fair and just that this application herein be heard instantly and the orders sought granted.**
3. The applicants have now applied for the reference of this matter to the **Hon. Chief Justice** to empanel a bench made up of three judges to hear and determine this matter. It is submitted that the said prayer is necessitated by the sentiments expressed by **Hon. Lady Justice Githua** that the issues raised herein are weighty. It is further submitted that this application is a matter of National and Constitutional importance since the University is a public institution of higher learning with nationwide enrolment of students and employing Kenyans in their thousands and its running and management is integral to the education standards of this country, the livelihood of many Kenyans and the economy in general. It is submitted that in consideration of Articles 165, 131 and 132 of the Constitution as well as Article 232(1) and Chapter Four of the Constitution, the Court should be persuaded that this matter is of such National and Constitutional importance and do proceed to invoke Article 165(4) of the Constitution and issue appropriate orders in favour of the applicants.
 4. According to the applicants this application is of such fundamental importance that is of public interest in nature and that the decision to be made by this Honourable Court shall be precedent setting to all Public Institutions of higher learning other state organs and formation of out judicial jurisprudence. Since the University is run by the tax revenue collected from the citizenry, it is therefore follows that every Kenyan citizen who is a tax payer has a stake in the institution and therefore its running and management or mismanagement is of national importance. It is further submitted that as a national institution of higher learning, the University's core value is to nurture human resource which is the fabric of the nation hence the national and constitutional importance of this institution cannot be wished away. According to the applicants taking into account the University population in terms of the staff and students, its national importance cannot be overemphasised.
 5. It is therefore submitted that the crux of the matter is that the application has raised very weighty Constitutional issues that can properly and judiciously addressed and determined by a bench of three judges hence the orders sought.
 6. On behalf of the 1st, 2nd and 5th Respondents, it is submitted that the provisions of Article 165(4) of the Constitution can only be invoked in a matter specifically dealing with issues of infringement of fundamental rights and interpretation of the Constitution and more so the Court must certify that the matter raises a substantial question of law. Relying on **Community Advocacy Awareness Trust & Others vs. Attorney General [2012] eKLR**, it is submitted that since the Constitution does not define what a substantial question of law is, the same is left to the individual judge to determine. Citing **Sir Chunilal V Mehta and Sons Ltd vs. The Century Spinning Ltd [1962] SCR Supl. (3) 549**, it is submitted that the instant application is a judicial review application

- seeking prerogative remedies of mandamus and prohibition and it has not been demonstrated that the matter raises a substantial question of law or why the matter ought to be heard by a bench of not less than three judges. According to these respondents, the issues raised do not amount to a substantial question of law as these are matters of fact and are very specific and straightforward hence there is no need to be heard by such a bench.
7. It is submitted that the issue of appointment to public offices has previously been dealt with at the superior court level and this matter does not raise a novel issue to warrant the Chief Justice to empanel a bench to hear the matter. On the basis of **Matiko Bohoko & Another vs. Deputy Prime Minister and Minister of Local Government & 2 Others [2012] eKLR**, it is submitted that if every such question were to be determined by a bench of more than two judges, other judicial business would definitely come to a standstill and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the Civil Procedure Act would never be realised. It is therefore submitted that there is a need to balance the fine line to ensure that justice is not delayed and at the same time not to throw out fundamental and genuine substantial questions of law that need to be determined by a three judge bench.
 8. This matter, it is submitted was commenced in 2012 under certificate of urgency and is ripe for hearing hence the application for constitution of a bench is dilatory tactic by the applicant as the applicants now do not seem interested in prosecuting the matter but taking the court for a ride hence the application should be disallowed.
 9. On behalf of the 3rd and 4th respondents, it was submitted that the basis and indispensable ingredient in applications for constitution of a bench of not less than three judges under Article 165(4) of the Constitution is the existence of a disputed question of law in the proceedings sought to be referred hence where it is shown that a matter does not involve a question of law but solely involves a question of fact such a matter lacks the most basis ingredient to warrant any further inquiry into whether it ought to be referred to a three judge bench. This is so, it is submitted, because the constitutional accommodation to have more than one judge to hear a matter is premised on the assumption that there may be substantial differences of opinion on points of law
 10. Apart from that it is submitted that the constitution requires that the points of law ought to be substantial for instance where the controlling precedents may not cover the matter, or there may be important questions concerning the scope and meaning of decisions of the higher courts. In support of this submission the case of **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** is cited.
 11. In this case, it is submitted that the ex parte applicants pray for orders of mandamus and prohibition with respect to the appointment/reappointment of the 1st interested party hence the only question in these proceedings is not a question of law but fact and the applicable law is not disputed or challenged as unconstitutional hence the matter does not involve any question of law let alone a substantial one to merit the reference sought. Relying on the said **Kinyanjui's case**, it is submitted that matters concerning legality or otherwise of appointment of persons to constitutional office under the Constitution can no longer be considered novel or difficult.
 12. On the ground of public interest and national interest, it is submitted that those are not the grounds upon which a reference under Article 165(4) is to be made hence the application ought to be dismissed.
 13. I have considered the foregoing. As the only issue raised before me was whether or not I should refer the matter to the **Hon. Chief Justice** to consider the question whether or not a bench of not less than three Judges should be constituted, I will try not to deal with the substance of the application unless it is necessary to do so. **Article 165** of the Constitution provides as follows:

