



**Kagocha v Multimedia University of Kenya & 11 others (Employment and Labour Relations Petition E222 of 2023) [2025] KEELRC 168 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 168 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E222 OF 2023  
AN MWAURE, J  
JANUARY 31, 2025**

**BETWEEN**

**NANCY WARUGURU KAGOCHA ..... PETITIONER**

**AND**

**MULTIMEDIA UNIVERSITY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**THE VICE CHANCELLOR, MULTIMEDIA UNIVERSITY OF  
KENYA ..... 2<sup>ND</sup> RESPONDENT**

**LIVINGSTONE NGOO ..... 3<sup>RD</sup> RESPONDENT**

**FESTUS KABERIA ..... 4<sup>TH</sup> RESPONDENT**

**ROSEBELLAH MARANGA ..... 5<sup>TH</sup> RESPONDENT**

**PAUL MBATHIA ..... 6<sup>TH</sup> RESPONDENT**

**CORNELIUS MUTANGILI ..... 7<sup>TH</sup> RESPONDENT**

**ANDERSON MAINA ..... 8<sup>TH</sup> RESPONDENT**

**COLLINS WAGUMBA ..... 9<sup>TH</sup> RESPONDENT**

**FRANCIS MANYA ..... 10<sup>TH</sup> RESPONDENT**

**LENEATH W MUNENE ..... 11<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 12<sup>TH</sup> RESPONDENT**



## RULING

### Introduction

1. The Petitioner/Applicant filed a Notice of Motion dated 23<sup>rd</sup> November 2023 under certificate of urgency seeking the following orders that:
  1. Spent
  2. The Honourable Court be pleased to issue an interim order summoning the Respondents under Order 16 Rule 1 of the Civil Procedure Rules 2010 to produce the following documents that are in custody of the 1<sup>st</sup>-7<sup>th</sup> Respondents to the Registry of the court at least a day before the date of interparties hearing of this application to ensure fairness at trial:
    - a. Hard copies of the signed minutes of the promotion committee proceedings;
    - b. Copy of the letter that appointed the committee and defined the terms of reference;
    - c. Copies of any written objections by the three that influenced the failure to give the Applicant her letter of appointment;
    - d. Copies of scores sheets that were filled in and signed by each individual committee member in regard to the Applicant;
    - e. Copy of signed report on the promotion interview attended by the Applicant;
    - f. Copy of minutes of any disciplinary proceedings that is in personal file of the Applicant and that was done within two years before date of this Application;
    - g. List of persons that carried out the short listing and/or letter that appointed them;
    - h. Copy of short-listing guidelines and report of the short-listing;
    - i. Copy of report from the 3<sup>rd</sup> Respondent that made the Respondents deny the Applicant promotion;
    - j. Copy of the Staff Establishment of the 1<sup>st</sup> Respondent that the Respondents relied upon to carry out the promotion;
    - k. Copy of career progression and succession policy of the 1<sup>st</sup> Respondent.
  3. The 12<sup>th</sup> Respondent be barred, pending determination of the suit, from receiving applications, shortlisting, interviewing or recommending for appointment to positions as Vice Chancellor or Deputy Vice Chancellor of the 3<sup>rd</sup>, 5<sup>th</sup> or 6<sup>th</sup> Respondents;
  4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents or any entity be barred, pending determination of the suit, from conferring benefits upon any of the 3<sup>rd</sup>, 5<sup>th</sup> or 6<sup>th</sup> Respondent including appointing any of them in acting positions as Vice Chancellor or Deputy Vice Chancellor
  5. The 1<sup>st</sup> Respondent be barred, pending determination of the suit, from hiring, instructing, retaining or settling legal representation for the 3<sup>rd</sup> 4<sup>th</sup>- 11<sup>th</sup> Respondents since they are sued in their personal capacities



6. Consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice
  7. Costs of this application be provided for; and
  8. Any other order that the Honourable Court may issue to meet ends of justice.
2. The Application is supported with the Petitioner/Applicant's Affidavit with the grounds on the face of the application.
  3. The Petitioner/Applicant avers she complained in writing to the 1<sup>st</sup> Respondent regarding her assigned duties and harassment from the 3<sup>rd</sup> Respondent, but no investigation or disciplinary action was taken against him.
  4. The Petitioner/Applicant was issued with a warning letter to that effect.
  5. The Petitioner/Applicant avers that she applied for a job promotion from Assistant Registrar grade NT 12 to Senior Assistant Registrar grade NT 13 having been in that position for 11 years.
  6. The Petitioner/Applicant avers that she was informed in confidence by one of the Council committee members who sat in the promotion committee that she had passed her interview.
  7. The Petitioner/Applicant avers she, unfortunately, received a regret letter for not getting a promotion letter on the grounds of the warning letter issued by the 5<sup>th</sup> Respondent despite having no disciplinary record.
  8. The Petitioner/Applicant avers that the warning letter issued to her by the 5<sup>th</sup> Respondent had expired six months after its issuance and the said warning letter was misplaced in her personal file.
  9. The Petitioner/Applicant avers that there was no quorum for the Council meeting that approved staff promotions as the Council of the 1<sup>st</sup> Respondent term ended and two members were appointed vide Gazette Notice No. 7492 dated 5<sup>th</sup> June 2023.
  10. The Petitioner/Applicant avers that the 3<sup>rd</sup> Respondent had uttered words amounting to sexual harassment to her making her seek psychiatrist help and was diagnosed with depression due to the work-related stress, harassment and psychological turmoil caused by the actions of the 3<sup>rd</sup> Respondent.
  11. The Petitioner/Applicant avers that the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 11<sup>th</sup> Respondents have not remitted her pension contributions between January 2016 and December 2022 amounting to Kshs.2,968,671.90 and unpaid annual increment amounting to Kshs.17,000.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents Grounds of Opposition**

12. In opposition to the application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Grounds of opposition dated 15<sup>th</sup> January 2024 on the following grounds that:
  1. The Applicant's application is misconceived and bad in law.
  2. The application has no merit and should be dismissed with costs.
  3. The Applicant has not satisfied the requirements for grant for conservatory orders and the application has no merit.



4. The entire petition and the application is incompetent for the reason that the same relates to the recruitment of a Vice Chancellor and Deputy Vice Chancellor for the 1<sup>st</sup> Respondent and which process has already progressed upto and including interview of candidates and the prayer sought are therefore unavailable having been overtaken by events.
  5. The application is further incompetent having been overtaken by events as the 1<sup>st</sup> Respondent has been appointed an acting vice Chancellor pending the recruitment of substantive one.
  6. The petition also related to issues of promotion of staff which is a function of the council of the university which also hears and determines any appeals arising therefrom and accordingly this court has no jurisdiction to hear the present matter.
  7. The applicant is clearly challenging the merits of the decision of the 1<sup>st</sup> respondent in the promotion of employees of the 1<sup>st</sup> respondent and which ought to be heard in the first instance by the Council of the University. Accordingly, the entire petition and the application for conservatory orders are premature.
  8. The Application is misconceived, frivolous and calculated at delaying the ultimate disposal of the miscellaneous and ought to be dismissed with costs.
13. The Petitioner/Applicant filed a replying affidavit dated 22<sup>nd</sup> January 2024 opposing the grounds of opposition dated 15<sup>th</sup> January 2024.
  14. The application was disposed of by way of written submissions.

#### **Petitioner/Applicant's submissions**

15. The Petitioner/Applicant submitted that the grounds of opposition by the 1<sup>st</sup>, 2<sup>nd</sup> and 10<sup>th</sup> Respondents did not challenge the contents of the application and supporting affidavit. The Petitioner/Affidavit relied on the case of Faustine Njeru Njoka V Kimunye Tea Factory Limited [2022] eKLR it was stated that:

I have considered the court of appeal authority relied upon by the applicant in Civil Appeal No. 95 of 2016 in the case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR where the court cited with authority the case of Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR which stated

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”

16. The Petitioner/Applicant also submitted that the application stands unopposed and relied on the case of Faustine Njeru Njoka V Kimunye Tea Factory Limited(supra) the court stated that a replying affidavit is essential to deny issues raised in an application. Without it, the averments in the application are deemed uncontroverted and unchallenged. The court held that the respondents' mode of opposition did not effectively rebut the unopposed issues in the application.
17. The Petitioner/Applicant submitted that the court cannot determine the issues raised without evidence from the Respondents and a review of the Petitioner/Applicant's evidence. This includes verifying the Respondents' internal council's constitution, the existence of any undisclosed



- miscellaneous applications, and the recommendations for Vice Chancellor or Deputy Vice Chancellor appointments.
18. The Petitioner/Applicant also submitted that the evidence is needed to determine if the Respondents acted outside their employment scope and if the doctrine of frolic and detour applies. The Respondents should have provided evidence and rebuttals to defend themselves.
  19. The Petitioner/Applicant submitted that her claims of discrimination in promotion did not constitute personal grievances, and that the individual liabilities of the 10th Respondent for intentional torts necessitate a thorough examination of the case's substance.
  20. The Petitioner/Applicant cited Article 33(1)(a) of *the Constitution* of Kenya provides that every person has a right to freedom of expression which includes freedom to seek, receive or impart information concerning employment within the law.
  21. The Petitioner/Applicant relied on Order 16 Rules 1 and 6 of the Civil Procedure Rules which provides as follows:
    1. At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.
    6. Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.
  22. The Petitioner/Applicant submitted that the 1<sup>st</sup> to 7<sup>th</sup> Respondents have custody of the requested documents as stated in Clause 9(g) page 33 of the 1<sup>st</sup> Respondent's Statutes. In *Dolagovinda Pradhan V Bhartruhari Mahatab 1991 (II) OLR-395* cited the case of *Saraswati Nayak and others V Susen Nayak* and another CMP No. 1249 of 2015 the Indian High Court at Orissa held that direction for production of documents relies on satisfaction by court that the documents are in power and possession of the party required to produce them and that they relate to the suit. Therefore, the Petitioner/Applicant submitted this Honourable court has the power to summon the 1<sup>st</sup> to 7<sup>th</sup> Respondents to produce documents for purposes of fair hearing and determination of this suit.
  23. The Petitioner/Applicant submitted that recommending the appointment of the 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents as Vice Chancellor or Deputy Vice Chancellor would perpetuate impunity against her and overlook the issues she has faced which were caused by the Respondents.
  24. The Petitioner/Applicant submitted that the 12<sup>th</sup> Respondent is required to be guided by Article 73(2) of *the Constitution* which outlines the guidelines for day to day conduct of public officers by principles of leadership and integrity.
  25. The Petitioner/Applicant submitted that the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondent failed in their duties to stop the sexual harassment against her at work place and therefore they are not fit to be recommended by the 12<sup>th</sup> Respondent for appointment. In *Emmanuel Mambo Oduory V One acre Fund [2020] eKLR* the court observed that sexual harassment is a serious offense that impacts the dignity and well-being of victims, and that employers have a duty to protect their staff from such conduct.
  26. The Petitioner/Applicant submitted that she stands to suffer irreparable loss if the injunction is not granted to bar the 12<sup>th</sup> Respondent from recommending the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents for the



appointment and her Petition may largely be rendered nugatory. In Halsbury's Laws of England, 3<sup>rd</sup> Edition Volume 21, paragraph 739, page 352 irreparable injury is defined as follows:

“Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subject matter in question.”

27. The Petitioner/Applicant submitted that no evidence has been brought before the court to confirm the conferment of her benefits.
28. The Petitioner/Applicant submitted that the 1<sup>st</sup> Respondent has not hired, instructed, retained or settled legal presentation for the 3<sup>rd</sup> to 11<sup>th</sup> Respondents who have been sued in their personal capacity.
29. The Petitioner/Applicant urges this Honourable Court to allow the application as prayed since it is unopposed.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions**

30. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have submitted that the applicants for the Vice Chancellor position, shortlisted and interviewed by the 12<sup>th</sup> Respondent were not served with the application and are unaware of the matter, violating their constitutional right to be heard.
31. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner/Applicant's complaint about promotions to Assistant Registrar position is unrelated to the Vice Chancellor recruitment process. No irregularities or unlawful actions by the university or Public Service Commission have been proven, and the Petitioner/Applicant has not shown any wrongdoing by the Respondents or candidates. Therefore, there is no basis for issuing the conservatory orders sought.
32. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on the Supreme Court case of Peter Gatirau Munya V Dickson Mwenda Kithinji and others [2014] eKLR where the court outlined the principles for grant of conservatory orders in a constitutional petition as follows:

“Before a Court grants an order for stay of execution, the appellant or intending appellant, must satisfy the court that:

- i. the appeal or intended appeal is arguable and not frivolous; and
  - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. These principles continue to hold sway not only at the lower court, but in this court as well. However, in the context of the constitution of Kenya 2010, a third condition may be added, namely:
    - iii. that it is the public interest that the order of stay be granted.”
33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner/Applicant has failed to establish the said principles enunciated above therefore the application before this Honourable court be dismissed with costs.



34. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner/Applicant should have utilized the dispute resolution mechanisms provided in Schedule 5 of the Multimedia University Statute, which includes the right to appeal to the Appeals Committee for disciplinary actions. For promotion issues, the Petitioner/Applicant should have appealed or applied for a review with the University Council, which has the authority to review committee decisions. Additionally, the Human Resources Manual of the Public Service allows an officer to appeal to the commission within thirty days of the decision, with the possibility of considering late appeals under certain circumstances. The court cannot assume jurisdiction over the matter until these channels and forums have been invoked and exhausted.
35. In *Samuel Kamau Macharia & another V Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court stated as follows:
- “ A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
36. In *David Ramogi & 4 others V The Cabinet Secretary, Ministry of Energy & Petroleum & 7 others* [2017] eKLR the court held that where particular institutions are tasked under *the Constitution* or statute to deal with specific grievances, then these channels need to be first explored and exhausted before the intervention of the court is sought unless these are shown to be ineffective or unwilling to discharge their mandate.
37. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent also relied on the Court of Appeal case in the matter of *Mui Coal Basin Local Community* [2015] eKLR where the court held that the reasoning is grounded in Article 159 of *the Constitution*, which promotes a matrix dispute resolution system. This policy emphasizes that courts should respect the principle of fitting disputes to appropriate forums, as highlighted by Justice J.B. Ojwang’s concept of an “Ascendant Judiciary.” *The Constitution* does not advocate for an Imperial Judiciary driven by legal centrism to address every issue. Instead, it prefers other dispute resolution mechanisms, including statutory regimes, in specific cases.
38. In *Geoffrey Muthiga Kabiru & 2 others V Samuel Munga Henry & 1756 others* [2015] eKLR the Court of Appeal stated that dispute resolution mechanisms outside of courts should be exhausted first before taking matters to court. Courts should be the last option, not the first, when conflicts arise.

### **10<sup>th</sup> Respondent submissions**

39. The 10<sup>th</sup> Respondent submitted that the Petitioner/Applicant stated that the 10<sup>th</sup> Respondent should be personally liable for the alleged wrongs committed to her by the 1<sup>st</sup> Respondent and some members of the interviewing panel. Furthermore, the Petitioner/Applicant stated that the 1<sup>st</sup> Respondent should not provide any legal representation for him.
40. The 10<sup>th</sup> Respondent argued that the doctrine of Respondent Superior where employers are generally held responsible for the actions and omissions of their employees that occur in the course of employment is commonly referred to as vicarious liability.
41. The 10<sup>th</sup> Respondent relied on the case of *Teachers Service Commission V WJ & 5 others* [2020] eKLR, where the Court of Appeal held that the Teachers Service Commission was responsible for the actions of the teacher that had contravened the constitutional human rights of the minor. This position was also upheld by Justice Gamble in the South African case of *Groenewald V Irvin & Johnson Limited and Others* (3595/08) [2017] ZAWCHC 62 (17 May 2017) where the court held Ehlers who was the employer of I & J was liable for the actions of his employees.



42. The 10<sup>th</sup> Respondent submitted that his actions as a member of the interviewing panel were not done in his personal capacity but within the confines of his employment at the 1<sup>st</sup> Respondent's university. The 10<sup>th</sup> Respondent also submitted that he did not show any personal issues, discrimination or unfairness against the Petitioner/Applicant.
43. The 10<sup>th</sup> Respondent submitted that he has no legal ability to produce the said documents and relied on the case of Waste and Environment Management Association of Kenya (WEMA) V Nairobi City County [2015] eKLR in support of that proposition.
44. The 10<sup>th</sup> Respondent submitted that the application has no clear course of action against him and the orders sought cannot be enforced as well. In conclusion, the 10<sup>th</sup> Respondent urges the application be dismissed with costs.

### **Analysis and determination**

45. The court has considered the application, grounds of opposition, replying affidavit by the Petitioner/Applicant as well as the submissions by parties herein, the issue of determination is whether the application is merited.
46. Article 35 of *the Constitution* provides as follows:
  35. Access to information
    - (1). Every citizen has the right of access to—
      - (a). information held by the State; and
      - (b). information held by another person and required for the exercise or protection of any right or fundamental freedom.
    - (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation.
47. The right mentioned in Article 35 is subject to limitations as outlined in Article 24 of *the Constitution*. These limitations must be reasonable and justifiable in an open and democratic society that values human dignity, equality, and freedom. All relevant factors should be considered as stated in Article 24.
48. Order 16 Rules 1 and 6 of the Civil Procedure Rules have been reiterated in the preceding part of this ruling and it clearly provides that summons shall be issued to give evidence or to produce documents. In this instant case, the Petitioner/Applicant is seeking the production of several documents so that she can use them in the hearing of the application.
49. The Respondents did not submit on this issue of the production of the said documents which the Petitioner avers are in the custody of the 1 - 7<sup>th</sup> Respondents. In that case the Petitioner is entitled to the production of the requested documents as prayed.
50. On the issue of barring the advertisement and appointment of the Vice Chancellor and Deputy Vice Chancellor, in this instant case this Honourable court does not understand how it is related to the Petitioner/Applicants case and she has not proved the same as whoever alleges must in accordance to sections 107, 108 and 109 of the *Evidence Act* prove. Section 107 of the *Evidence Act* states as follows: -
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
51. The court has not found any evidence adduced by the Petitioner to support her prayers 3 and 4 of the Application and so the court must decline to grant those prayers as they are not merited.
52. As for prayer No. 5 pertaining to the legal representation the court finds there is no basis to justify the petitioner to delve into the matters of the legal representation of the parties.
- In any event, it is questionable why those individuals are sued and yet they are not employers of the petitioner.
53. Section 12 of the *Employment and Labour Relations Court Act* defines the scope of the jurisdiction of this court. In Section 2 of *Employment Act* defines employee as follows:-
- “A person employed for wages or a salary and includes an apprentice and indentured learner.”
- An employer is defined as:-
- “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes agent, foreman, manager or factor of such person, public body, firm or corporation and company.”
- The respondents number 2 - 12 may be regarded as agents of the Council of the University but this is extending the vicarious liability quite far.
54. In any event the Council is not part of the suit and yet it is the one with the legal right to sue and or be sued on behalf of public universities.
55. The court finds this prayer is also not merited and is also not granted.
56. Flowing from the contents of the Petitioner’s application and the grounds of opposition of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents as well as the respective submissions of the parties the court orders the Petitioner to be availed the requested documents within 30 days to enable her to set down the main petition for hearing if she so wishes.
57. The other orders are declined as already ruled.
58. Costs will be in the main Petition.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

