

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. E004 OF 2024

KENYATTA UNIVERSITY.....1ST
PETITIONER
COUNCIL OF KENYATTA UNIVERSITY.....2ND PETITIONER
VERSUS
THE PUBLIC SERVICE COMMISSION.....RESPONDENT
AND
PROFESSOR FATUMA CHEGE.....INTERESTED PARTY

JUDGMENT

Kenyatta University and Council of Kenyatta University are the 1st and 2nd Petitioners against the Public Service Commission, the Respondent and Professor Fatuma Chege the Interested Party seeking the following reliefs: -

- a) A declaration that the Petitioners do not fall within the meaning of public service for the purpose of Article 234 of the Constitution of Kenya.
- b) In the alternative to prayer (a) above, a declaration that the power of the Respondent to establish and abolish offices in 1st Petitioner is subject to the provisions of the Universities Act, 2012.
- c) A declaration that under section 35(1)(a)(vi) of the Universities Act, 2012 as read with section 17(10) and 31(1)(a) of the Kenyatta University Charter, 2013 the 2nd Petitioner is entitled to restructure the management, colleges, campuses, schools, facilities,

institutes, directorates, foundations and centres of the 1st Petitioner.

- d) A declaration that the Respondent has no power under the Constitution of Kenya to direct the Petitioners:
- (i) To align their Human Resource Policy and Manual to the Public Service Commission Regulations;
 - (ii) Not to reorganize and restructure itself in a manner that is beneficial to the Petitioners, and
 - (iii) Reinstate persons in the 1st Petitioner to positions which no longer exist in the 1st Petitioner's organizational structure.
- e) A declaration that the purported decision of the Respondent delivered on 28th July 2023 in **State Corporation Appeal No. 001 of 2023 – Prof. Fatuma Chege vs. Kenyatta University** is *ultra vires* the powers and functions of the Respondent hence illegal and unconstitutional and, therefore, invalid, null and void *ab initio*.
- f) An order of certiorari directed at the Respondent quashing the decision delivered on 28th July 2023 in **State Corporation Appeal No. 001 of 2023 – Prof. Fatuma Chege vs Kenyatta University**.
- g) An order of prohibition prohibiting the Respondent from implementing or enforcing its decision of 28th July 2023 delivered in **State Corporation Appeal No. 001 of 2023 – Prof. Fatuma Chege vs Kenyatta University**.
- h) The Petitioner be awarded costs of this petition.

The 1st Petitioner is established under the Kenyatta University Charter, 2013 (the Charter) whereas the 2nd Petitioner is established under section 17 of the Charter.

Pursuant to section 17(12) of the Charter, the 2nd Petitioner appointed a committee to restructure the University Organization as a cost cutting measure by reducing the top administration structure of the University from four divisions (Academic, Administration, Finance and Development and Research Innovation and Outreach) to three divisions, in that the Administration and Finance and Development Divisions would be merged since their functions complement each other; merging University's departments and closing the University's Embu Campus and Kisumu Open Learning Centre and subsequently redeploying the staff.

The Charter granted the Council the power to adopt and implement the recommendation made by the Committee, which measures were projected to save the Petitioner about Kshs. eight hundred million (800,000,000.00).

The Senate of the 1st Petitioner approved the report on 30th March 2022 and so did the University Staff at a staff meeting held on 1st April, 2022.

Pursuant to the report, on 1st April 2022, several organizational changes were made to the contractual positions within the University. One of the positions that was affected was the position of Deputy Vice Chancellor Administration, which, was previously held by the Interested Party before she took her leave of absence from the University to serve as Principal Secretary, State Department for Implementation of Curriculum Reforms, Ministry of Education.

Prior, the Interested Party held two positions at the University being, a Professor in the School of Education on Permanent and Pensionable basis and also was in March 2019, appointed DVC, Administration on a contractual term of five (5) years. She started her leave of absence vide a letter of request dated 20th May 2021.

Regulation 38(3) as read with 38(9) of the Public Service Commission Regulation 2020 direct that a public officer may only be granted leave of absence from the substantive position (permanent and pensionable) to take up a contractual position and upon completion of the leave of absence, the public officer shall revert to their substantive position. There is no provision permitting a public officer to be granted leave of absence from a contractual position to take up another contractual position.

Being aggrieved by the University's decision to restructure and merge the Administration Division and the Finance and Development Division into one division, the Finance and Administration Division, the Interested Party appealed to the Respondent.

The Respondent (PSC) in a decision dated 28th July 2023 delivered in State Corporation Appeal No. 001 of 2023 – Prof. Fatuma Chege vs. Kenyatta University held that:-

a. In paragraph 19,

'From the foregoing the Commission finds that the only power and function given to the University is to make proposals for the establishment of constituent colleges, campus colleges, colleges, campuses, schools, facilities, directorates, institutes, departments,

centres and other resource and administrative units as may be appropriate. the University has no power to establish and abolish in the University. Therefore, this remains the mandate of the Commission.'

b. In paragraph 23

'In the instant case the Public Service Commission did not approve the restructuring that was undertaken by the Respondent which at the end abolished offices in the Respondent's institution. The Commission therefore finds that the office that was held by the Appellant was unlawfully abolished as the new staff establishment and structure were not approved by the Commission.'

c. In paragraph 28(ii),

'The Respondent to forward to the Commission, their Staff Establishment and Organization Structures that were ratified by the University Council on 13th October 2022 for consideration.'

d. The Interested Party was reinstated back to her former position as the Deputy Vice Chancellor, Administration despite finding that leave of absence could only be granted, *'...to a public office on their substantive position held on permanent and pensionable terms.'*

Cause of action

The Petitioners are aggrieved by the PSC's decision of 28th July 2025 aforesaid as the same is intra vires the Respondent's powers and obligations under Article 234 of the Constitution of Kenya 2010 and violates the University Act, 2012 as read with the Kenyatta University Charter 2013. The Interested Party has instituted ELRC Misc. Cause No. E175 of 2023 – Professor Fatuma Chege vs Kenyatta University and

Council of Kenyatta University in which she seeks to have the court adopt the decision of the PSC as its judgment.

Particulars of Constitutional violations.

The Petitioners allege that PSC is in violation of Articles 234 of the Constitution which defines the function and powers of PSC and are restricted to public service, which does not include powers donated to Universities by the Universities Act, 2012 and the specific Universities Charters. PSC was therefore wrong to hold that the establishment and abolishment of the offices and positions at the University fell within the purview of PSC and that the University had no power to restructure its structures in the manner it did.

In any event, Article 234(2) provides that the power of PSC to establish and abolish offices is subject to legislation and in this case, Universities Act, 2012, if at all PSC had such mandate, which is denied by the Petitioners.

That section 35(1)(a)(vi) of the Universities Act, 2012 gives mandate to the Council to undertake functions set out in the Act and the Charter whereas section 31(1)(a) of the Charter mandates the Council to make statutes generally for the governance, control and administration of the University and in particular for the establishment of colleges, campuses, schools, faculties, institutes, directorates, foundations and centers of the University.

Section 17(10) of the Charter provides that the Council is obligated to ensure, the University had a proper management structure which

functions to maintain corporate integrity, reputation and responsibility
(Emphasis added).

The Universities Act, 2012 on the other hand provides under section 35(1)(a)(v) that the appointment of Vice Chancellor (VC); Deputy Vice Chancellors (DVCs) and Principals and Deputy Principals of constituent colleges shall be by the Council in consultation with Cabinet Secretary, after a competitive process conducted by the PSC.

The Petitioners conclude therefore that PSC has no power to issue directions requiring the University and the Council to: (a) align their Human Resource Policy and Manual to the Public Service Commission Regulations; (b) not to reorganize and restructure in a manner beneficial to the Petitioners; and (c) reinstate to positions that no longer exist within an organization.

The Petitioners add that the purported usurpation by PSC violates Article 47 of the Constitution and the Fair Administrative Action Act No. 4 of 2015 for being unfair in the circumstances of this case hence the prayers sought in the petition as supported by the annexures thereto.

Response

The Respondent filed a replying affidavit to the petition sworn by the CEO Mr. Paul Fwamba on 17th June 2025 in which it admitted that PSC received an Appeal dated 28/3/2020 from the Interested Party Prof. Fatuma Chege, which appeal it considered and rendered the decision already set out in this judgment.

The deponent states that there was an error in the decision and letter communicating it as the decision was made pursuant to section 74 of the Public Service Commission Act which provides that: -

“Any person who is dissatisfied or affected by a decision made by an authorized officer or another authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission.”

That the aforesaid error did not change the decision and/or findings by PSC under paragraph 38 of the decision.

PSC deposes that it has powers under Article 234(2) to establish and abolish offices in the public service, which includes public universities and so the Petitioners had no power to restructure the University in the manner they had done and their decision to that extent was null and void.

PSC relies on the High Court decision per Lenaola J. (as he then was) in **Kenya Union of Domestic Hotels Education and Allied Workers (KUDHEIHA workers) vs. Salary and Remuneration Commission [2014] KLR** for the proposition that State Corporations and Public Universities were part of the public service. That following that decision, PSC embarked on ensuring that its mandate was applicable in state corporations and public universities in that regard. On 14th December 2015, PSC issued a delegation instrument to SCAC to undertake the Commission’s functions and powers in state corporations and public universities which instrument is attached to the affidavit. That while

delegating its mandate to SCAC, it did not delegate its power to establish and abolish office in state corporations and public universities as that power could not be delegated. The delegation to SCAC was abused and so, that delegation was subsequently revoked by PSC.

The Respondent further relies on the case of ***Nairobi ELRC Petition No. 4149 of 2022; Enos Namasaka and others vs KEMSA and others*** in which the court, while nullifying a restructuring process undertaken by KEMSA stated as follows:

“51. A plain reading of the general notice issued by KEMSA to its staff dated 4/1/2021 and re-issued on 10/6/2022 together with express deposition by 1st and 2nd Interested Parties in the replying affidavits and submissions, leads the court to the conclusion that KEMSA was involved in establishing and abolition of office within the meaning of Article 234(2) of the Constitution of Kenya 2010. The Public Service Commission was not involved by the 1st Respondent and the 2nd Interested Party in the intended restructuring exercise which in the court’s considered finding constitutes establishment and abolition of office.

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53. There is no evidence at all that Public Service Commission had delegated their mandate to establish and abolish office in KEMSA to the Board

54. Indeed, it is clear that KEMSA DID NOT INFORM Public Service Commission at all of the exercise they were undertaking

55. To the extent that the intended exercise by KEMSA amounts to establishment and abolition of office, the action is ultra vires Article 234(2)(a) of the Constitution and is null and void ab initio. Indeed, in Petition No. E161 of 2021, *Manyara Muchui Anthony vs Communication Authority of Kenya and 3 others*, it was held that: -

“The constitutional threshold for regulation of public service is a mandate of the 3rd Respondent (Public Service Commission)”

The Respondent prays that the petition be dismissed with costs and the Petitioners proceed to implement the decision by PSC.

Response by the Interested Party.

Professor Fatuma Chege deposes to a replying affidavit sworn on 7th May 2025 in which she acknowledges the turn of events as narrated by the Petitioner and confirmed by the Respondent. The Professor states that the Petitioner had no mandate to abolish her office adding that the Petitioners are obliged to abide by the decision by PSC to reinstate her to the position she previously held of DVC – Administration. That she held the position of DVC – Administration from January 2019 and the position was held on a 5 years contract that was due to expire in January 2026.

That the Interested Party had been granted leave of absence for a period of two years by the Council. That upon end of her term as Principal Secretary, she wrote to the Vice Chancellor on 2nd December

2022 informing him of her intention to resume duties at the University including her duties of DVC – Administration. That the University did not respond to her and held a meeting with the Vice Chancellor who assured her that she would be reinstated to her position.

The Vice Chancellor eventually wrote a letter dated 17/1/2023 to her informing her that the position of DVC – Administration was no longer available as unbeknown to her, it had been merged with the position of DVC – Finance. That by a letter dated 31st January, 2023, the deponent expressed concerns to the Vice Chancellor in the manner in which she was being prevented to resume her position.

By a letter dated 13th February 2023, the Vice Chancellor, terminated her contract as DVC – Administration and consequently she filed an appeal to the Chairperson of the University Council on 15th February 2025 but the appeal was not successful and the Council reiterated the decision by the Vice Chancellor.

The Interested Party then filed an appeal to the PSC on 28th March 2023 which appeal was decided in her favour as earlier said in this judgment on 28th July 2023. PSC stated inter alia, that the office of the Interested Party was unlawfully abolished; that she be reinstated to the position of DVC – Administration and she be paid the withheld salaries from 2nd December 2022. That the Petitioners have failed to implement the decision by PSC aforesaid, that the petition lack merit and it be dismissed with costs.

DETERMINATION

The parties filed submissions which the court has carefully considered together with the evidence tendered by the Petitioners, Respondent and the Interested Party in their averments and depositions and the issues for determination are:-

- (i) Whether the restructuring of the University administration structure by the 1st and 2nd Petitioner was lawful.
- (ii) Whether PSC had lawful mandate to nullify the said restructuring and directing reinstatement of the Interested Party to the position of DVC-Administration.
- (iii) Whether the Petitioners are entitled to the reliefs sought.

The court will deal with all the issues together. Section 17(10) of the Kenyatta University Charter provides that the University Council is mandated to ensure that the University has a proper management structure which maintains corporate integrity regulation and responsibility.

The University Charter is granted to the University pursuant to the University Act No. 42 of 2012, whereas the Council is the governing body of the University responsible for making strategic decisions including governance, restructuring and financial sustainability under both the Universities Act and the Charter.

Section 31(1)(a) of the Charter provides that the Council shall make statutes generally for the governance, control and administration of the University and in particular for the establishment of colleges, campuses,

schools, faculties, institutes, directorate, foundation and centre of the University.

The appointment of the Vice Chancellor, Deputy Vice Chancellors, Principals and Deputy Principals of Constituent Colleges, under section 25(1)(a)(v) are appointed by the Council in consultation with the Cabinet Secretary after a competitive recruitment process conducted by the PSC.

The court notes that there is no reference to PSC with regard to other powers exercised by the Council under section 35 of the University Act, 2012.

Article 234 of the Constitution provides that,

“(2) The Commission shall –

(a) Subject to this Constitution and legislation

- (i) establish and abolish offices in the public services; and
- (ii) appoint persons to hold or act in those offices and to confirm appointments.”

It is clear that PSC has no role in the appointment of Deputy Vice Chancellors in terms of section 35(1)(a)(v) except in the conduct of the recruitment process which leads to the appointment of the Deputy Vice Chancellor by the Council upon advice by the responsible Cabinet Secretary. It is also clear that the Council under section 17(10) of the University Charter is mandated to ensure that the University has “*a proper management structure which maintain corporate integrity, reputation and responsibility.*”

A purposive interpretation of Article 234(2)(a) demands that PSC defers to the legislation, in this case the Universities Act, 2012 and by extension the Charter made under the Act, in not only the appointment of Deputy Vice Chancellor of the University but also in the restructuring of the University establishment from time to time to give leeway to the Council to ensure a proper management structure which maintains corporate integrity reputation and responsibility.

Clearly, that cannot be the responsibility of the PSC which is far removed from the day-to-day management of the University. To rule otherwise would lead to an absurdity where officers far removed from the daily operations of the University have responsibility in reviewing structure for efficient and effective management of the responsibilities within the financial abilities and restraints of the University at any given moment.