“165. (1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

14. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4)**. Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify

that the matter raises a substantial question of law:

1. **Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**
2. **That it involves a question respecting the interpretation of this Constitution and under this is included (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.**

15. In this case it is not alleged that the applicants' rights or fundamental freedoms in the Bill of Rights have been denied, violated, infringed or threatened. It is also not alleged that there is anything that has been done under the authority of this Constitution or of any law which is inconsistent with, or in contravention of, this Constitution. What is alleged is that the appointment or reappointment of the 1st interested party is contrary to the statute governing the University. Similarly, there is no allegation there is a question relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government. Lastly, there is no allegation of conflict of laws under Article 191.

16. It follows that the issues raised in this application do not fall within the examples given under Article 165 of the Constitution. However, the operative word in Article 165(4) is includes. To my mind the examples set out under Article 165(4) are not exclusive. However, in interpreting circumstances under which the Court may invoke its powers under Article 165(4) I associate myself with the decision in **Sir Chunilal V Mehta and Sons Ltd vs. The Century Spinning Ltd** (supra) that:

“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”

17. Therefore where a matter has been subject of previous judicial determinations, the mere fact that the matter is of great public interest or substantial national importance does not necessarily qualify it to amount to a substantial question of law in order to warrant reference to the **Chief Justice** under Article 165(4) aforesaid. Public interest and national importance are by themselves not necessarily grounds for the empanelling of a bench of not less than three judges. To make a determination on whether or not to refer the matter to the **Chief Justice** pursuant to Article 165(4) of the Constitution solely on public interest and national importance would amount to elevating such matters to a different class from other disputes and that in my view would amount to unjustified discrimination in dispute resolution mechanisms. As was held in **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996**, litigation is not a luxury as justice is for all and all must have equal access to courts as well as equal priorities in being heard. Sections 1A and 1B of the Civil Procedure Act require the Court to take into account **“the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”** See **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008**.

18. It is, in my view, only in cases contemplated under Article 165(4) of the Constitution that the Court will certify that a matter raises a substantial issue of law.

19. The present application was brought under certificate of urgency and one of the grounds of the application is that it is only fair and just that this application herein be heard instantly and the

orders sought granted. In my view to grant the orders sought would be contrary to the very grounds upon which the application is based which is instant hearing and grant of the orders sought. I associate myself with **Majanja, J's** sentiments in **Harrison Kinyanjui's Case** (supra) that the meaning of "substantial question" must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation.

20. The issue raised in this application is whether or not the 1st interested party was lawfully appointed or reappointed as provided under the relevant University Statutes. That in my view is not a matter which necessarily raises a substantial question of law since it is a matter respecting the legality of appointment of a person to hold office which is a matter that the High Courts of this country deal with routinely.
21. In the circumstances, I decline to certify that this matter raises a substantial question of law to warrant reference of the same to the **Chief Justice** as required under Article 165(4) of the Constitution and the oral application to do so is dismissed with costs.

G V ODUNGA

JUDGE

Dated at Nairobi this 6th day of June 2013

JUDGE

Delivered in the presence of: