



**Republic v University of Nairobi; Mutemi (Exparte Applicant) (Judicial Review Application 46 of 2023) [2024] KEELRC 806 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 806 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW APPLICATION 46 OF 2023**

**B ONGAYA, J**

**APRIL 8, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI AND PROHIBITION  
IN THE MATTER OF CONTRAVENTION OF ARTICLES 10,  
232, 233, 234 AND 248 OF THE CONSTITUTION OF KENYA  
IN THE MATTER OF SECTIONS 4, 5, 7, 9, 11, & 12  
OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF ADVERTISEMENT FOR APPOINTMENT TO  
PUBLIC POSITIONS WITHIN THE UNIVERSITY OF NAIROBI**

**-BETWEEN-**

**REPUBLIC**

**-AND-**

**-EX-PARTE-**

**JULIUS MUTEMI APPLICANT**

**- VERSUS -**

**UNIVERSITY OF NAIROBI RESPONDENT**

**(BEFORE HON. JUSTICE BYRAM ONGAYA ON MONDAY 08TH APRIL 2024.)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**



AND

UNIVERSITY OF NAIROBI ..... RESPONDENT

AND

JULIUS MUTE MI ..... EXPARTE APPLICANT

### JUDGMENT

1. The ex-parte applicant filed an application by the notice of motion dated 20.12.2023 filed through Bryan Khaemba, Kamau Kamau & Company Advocates. The application was based upon the verifying affidavit of Julius Mutemi sworn on 15.12.2023 and the attached statutory statement dated 15.12.2023. The applicant prayed for:
  - a. An order of certiorari to remove the Honourable Court for purposes of it being quashed the respondent's decision duly communicated through an external advertisement declaring vacant positions as contained in the My Gov printed by the Star Newspapers dated 12.12.2023 and the respondent's website, [ww.uonbi.ac.ke](http://ww.uonbi.ac.ke)
  - b. An order of prohibition to prohibit the respondent from proceeding with any advertisement of the positions as per the external advertisement contained in the My Gov printed by the Star Newspapers dated 12.12.2023 and the respondent's website, [ww.uonbi.ac.ke](http://ww.uonbi.ac.ke)
2. The applicant urged the following grounds to support the application:
  - a. The respondent published the external advertisement dated 12.12.2023 subject of the prayers herein and duly exhibited. It was with respect of 24 vacancies allegedly in the establishment of the respondent and invited applicants from the public.
  - b. Rule 22(8) of the respondent's charter provides that all members of staff of the respondent shall, subject to the charter, either be seconded or appointed by the Council of the respondent in the manner and terms of conditions of service prescribed by statutes of the respondent. Rule 29(1) (g) provides that the Council shall make Statutes for inter alia settlement of terms and conditions of service including appointment, dismissal, remuneration and retiring benefits of members of staff of the respondent.
  - c. Section 23(2) of the [Universities Act](#) provides that the Council of a University is required to submit a Statute to the Cabinet Secretary within 3 months of its creation for publication in the Gazette.
  - d. With respect to advertised vacancies in serial Nos. 1-18 in the impugned advertisement herein, there exist no Statutes created by the Council, submitted to the Cabinet Secretary and published in the Gazette as required under rule 22(8) and 29(1) (g) of the respondent's charter and section 23(2) of the Universities Act. The advertisement is *ultra vires* the express provisions of the law.
  - e. Section 27 of the [Public Service Commission Act](#) provides conditions for creation of new offices requiring that the proposals be submitted to Public Service Commission for approval before creation of the said positions. The respondent has not obtained the Commission's approval to establish the offices in serial Nos. 1-18 of the advertisement.



