



**Ogato v Kisii University & 2 others (Judicial Review E015 of 2021)
[2024] KEELRC 494 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E015 OF 2021
S RADIDO, J
FEBRUARY 14, 2024**

BETWEEN

WILLIAM ATEKA OGATO APPLICANT

AND

KISII UNIVERSITY 1ST RESPONDENT

KISII UNIVERSITY COUNCIL 2ND RESPONDENT

PROFESSOR FREDRICK O WAMALWA 3RD RESPONDENT

JUDGMENT

1. On 8 December 2023, the Court of Appeal granted William Ateka Ogato (ex-parte applicant) leave to commence judicial review proceedings against Kisii University, Kisii University Council and Professor Fredrick O. Wanyama.
2. The Motion was filed on 28 December 2023, and the Court gave directions on the same day.
3. The ex-parte applicant filed his submissions on 10 January 2024, and the 1st and 2nd Respondents filed a replying affidavit sworn on their behalf by the Vice Chancellor and submissions on 19 January 2024.
4. Professor Wanyama filed his replying affidavit on 19 January 2024, and submissions on 22 January 2024.
5. Pursuant to leave granted on 23 January 2024, the ex-parte applicant filed supplementary submissions on 28 January 2024.
6. The Court has considered the Motion, affidavits and submissions and isolated the Issues arising as examined hereunder.



Competency of the Motion

7. The 1st and 2nd Respondents challenged the competency of the Motion on the grounds that it had been filed under the same file number wherein leave had been sought.
8. These Respondents further challenged the locus standi of the ex-parte applicant to commence the proceedings contending that he was a busybody with no interest in the proceedings, and that he had not disclosed in the affidavits the source of information deponed to therein.
9. This Court is aware that different positions have been taken by different Courts with respect to the question of whether a fresh file (number) should be opened after the grant of leave to commence judicial review proceedings.
10. Article 159(2)(d) of *the Constitution* deprecates locking out parties from the temple of justice on the basis of procedural technicalities.
11. This Court would, therefore, endorse and apply the position taken by the High Court in R v Meru Central Land District Land Tribunal ex parte M'arimi Ikungan, High Court Misc Application No. 68 of 2008 that the issue of separate file numbers in judicial review proceedings while seeking leave and the substantive Motion is a mere technicality of the law which should not defeat a judicial review proceeding.
12. On the question of locus standi, the 1st and 2nd Respondents asserted that the ex-parte applicant had not demonstrated any interest in the subject matter.
13. The determination of these proceedings turns on a legal question on the application and interpretation of section 35(1)(a)(v) of the *Universities Act* as amended by the Statute Law (Miscellaneous Amendments) Act, 2018 and thus is a matter of public interest.
14. The Court also notes that the Respondents did not raise the question of the ex-parte applicant's locus standi before the Court of Appeal.
15. Consequently, if the Respondents genuinely felt that the ex-parte applicant lacked locus standi, that could have been made one of the grounds for appeal before the Court of Appeal.
16. The Court holds that the objection on the competency of the Motion should not be determinative of these judicial review proceedings.

Sub judice and res judicata

17. Professor Wanyama however raised a plea of sub judice and res judicata in that there were 4 pending or determined proceedings in other Courts on the same matter
18. The pending or determined proceedings, according to Professor Wanyama were Eldoret Judicial Review Miscellaneous Application No. E004 of 2021, R v Kisii University & Ors, Kisumu Judicial Review Miscellaneous Application No. E013 of 2021, R v Kisii University & Ar and Kericho Judicial Review Application No. E010 of 2021.
19. Professor Wanyama did not place before this Court the pleadings and/or orders emanating from the proceedings before the Courts in Kisumu, Eldoret and Kericho and the Court cannot therefore make a finding of res judicata or sub judice.
20. With respect to the instant proceedings, the Court of Appeal expressly granted the ex-parte applicant leave to commence the proceedings.



Merits of the judicial review Motion: Competitive process upon Re-appointment or renewal of contract

21. Professor Wanyama was appointed as the Deputy Vice-Chancellor, Academic, Research and Student Affairs, Kisii University on 16 December 2016 for a 5-year fixed term. The term was to expire on or around 30 November 2021.
22. Before the expiry of the term, Prof Wanyama applied for the renewal of the contract, and the Council of Kisii University in a meeting held on 28 September 2021 approved the request for renewal.
23. The ex-parte applicant's case is that the renewal of Professor Wanyama's contract by the Council was contrary to section 35(1)(a)(v) of the [Universities Act](#) as amended by the Statute Law (Miscellaneous Amendments) Act 2018 No. 18 of 2018, which grants the power to recruit a Deputy Vice-Chancellor in the Public Service Commission.
24. The ex-parte applicant also asserted that the renewal or re-appointment of Professor Wanyama should have been made after a competitive recruitment process.
25. The ex-parte applicant cited the Speaker of the National Assembly & Ar v Senate & 12 Ors (2021) KECA 282 (KLR), Okiya Omtatah Okoiti v Public Service Commission & 3 Ors (2020) eKLR and Kenya Medical Laboratory Technicians and Technologists Board & 4 Ors v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 Ors (Interested Parties) (2020) eKLR.
26. The 1st and 2nd Respondents urged the Court to reject the application because the Court's jurisdiction in judicial review proceedings was restricted to an adjudication on the process and not the merits of a decision.
27. According to these Respondents, the Council had the power under the Kisii University Charter, 2013 and Statute No VI(iii) of the Kisii University Statutes, 2020 to renew the contract of Professor Wanyama for a further term of 5 years.
28. On the interpretation and application of section 35(1)(a)(v) of the [Universities Act](#), the Respondents contended that it was not applicable because it related to appointments and not re-appointments. The Respondents cited Wilfrida Arnodah Itolondo v Attorney General & 9 Ors (2020) eKLR and R v Cabinet Secretary for Education, Science & Technology & 3 Ors (2014) eKLR.
29. Professor Wanyama made similar submissions to those made by the 1st and 2nd Respondents.
30. The Court of Appeal addressed the question of application and interpretation of section 35(1)(a)(v) of the [Universities Act](#) in the Itolondo judgment (supra) thus:
 - (24) We understood the appellant to be saying that the [Universities Act](#) and their respective Charters should provide for a competitive and open process for re-appointment of VCs. It is for this reason the appellant adopted the two-pronged approach, by blaming the 1st respondent for not amending the law to harmonize it with [the Constitution](#), and seeking that we find the values in [the Constitution](#) were being undermined by the [Universities Act](#) and the attendant policies and regulations. The real controversy we are invited to resolve is whether we should declare section 39 of the [Universities Act](#) unconstitutional for not providing a competitive process for the re-appointment of the VCs to the Public Universities

.....



- (25) It is common ground that when the 7th to the 10th respondents were first appointed as VCs they were taken through a competitive recruitment process. There is also no challenge that they were all eligible to re-apply and that the respective University Charters and the Mwangozo policy which is a code of governance for State Corporations enacted in 2015 to engender the principles of good governance and national values provides under Article 1.12 (6) that re-appointment of a Chief Executive Officer (CEO) for a subsequent term shall be based on a favourable evaluation as spelt out in the evaluation tool. The 7th to the 10th respondents provided detailed information in their responses that their contracts provided a renewal clause; that they were required to apply for re-appointment 6 months before the expiry of the contract which they did, and each was taken through a rigorous process of evaluation before they were finally re-appointed in office. In this regard, we are of the view that if it was the intention of the of the Legislature to provide under the *Universities Act* for a competitive process of re-appointment of VC's the law should have expressly provided for that.
31. It is clear that the Court of Appeal made a binding finding that the renewal or re-appointment of a Vice-Chancellor did not require a further re-opening of the recruitment process, if the criteria for renewal or re-appointment complied with prescribed requirements.
32. Professor Wanyama applied for the renewal of his contract as prescribed. The Council processed the request within the prescriptions of the University.
33. The position of Deputy Vice-Chancellor and indeed that of Professor Wanyama is in pari materia with the legal position set by the Court of Appeal for the renewal of a contract for a Vice-Chancellor in the Itolondo judgment, and this Court holds that the renewal or re-appointment of Professor Wanyama did not require a fresh competitive merit-based process.

Role of the Public Service Commission/Cabinet Secretary

34. Section 35(1)(a)(v) of the *Universities Act* (amended in 2018) provides:
- 35 Governing Organs of a University
- (1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent-
- (a) A Council, which shall-
- (i) ...
- (ii) ...
- (iii) ...
- (iv) ...
- (v) in the case of public universities, appoint Vice-Chancellor, Deputy Vice Chancellors and Principals and Deputy Principals of constituent colleges in consultation with the Cabinet Secretary, after a competitive process conducted by the Public Service Commission.
35. The text reproduced above speaks to an appointment process and not the renewal of a contract or re-appointment. It does not explicitly address the question of renewal or re-appointment of the named officers of public universities.
36. The Court can, therefore, look elsewhere to evaluate whether the Public Service Commission or Cabinet Secretary has a role in the renewal/re-appointment process.



37. Section 16(1) of the Kisii University Charter envisages a renewal of the term or contract of a Deputy Vice-Chancellor.
38. Since the Council is the one with the mandate to evaluate and appraise the performance of the Deputy Vice-Chancellor, it does not require any argument to surmise that it is the organ clothed with the mandate to determine whether to renew the contract or not, without the involvement of the Public Service Commission or Cabinet Secretary.

Conclusion and Orders

39. Arising from the above, the Court finds no merit in the Motion dated 28 December 2023, and it is dismissed with costs to the Respondents.

Delivered virtually, dated and signed in Kisumu on this 14th day of February 2024.

Radido Stephen, MCI Arb

Judge

Appearances

For *ex-parte* applicant Robert Ndubi & Co. Advocates

For 1st and 2nd Respondents Nyairo & Co. Advocates

For 3rd Respondent Amondi & Co. Advocates

Court Assistant Chemwolo

4 | 15 Page Kisumu JR No. E015 of 2021

