



University Academic Staff Union (UASU) v Moi University Council & another (Judicial Review E004 of 2022) [2023] KEELRC 959 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 959 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E004 OF 2022**

NJ ABUODHA, J

APRIL 28, 2023

**IN THE MATTER OF APPLICATION BY UNIVERSITY
ACADEMIC STAFF UNION (UASU) FOR JUDICIAL REVIEW
FOR ORDERS OF CERTIORARI, PROHIBITION AND
MANDAMUS**

AND

**IN THE MATTER OF ARTICLE 41 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF THE LAW REFORM ACT SECTION 8 AND
9, CAP 26 LAWS OF KENYA**

AND

**IN THE MATTER OF UNIVERSITIES ACT 2012 AND MOI
UNIVERSITY CHARTER (LN 202 OF 2013) STATUTE VIII 3(2)**

(C) (V)

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JUDGMENT JR NO. E004 OF 2022

AND

**IN THE MATTER OF SECTION 20 GOVERNMENT
PROCEEDINGS**

ACT 1956

BETWEEN



BETWEEN
UNIVERSITY ACADEMIC STAFF UNION (UASU) APPLICANT
AND
MOI UNIVERSITY COUNCIL 1ST RESPONDENT
MOI UNIVERSITY 2ND RESPONDENT

JUDGMENT

1. The Applicant herein initially moved the Court on 5th May 2022 for leave to file judicial review orders. The Court did not grant the prayer that leave so granted operate as a stay but directed that the Applicant files the substantive Motion within 14 days and serves the same on the Respondent. From the record the Respondent though served, neither responded to the motion nor filed submissions as directed by the Court.
2. In the motion dated 22nd May, 2022, the Applicant sought orders among others that:
 - i. The Honorable court be pleased to and do hereby issue orders of Certiorari and Prohibition against the Respondents from enforcing the proceedings, decisions and/or directives on the intended interviews for the positions of Deans for all schools for Moi University.
 - ii. Upon the grant of prayer 1, the Honorable Court be pleased to quash the proceedings, decisions and/or directives of the Respondents thereof.
 - iii. The Honorable Court do hereby issue an order of Mandamus against the Respondents to incorporate/involve the Applicants in the planning and/or proceedings leading to and/or the intended interviews thereafter for Deans for all schools for Moi University.
 - iv. The costs be granted to the Applicant.
3. The motion was supported by the joint affidavit of Dr. Okero Richard and Dr. Busolo Wegesa who deponed among others that:
 - i. We are the Chair the Secretary to the Applicant's Union hence competent to swear this affidavit.
 - ii. The Respondents have put up an advert on their website on the 20th day of October, 2021 inviting shortlisted applicants' for interviews for the positions of Deans for all/various schools at the Moi University, Two (2) Deputy Voce Chancellors i.e. Academic Research and Extension (A, R & E), Student Affairs & Administration Planning and Development (A, P&D).
 - iii. The Union (UASU)/Applicant has in the past and through statutorily provisions duly participated and/or had representation on such interviews, whereas, the Respondents have removed, ignored and/or overlooked the participation or involvement of the Applicant in the instant interviews scheduled for Wednesday 18th May, 2022 or 19th May, 2022 being twoo (2) days shy from this application.
 - iv. The Union (UASU)/Applicant has on severally occasions i.e. on 12th November, 2021, 1st May, 2022 & 13th April, 2022 protested and/or expressed dissatisfaction by the move by



the respondents to remove/exclude it from participating in the interviews on the advertised positions.

- v. The Respondents have already started to implement the amendments under the (*Miscellaneous Amendments; Act No. 18 of 2018* and created new positions without the inputs of the Applicant.
 - vi. The Applicant is to be sitting in the Senate of the Respondents, however, after several pleads/requests and/or demands, the Respondents have adamantly refused to incorporate/add or the Applicant into Senate.
 - vii. The Applicant avers that, it is within the *University Act*, the laws of the Moi University and the Charter that the Applicant is accorded an opportunity to participate in the interviews for various positions within the University of the 2nd Respondent.
4. As observed earlier, the Respondent despite being served never participated in these proceedings.
 5. In his closing submissions, Mr. Omusundi for the Applicant submitted in the main that by not involving UASU, the Respondents were assaulting the rights of every worker to fair labour practices and the rights of UASU pursuant to the provisions of the CBA, statute of Moi University and Recognition Agreement. Counsel thus submitted that if the orders are not granted, there was real danger that the Applicant would suffer prejudice as a result of this violation or threatened violation of the Constitution.
 6. Concerning consultation, Counsel submitted that meaningful consultation must involve a demonstrable consideration of the views and opinions gathered at the consultation. In this regard Counsel relied on the case of *Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 8 others* [2014] eKLR where the Court stated that although views expressed by stakeholders are not binding, public involvement cannot be meaningful if there is no willingness to consider their views.
 7. According to Counsel, the 2nd Respondent had in total disregard of the laws and rules of Fair Administrative Action proceeded to implement amendments under the *Miscellaneous Amendments Act* No. 18 of 2018 without following the due process and at the exclusion of the Applicant and ultimately the 2nd Respondent's employees whose interests ought to be advocated for by the Applicant pursuant to the CBA, Statute of Moi University and Recognition Agreement had been grossly violated. In this regard the Applicant relied on the case of *Kevin Mwiti & Others v Kenya School of Law & 2 Others* [2015] eKLR and *Universities Academic Staff Union v Machakos University & another* [2019] eKLR. Based on these authorities and submissions, Counsel urged the Court to grant the orders sought in the motion herein.
 8. The Court has carefully considered and reviewed the motion, the supporting affidavit and submissions by Counsel. The Court has further noted that the Respondent despite having been served neither responded to the motion nor participated in any way including the filing of submissions. The Court did not therefore have the benefit of receiving interventions by the Respondent.
 9. The Applicant before me is a very well-known and strong trade union which has over the years agitated for its members' rights. Their exclusion in the amendment of the 2nd Respondent's statute and omission to include them in recruitment of Deans of various schools and the two Vice Chancellors is a serious matter which required their participation and input.



10. The Court in Universities Academic Staff Union v Machakos University & another [2019] eKLR observed as follows:

“The Court is therefore of the view and finds that UASU as a primary stakeholder was not afforded reasonable opportunity to participate in the process.”

11. The Court further stated in Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 8 others [2014] eKLR that although views expressed by stakeholders were not binding, public involvement cannot be meaningful if there was no willingness to consider those views.

12. The Court cannot agree more with the profound sentiments by my brother Judges in the above two cases. In the circumstances the Court will grant prayers 1, 2 and 3 of the motion dated 23rd May 2022. The Applicant shall further have the costs of the application.

13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA J. N.

JUDGE

In the presence of:-

..... for the Claimant

..... for the Respondent

