



**Universities’ Academic Staff Union (UASU) University of Eldoret
Chapter v University of Eldoret (Judicial Review Application
E005 of 2022) [2023] KEELRC 977 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 977 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
JUDICIAL REVIEW APPLICATION E005 OF 2022
NJ ABUODHA, J
APRIL 28, 2023
IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF JUDICIAL REVIEW (ORDER
PROHIBITION AND CERTIORARI)
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS
ACT, 2015
AND
SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26
LAWS OF KENYA AND THE CIVIL PROCEDURE ACT CAP 21
LAWS OF KENYA

BETWEEN
THE UNIVERSITIES’ ACADEMIC STAFF UNION (UASU) UNIVERSITY OF
ELDORET CHAPTER APPLICANT
AND
UNIVERSITY OF ELDORET RESPONDENT



JUDGMENT

The Applicant's Case

1. By a notice of motion dated November 1, 2022, Applicant herein sought the following orders:-
 - i. That an order of prohibition to issue to the Respondent to stop the recruitment process of Deans and Directors of the Schools which process commenced pursuant to the advertisement of August 4, 2022
 - ii. That an order of certiorari to issue to the Respondent to quash the advertisement and recruitment process of the Deans of Schools and Directors made pursuant to the advertisement of August 4, 2022.
 - iii. That in default of compliance with the orders of prohibition and certiorari by stopping the recruitment process of the Deans of Schools and Directors and quashing the advertisement of August 4, 2022 the order of prohibition and certiorari be deemed as sufficient notice to the persons holding offices of the Vice Chancellor and chair persons of the senate of the Respondents and requiring them to show cause why contempt of court proceedings should not be commenced against them upon service of the orders of prohibition and certiorari.
 - iv. That in default of compliance with the orders of prohibition and certiorari and failure to stop the recruitment process of Deans of Schools and Directors and quashing the advertisement of August 4, 2022 thirty (14) (sic) days after date of service of the orders of prohibition and certiorari and failure to show sufficient cause for non- compliance with the orders of prohibition and certiorari the ex-parte applicant be at liberty to commence contempt of court proceedings against the persons holding offices of the Vice Chancellor and Chair persons of the Senate of the Respondents for them to personally be summoned to court and be committed to civil jail for contempt of court orders.
 - v. The cost of this application be borne by Respondent.
2. The application was based on the grounds set out in the foot of the application to wit; that on August 4, 2022, the Respondent issued an internal advertisement calling for applicants for the post of deans and directors for the following schools
 - a. Dean, School of science
 - b. Dean, School of Education
 - c. Dean, School of Agriculture
 - d. Dean, School of Business, Economics and management science
 - e. Dean, School of Environment science & natural resources management
 - f. Director, Strategic planning & performance contracting
 - g. Director Information & Communication Technology
 - h. Director, Board of postgraduate studies
 - i. Director, Industrial Linkage , Partnerships & Collaboration