- f. In Article 234 (2) (a) of the Constitution and section 37 of the Public Service Commission Act, the Commission is vested with the legal mandate to abolish, create offices in the public service and to competitively and meritoriously appoint persons to such offices. The proposed advertisement will amount to an illegality, violation of principles of good governance, and of public service provided for in the Constitution.
  - g. Section 35(1) (a) (v) of the Universities Act and section 15(a) of the respondent's charter provide for position of Deputy Vice Chancellor. Section 22A of the Universities Act is the sole provision which governs variation of the Charter by abolition of offices created pursuant to it by first initiating and recommending to the Commission of University Education and which will then request the Cabinet Secretary to authorise such changes to the Charter.
  - h. In disregard of the cited applicable provisions, the Council in its meeting of 12.07.2021 and 20.08.2021 opted to, "Abolish the divisions of (i) Human Resource and Administration, (ii) Finance, planning and Development and (iii) Student Affairs and Respective Deputy Vice Chancellor positions, revoked their respective Statutes and Support functions thereof designated and professionalized under respective professional service heads reporting to Chief Officer..." Acting appointments were made to the position of Chief Operations Officer pending the alignment of statutory instruments. The respondent seeks to recruit for the position of Chief Officer substantively without aligning the instruments as per law and the recruitment per the impugned advertisement is ultra vires the cited law.
  - i. Only the Cabinet Secretary for Education has the sole responsibility to grant, revoke or amend the 1<sup>st</sup> respondent's Charter under section 19 and 22 of the Universities Act. The State Corporations Advisory Committee or the Public Service Commission has not approved the respondent's HR instruments from which the advert is based and as required in law. It is unreasonable, illegal and an abuse of process for the respondent to advertise the position of Chief Operations Officer at Grade 17 contrary to the directions and grading systems of the Public Service Commission.
3. The respondent filed the replying affidavit of Professor Amukowa Anangwe, PhD, EGH and Chairperson of the respondent's Council. It was sworn on 31.01.2024 and filed through CS Fredrick Collins Omondi, Director, Legal & Corporate Board Services. It was stated and urged as follows:
- a. The applicant has no standing to challenge the advertisement in issue.
  - b. The respondent is a public university established under the Universities Act 2012 and operating under its Charter of 2013. The Council is established per sections 35 and 36 of the Act and read together with Article 18 of the Charter, the Council is responsible for the exercise of prudent leadership, innovation, enterprise and good judgment in directing the University in the University's best interest.
  - c. Section 35 (1) (a) of the Universities Act provides the Council shall—
    - (i) employ staff;
    - (ii) approve the statutes of the University and cause them to be published in the Kenya Gazette;
    - (iii) approve the policies of the University;
    - (iv) approve the budget;



- (v) in the case of a public university, recommend for appointment of the Vice-Chancellor, Deputy Vice-Chancellors and principals of constituent colleges through a competitive process; and,
  - (vi) undertake other functions set out under this Act and the Charter.
- 4. The issue of establishment of office of the Chief Operations Officer as established by the Council is subject of other litigation namely ELRC Petition E118 of 2021 UASU v UON and ELRC Cause 700 of 2023 UASU v UON. In ELRC E118 of 2021 a ruling was delivered and appealed against with the consequence the Court of Appeal has granted orders staying further steps in the pending E118 of 2021. In a ruling delivered on 19.12.2023 in Cause No. 700 of 2023, the Court found that issue was in dispute in E118 of 2021 and therefore sub judice. The issue as raised in the instant case about Chief Operations Officer should be left for determination by the Court of Appeal upon the *sub judice* rule or *res judicata*.
- 5. The respondent pleaded that Section 40 of the Universities Act provides that the academic staff of a University shall be provided for 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 which 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.
- 6. Further, the impugned positions are management and administrative staff of the University. Council establishes the positions and they need not be established under a statute developed by the Council for that purpose. The Universities Act and Charter have conclusive provisions on the power to establish the positions. No statute needs be drawn and submitted to the Cabinet Secretary for approval for that purpose as alleged for the applicant.
- 7. Further, the respondent states that creation and abolition of offices by the Public Service Commission under Article 234 (2) of the Constitution is subject to the Constitution and legislation. The Universities Act is one such legislation. The cited provisions of the Act and respondent's Charter apply.
- 8. Further, Article 18 of the respondent's Charter empowers the Council to employ staff.
- 9. The application is therefore calculated to unfairly delay the recruitment of the advertised vacancies.
- 10. Further, the respondent pleaded that the provisions of the Universities Act and the respondent's Charter under which the impugned offices subject of the vacancies in the advertisement have not been shown to be unconstitutional. Sections 13(1), 20, 29, 35 (1) (a) and 40 of the Universities Act, 2012 and sections 3, 18 (6), (7) (8) (10) and 22(5) (8) of the charter, 2013 are all capable of being constitutionally applied and implemented.
- 11. The application is thus misconceived, devoid of merit and be dismissed with costs.
- 12. The applicant filed his further affidavit sworn on 12.02.2024. he stated as follows:
  - a. He is aggrieved by the respondent's impugned decision. He is entitled to bring the application under section 7 of the Fair Administrative Action Act. As a citizen, he is entitled to bring the application in the public interest.



- b. The present suit is based on a new cause of action based on the advertisement as impugned and were not in issue in the previous suits or petition. The sub judice rule and res judicata doctrine do not apply.
- c. Rule 22 (8) of the respondent’s charter provides thus, “All members of staff of the university, subject to the charter, be appointed by the Council either (a) in the manner and upon the terms and conditions of service prescribed by Statutes or (b) in case of seconded staff....” Further, Rule 29(1) (g) provides, “The Council shall make Statutes for the settlement of terms and conditions of service, including appointment, dismissal, remuneration, and retiring benefits of the members of staff of the University.” The applicant’s case is that the respondent’s Council has not the prescribed statutes.
- d. The Public Service Commission is vested with the Constitutional authority to review HR instruments.
13. The Court has considered all the material on record including the final submissions filed for the parties and returns as follows.
14. To answer the 1<sup>st</sup> issue, the applicant has the necessary standing to bring the petition. It is sufficient that the dispute is about employment function, namely whether the respondent’s Council validly created the offices subject of the advertisement and due for recruitment per impugned advertisement. Section 12(2) of the *Employment and Labour Relations Court Act* allows any person to file legal proceedings against the mentioned categories including an employer like the respondent. Invariably, Articles 22 and 258 institute a constitutional principle that any person can move the Court in matters of public interest.
15. To answer the 2<sup>nd</sup> issue, the application is not trapped by the doctrine of res judicata or even sub judice in view of the previous pending suits or petition. The application is based on the cause of action flowing from the impugned advertisement and which was not in issue in the previous suits. Invariably the parties are different from those in the earlier suit and petition.
16. To answer the 3<sup>rd</sup> 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. However, there is an exception. Where the Charter has expressly created the positions such as the Vice Chancellor, Deputy Vice Chancellor or registrars and directors, then the Council cannot abolish such positions without amending the charter as such abolition would amount to irregular variation of the Charter. Section 22A of *the Act* states thus:
- (1) The Cabinet Secretary may, upon an initiation made under subsection (3), vary a Charter if in the opinion of the Cabinet Secretary that the variation is in the best interest of university education in Kenya.
- (2) The recommendation referred to under subsection (1) shall be made based on need to —



- (a) align the particular Charter to the *Constitution* or any written law; (b) align the university to the training and research priority of the national government that would develop expertise in a specified academic field, including instilling of skills with bias in employment creation;
  - (c) in the case of a private university, to reflect changes in sponsorship of the university;
  - (d) align the university to the dynamics in research, technology and prevailing academic requirements recommended by the body which by law represents employers; or,
  - (e) align the charter to the best interests of university education in Kenya.
- (3) A variation under subsection (1) may be initiated —
- (a) by the Commission upon request by a university, in the case of a public university; or,
  - (b) by the sponsor in the case of a private university; and,
- may include the introduction of such mechanisms as shall enable the university concerned to better carry out its functions.
- (4) A decision for the variation by the Cabinet Secretary shall be made without unreasonable delay, but in any case —
- (a) within three months from the date a recommendation for variation is made by the Commission, if the process is initiated by the Commission; or,
  - (b) within six months from the date a formal request for variation is made by a university, if the process is initiated by a university.
- (5) If a Charter is varied under subsection (1), the Cabinet Secretary shall forthwith cause a notice of variation to be published in the Gazette, and the variation shall come into effect on such date as may be specified in the notice.
- (6) Notwithstanding subsection (5), the variation of the Charter shall not affect the validity of any academic award made by the University before variation.
- (7) For the purpose of this section, "vary" includes a review or amendment.

The positions in the advertisement in serial number 2 to 18 as well as 19 to 24 appear to be the ones contemplated to vest in the Council per Article 22 of the Charter. It is not clear if the Chief Operating Officer is aimed at replacing Deputy Vice Chancellor at Grade 17 and if that is the case as urged for the applicant and not rebutted for the respondent, then, it appears to the Court that such creation of an office to abolish one expressly provided in the respondent's Charter would therefore require the compliance with the procedure in section 22A of *the Act*. It is submitted for the respondent thus, "... The position of Chief Operations Officer is central to all the respondent's directorates (the advised positions) in the centralization and delivery of professional support services to the respondent..." The Court finds the new positions aim to introduce a system and staff establishment of a centralised and professional service in place of Senior Management Staff and Administrative Staff contemplated in Article 22 of the Charter. To that extent it is imperative that a variation of the charter be undertaken per section 22 A of *the Act* for otherwise, the Council has embarked to create positions which it was not empowered in the charter and which significantly change the prevailing Senior Management Staff and Administrative Staff contemplated in Article 22 of the Charter. The Court finds accordingly. The Court further returns that while the Council may create or abolish positions where empowered in its Charter, the procedure of doing so would need to be provided in a University Statute failing, the



general statutory procedure prescribed in the *Public Service Commission Act*, 2017 would apply. In any event, it is trite law that no subsidiary legislation offends any statutory provision. It appears that the University Charter and Statutes provided for under Universities Act are subsidiary legislation. Their making must abide by the procedure in the provisions of the *Statutory Instruments Act* and their terms, procedures or conditions relating to performance of human resource functions such as advertisement, recruitment, selection, appointment, acting appointment, promotion, disciplinary control and others meet the minimum provisions of the *Public Service Commission Act*, 2017 as the statute of general application in that regard. Where the Charter or Statutes are lacking or deficient, the provisions of the Act would be invoked by the Council as appropriate.

17. To answer the 3<sup>rd</sup> issue, the Court returns that the respondent has failed to show that it has instituted relevant statutes to undertake the relevant human resource functions such as the recruitment is issue. In particular it has not been shown that the Council has by statute determined the conditions of service as contemplated in Rules (Articles) 22 (8) and Rule 29(1) (g) of the Charter and as urged for the applicant. Section 23 of the Universities Act provides thus:

- (1) Subject to this Act and to the Charter a University Council may, and where required by this Act to do so shall, make such statutes and regulations, as it considers appropriate to regulate the affairs of the university.
- (2) A university Council shall, as soon as practicable as and in any event not later than three months after the making of a statute or regulation under this section, submit it to the Cabinet Secretary for publication in the Gazette.

The respondent has not rebutted the applicant's position that respondent has not issued statutes as required in what the applicant calls Rule 22 (8) and Rule 29(1) (g) of the respondent's charter.

18. The Court returns that in view of the findings, the applicant has justified the grant of the prayers. Being a public interest litigation case, the Court returns that each party will bear own costs.

In conclusion, judgment is hereby entered for the applicant against the respondent for:

- a) The order of certiorari removing to the Honourable Court for purposes of it being quashed the respondent's decision duly communicated through an external advertisement declaring vacant positions as contained in the My Gov printed by the Star Newspapers dated 12.12.2023 and the respondent's website, [www.uonbi.ac.ke](http://www.uonbi.ac.ke) .
- b) An order of prohibition to prohibit the respondent from proceeding with any advertisement of the positions as per the external advertisement contained in the My Gov printed by the Star Newspapers dated 12.12.2023 and the respondent's website, [www.uonbi.ac.ke](http://www.uonbi.ac.ke) .
- c) Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8<sup>TH</sup> APRIL 2024.**

**BYRAM ONGAYA, PRINCIPAL JUDGE**