PSC would be overwhelmed if not completely incapable of discharging that mandate within the many Universities in Kenya and that is why the powers of PSC are to be exercised “*subject to this Constitution and legislation.*”

In the case of *Republic versus University of Nairobi; Mutemi (Exparte Applicant) (Judicial Review Application 46 of 2023 [2024])* the court held: -

“To answer the 3rd issue, the court finds that by legislation the Public Service Commission’s powers in Article 234(2)(a) of the Constitution 2010 can be vested in any other person or authority. In the instant case, section 40 of the Universities

Act provides that the academic and the administrative staff of a university shall be as provided in its Charter. Article 22 of the Respondent's Charter provides for the staff of the University. Article 22(4) provides that the Senior Management Staff of the University includes Vice Chancellor, Deputy Vice Chancellor and such other members of staff as the Council may from time to time determine. Article 22(5) of the Charter provides for the administrative staff of the University to include Registrars, Directors and such other members of staff as Council may determine from time to time. By those provisions, the Respondent's Council has established that it had the requisite authority to establish the offices."
[Emphasis added]

It is abundantly clear therefore, from the above decisions that in addition to what the Court has said earlier in this judgment Article 22(4) of the University of Nairobi Charter which is similar to the Kenyatta University Charter that senior management staff of the University includes Vice Chancellor, Deputy Vice Chancellor and such other members of staff as the Council may from time to time determine. (Emphasis added).

Whereas it is not disputed that officers serving universities are public officers, PSC is to exercise authority over them subject to the Constitution and in this case the Universities Act, 2012.

Accordingly, PSC misdirected itself and acted *ultra vires* its powers and authority to direct Kenyatta University and the Council to return to an old structure of administration already reviewed by the Petitioners herein

with full participation of the staff of the University as proved in this matter by the Petitioners.

Accordingly, this petition succeeds and the court finds that the Petitioners had mandate to restructure the Administration of the University and merge roles that subsumed the position previously held by the Interested Party.

Accordingly, the decision by the Respondent delivered on 28th July 2023 in ***State Corporation – Appeal No 001 of 2023 – Prof. Fatuma Chege vs Kenyatta University*** is *ultra vires*, the powers and functions of PSC hence illegal, unconstitutional and therefore, invalid, null and void ab initio.

In the final analysis this court makes the following orders in favour of the Petitioners against the Respondent and Interested Party: -.

- (a) A declaration is issued that the power of the Public Service Commission to establish and abolish offices in 1st Petitioner was subject to the Provisions of the Universities Act, 2012 and the Charter made thereunder.
- (b) A declaration is issued that under section 35(1)(a)(vi) of the Universities Act 2012 as read with section 17(10) and 31(1)(a) of the Kenyatta University Charter, 2013, the 2nd Petitioner is entitled to restructure the management, colleges, campuses, schools, faculties, institutes, directorates, foundation and centres of the 1st Petitioner.
- (c) A declaration is issued that the decision of the Respondent delivered on 28th July 2023 in ***State Corporation Appeal No. 001***

of 2023 – Prof. Fatuma Chege vs Kenyatta University is *ultra vires* the powers and functions of the Respondent hence illegal, invalid, null and void *ab initio*.

(d) An order of certiorari is issued directed at the Respondent quashing its decision delivered on 28th July 2023 in **State Corporation Appeal No. 001 of 2023 – Prof. Fatuma Chege vs Kenyatta University**.

(e) An order of prohibition is issued prohibiting the Respondent from implementing or enforcing its decision of 28th July 2023 delivered in **State Corporation Appeal No. 001 of 2023 – Prof. Fatuma Chege vs Kenyatta University**.

(f) Each party to meet their own costs of the petition.

Dated at Nairobi this 10th day of March 2026



Mathews Nduma

JUDGE

Dated, signed and delivered in open court at Nairobi this 11th day of March 2026

J.W KELI

JUDGE

In presence of:

Mr. Angwenyi for 1st and 2nd Petitioner

Ms. Wangechi for Respondent

Ms. Macheru for Interested Party

Mr. Kemboi – Court Assistant

ORIGINAL