- j. Director, Gender, Equity & Disability
 - k. Director, Quality Assurance
 - l. Director, Resource mobilization & strategic Initiative
 - m. Director, Research & Innovation
3. That many members of the Applicant applied for various posts pursuant to the advertisement having fully qualified with the requirements /qualifications in the internal advert.
 4. That clause 3:3 of the recognition agreement dated October 28, 2019 between the Applicant and the Respondent provides that both the Applicant and the Respondent shall ensure that employment practices in the university are conducted to the highest standards possible.
 5. That clause 4:3 of the recognition agreement acknowledges the value of up to date information on important changes which affect unionizable academic staff.
 6. That it is on the above basis and recognition that the applicant wrote to the respondent on August 25, 2022 following the applicant's executive meeting of August 22, 2022 where it was unanimously resolved and agreed that the internal advert of August 4, 2022 be deferred until the Applicant's members are promoted.
 7. That this was informed by the fact that majority of the Applicant's members who would have applied for the positions advertised had been overdue for more than 8 years in terms of promotion and that they all qualified for all the positions advertised and that proceeding with the recruitment exercise as it would in the circumstances disadvantage the Applicant's members.
 8. According to the Applicants, the recruitment process had been extremely opaque in that other than the internal advert displayed to all and sundry, the rest of the recruitment process had been done with a lot of secrecy in that it was not known who applied for the posts listed, when the shortlisting was done, who was shortlisted for the said posts and which persons were invited for the interview.
 9. That there was a complete violation of the law as members of the Applicant, members of the public and all staff of the Respondent were not given an opportunity to participate in the recruitment process as is the requirement of the law.
 10. That the advertised positions being public offices, public participation process and vetting of the applicants by the members of the applicant, members of the public and all staff of the Respondent was key.
 11. The Respondent filed a response to the Motion vide a replying affidavit sworn by Professor Teresa Akenga on November 17, 2022. In that affidavit, she deponed that pursuant to provisions of section 39 of the Universities Act 2012, she was the Academic and Administrative Head of the University.
 12. She averred further that as the Academic Head of the institution, she was the Chairperson to the University Senate which position according to her was distinct and separate from that of Chairperson of the University Council.
 13. Professor Teresa Akenga further averred that the University followed the due process and properly advertised the vacancies for Deans and Directors for the positions via an advertisement dated August 4, 2022.
 14. That contrary to the Applicant's assertion the recognition agreement dated October 28, 2019 was to the effect that the applicant has a role in the recruitment process of staff at the university, it is averred



- that the correct position was that the University statutes under clauses XVI (6)(X), the authority to appoint staff of grade 14 and above was vested on the University Council
15. That the appointment of Deans and Directors was a function properly vested in the University Council and there was no role the applicant union played at such meetings to consider appointments.
 16. It was contended that the University's management having noted that the term of the outgoing Deans and Directors was coming to an end proceeded to seek authority from the University Council to advertise the positions.
 17. That the request to advertise the vacant positions was tabled at the Council at the 43rd Ordinary meeting of Council held on the 11th May 2022 and that the University Council consequently directed the university management to develop the advertisement in accordance with the University of Eldoret Human Resource policy and procedure manual 2018, Clause 2.17.
 18. It was deponed that the interested applicants were requested to direct their applications to the Chairperson of the University council, wherein a tender opening committee was appointed by the Vice Chancellor via a letter dated August 30, 2022 recorded the received applications on 6th September 2022 and thereafter prepared a tender opening report which was forwarded to the university council.
 19. It was contended that the tender opening report was tabled at the Ad Hoc shortlisting committee of the university council on the 11th October 2022 and that the shortlisting was done following objective criteria and the Ad Hoc shortlisting Committee adopted both shortlisting criteria and a designated pass-mark applicable to the candidates.
 20. According to the Professor Akenga, the Ad Hoc Shortlisting Committee having reviewed applicants' qualifications resolved to invite the shortlisted candidates for interviews and that the shortlisted candidates were consequently invited for interviews having satisfied the requisite requirements.
 21. The court was informed that the University Council had already invited the shortlisted candidates for interviews which interviews proceeded to conclusion and that the successful candidates had since been issued with appointment letters.
 22. It was maintained that the recruitment process had since been concluded and as such, the Respondent's decision was not amenable to judicial review.
 23. The court was thus urged to dismiss the application before it with costs.
 24. On November 21, 2022, the Court directed parties to file written submissions. The applicant filed its submissions on January 16, 2023 and the respondents' submissions were filed on January 24, 2023.
 25. In the applicant's submissions, it was reiterated that the recruitment process of the deans and directors by the respondent did not meet the standard of public participation under article 10 and 232 of the [Constitution](#).
 26. According to the Applicant, other than the internal advert displayed to all, the rest of the recruitment process was done with a lot of secrecy as no one knows who was shortlisted for the interview. It was submitted that the respondent ignored the opinion of the applicant and did not in any way consider to consult with the applicant in the recruitment process. Reliance was placed on the cases of [University Academic Staff Union v Machakos University and another](#) (2019) eKLR, [Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Cordination of National Government & 8 others](#) (2014) eKLR and [Universities Academic Staff Union \(UASU\) v Salaries and Remuneration Commission & another](#) (2019) eKLR



27. It was also submitted that there was no transparency in the process of recruiting the deans and directors by the respondent. According to the applicant, the respondent acted in bad faith by running an opaque process of recruitment to the disadvantage of some members of the applicant.
28. The Applicant submitted that the respondent was a public university and pursuant to section 13 of the Universities Act, and Section 30 of the University of Eldoret Charter of 2013, the University was subject to the provisions of the Constitution of Kenya, The Universities Act of 2012 and all laws of Kenya.
29. It was the Applicant's contention that the process of recruitment and appointment of Directors and Dean by the respondent did not follow the principles of transparency, openness and public participation as enshrined in Articles 10 and 232 of the Constitution.
30. The Respondent on the other hand has submitted that the Applicant has not satisfied the standard for granting the orders sought as due process was followed in recruiting the Deans and Directors and as such the actions of the Respondent were within the law. The cases of Municipal Council of Mombasa v Umoja Consultants Ltd (2002) eKLR, Pastoli v Kabale District Local Government Canal & others (2008) 2EA 300, Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji & 9 others, Nairobi Civil Appeal No 266 of 1996 were cited to buttress this position.
31. It was the respondent's submission that there was no provision in law for consultation with the unions on the issue of recruitment when the Respondent has opted to conduct recruitment.
32. It was further submitted that as long as the employer believes that there is a genuine situation requiring recruitment, it was not for the court or the Union to question the employer's business decisions.

Determination

33. The Court has examined the recognition agreement exhibit "PKC. 2" exhibited in the affidavit of the applicant. Clause 3:3 provides that;

" ...both parties wish to achieve the following objectives;

 3. 3.1 to ensure that the employment practices in the public universities are conducted to the highest possible standards
 3. 3.2 To ensure effective communication with all academic staff throughout all the Public Universities..."
 3. 3.3 To achieve greater participation and involvement of all members of academic staff on the issues to be faced in running and developing public universities.
 3. 3.4 To facilitate constructive academic staff-management relations
34. I have read clause 3.3.1 in a bid to understand it. In my view, the import of the said clause is that both parties should ensure that they act in the best interest of each other in the performance of their mandate.
35. The Applicant has raised the issue of lack of public participation and transparency in the recruitment process.
36. It was not disputed that there was an internal advertisement which was placed at the University portal where members of staff and in this case, members of the applicant had access to.



37. Seemingly, the bone of contention according to the Applicant is with regards to the rest of the recruitment process after advertisement.
38. It is worth noting that judicial review remedies are discretionary and the court may decline to issue those orders provided that the Court gives a good reason for denying them.
39. Although article 10 and 232 of the *Constitution* as rightly submitted by the applicant, expressly require public participation in the recruitment process of public officers, in such a case as this one, the standard practice in the recruitment of Dean and Directors of Universities is solely a reserve of the University Council.
40. In this case, the Court has been told that the recruitment process was long concluded and the successful candidates have since been issued with appointment letters.
41. What purpose would the issuance of the Judicial Review order in this case serve in the circumstances especially where the Respondent acted within its mandate?
42. I find that this is a good case for exercise of the discretion of this court to deny the orders sought and as such, I dismiss the application dated November 1, 2022 with no orders as to costs.
43. It is so ordered

**DATED AT NAIROBI THIS 24TH DAY OF APRIL, 2023 DELIVERED VIA VIRTUAL COURT
THIS 28TH DAY OF APRIL 2023**

ABUODHA JORUM NELSON

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent

