



**Kenei v Egerton University & another (Petition E009 of 2022)
[2023] KEELRC 918 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 918 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E009 OF 2022**

HS WASILWA, J

APRIL 20, 2023

**IN THE MATTER OF ARTICLE 1,2,3,10,20(10), 22(1)(D), 27,41,47,258,259 AND
162(2)(A) OF THE CONSTITUTION OF KENYA AND SECTIONS 12 F THE
EMPLOYMENT AND LABOUR RELATIONS COURT ACT. AND IN THE
MATTER OF ALLEGED VIOLATION AND OR THREATENED VIOLATION
OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL AS
ENSHRINED UNDER ARTICLES 27,28,36,41,43 AND 47 OF THE CONSTITUTION**

BETWEEN

FRANCIS KIPLANGAT KENEI PETITIONER

AND

EGERTON UNIVERSITY 1ST RESPONDENT

THE VICE CHANCELLOR, EGERTON UNIVERSITY 2ND RESPONDENT

JUDGMENT

1. The Petitioner instituted this suit by a Petition dated and filed on the 22nd September, 2022 contending that the 1st Respondent through the 2nd Respondent, unilaterally changed the terms of service of the position of Registrar-Human capital and Administration, Grade 15 from that of permanent and pensionable to a contract of 5 years. He is apprehensive that these unilateral changes will have a ripple effect on all other position in the university including his position in violation of his constitutional rights. He prayed for the following orders:

1. A declaration that the advertisement made by the Respondents on its website and other forums between 26th May, 2022 and 8th June, 2022, shortlisting and interviewing of candidates for the position of Registrar-Human Capital and Administration of the 1st Respondent scheduled for 27th September, 2022 or thereabout is in contravention of statute 15(4) of the Egerton University Statute, 2013 and amounts to violation of Article 41(1) of *the Constitution* of Kenya.



2. A declaration is hereby issued that the Respondents in engaging in a process of recruitment of an officer of the Registrar-Human Capital and Administration for the 1st Respondent for a term of 5 years contravenes Statute 15(4) of the Egerton University Statutes, 2013 is unlawful, illegal, arbitrary and violates Articles 10, 27,41 and 47 of the Constitution.
 3. An order of specific performance be and is hereby issued compelling the Respondents to conduct fresh advertisement, short listing and interviewing for the Registrar-Human Capital and Administration of the 1st Respondent in accordance with statute 15 (4) of the Egerton University Statutes, 2013, Constitution and relevant law.
 4. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the advertisement notice made by the Respondents on its website and other forums between 26th May, 2022 and 8th June, 2022 for the position of the Registrar-Human Capital and Administration of the 1st Respondent.
 5. A Declaration that the Respondents in paying the acting allowance to the current office holder of the Registrar -Human Capital and Administration of the 1st Respondent for more than the limit of six (6) months permitted under section C 14 (1) of the Public Service Commission Human Resource Policies and Procedures Manual dated May, 2016 deems the acting Registrar -Human Capital and Administration of the 1st Respondent as a substantive office holder.
 6. Cost of this Petition.
2. The Petition is supported by the affidavit of the Petitioner sworn on even date, in which he basically reiterated the averments in the Petition and a supplementary affidavit filed on the 20th February, 2023.
 3. The Respondents opposed the Petition by swearing a replying affidavit deposed upon by Prof. Isaac Kibwage, the Vice chancellor of Egerton University, on the 18th January, 2023.

Petitioner's Case

4. The summary of the Petitioner's case is that he is a senior Administrative assistant in the 1st Respondent's institution. That sometimes between 26th May, 2022 and 8th June, 2022, the Respondent advertised in the 1st Respondent's website and other forums for recruitment of an officer in the office of Registrar-Human Capital and Administration-Grade 15 under file number EU/DVC/APD/2022-0503. In this office, there exists an acting Registrar-Human Capital and Administration, who has been acting in the said office for the last Fourteen (14) months.
5. Pursuant to this advertisement, several persons, including the acting officer, send their application to the 1st Respondent for consideration. The Respondents only shortlisted 4 applicants who were scheduled for interview on 27th September, 2022. However, that the name of the acting Registrar-Human Capital and Administration was conspicuously missing, raising questions on the criteria used in the shortlisting of applicants.
6. He alleged that the said advertisement, changed the terms of service of the said office from that of permanent and pensionable as provided for under section 15(4) of the Egerton University Statute, 2013, to 5-year contract, renewable once subject to satisfactory performance.
7. He contends that the change of terms of engagement in the said office was done by the Respondents unilaterally, unconstitutionally and illegally. He added that these change of terms locked out several qualified applicants who would have applied for the said vacancy.



8. He stated that the change of terms of the said office went against fair labour practices as envisioned under *the Constitution* of Kenya.
9. He also stated that the move by the Respondents in allowing the acting Registrar-Human capital and administration to receive an allowance for more than 6 months was in violation of Section C14 (1) of the Public Service Commission Human Resource policies and Procedures manual of May, 2016. Consequently, that the actions of the Respondent acquiesced that the current acting Registrar-Human Capital and Administration is fit to be confirmed as a substantive holder but failed to confirm her, committing an act of illegality.
10. That since the statute of the 1st Respondent has not been amended, changed or varied, the actions by the Respondent in unilaterally changing the terms of service of the subject office cannot be allowed to stand and the same ought to be quashed by this Court.
11. As a result of the Respondents' actions, the petitioners right to fair labour practices under Article 41(1) of *the Constitution* is threatened since such a conduct can easily cascade to affect his term of office.
12. That the conduct of the Respondents in making an advertisement for the recruitment of persons for the position of the holder of Registrar-Human Capital and Administration and unilaterally varying the term to a period of 5 years in contravention of the provisions of Statute 15 (4) of the Egerton University Statutes, 2013 which act amounts to violation of rights of an intended office holder to fair labour practice under Article 41(1) of *the Constitution*.
13. Further, that the petitioner, like many other employees of the 1st Respondent are at risks and under threat of their rights to fair labour practices under Article 41(1) of *the Constitution* being violated since it is clear that the Respondents can act arbitrarily.
14. The actions by the Respondents in engaging in a process of recruitment of an office whose term contravenes Statute 15(4) of the Egerton University Statutes, 2013 violates Article 10 of *the Constitution* of Kenya where a public Officer as the 2nd Respondent ought to act in a manner that respects the rule of law.
15. It is averred that the advertisement that reduces the terms of services of an employee is contrary to the provision of the Statutes of the 1st Respondent discriminated against qualified persons who would have been motivated to make an application for consideration for the position of the Registrar, in contravention of Article 27 of *the Constitution*.
16. The Petitioner avers that, he is apprehensive that owing to the Respondents' capricious, unconstitutional and illegal conduct, his right to a fair administrative action under Article 47 of *the Constitution* is under threat since the Respondents' conduct is likely to cascade to other positions, including that of the Petitioner, within the 1st Respondent's institution.
17. According to the petitioner, the Respondents' act of engaging in a process of recruitment of an office whose term contravenes Statute 15(4) of the Egerton University Statutes, 2013 violates Article 47 (1) of *the Constitution* of Kenya, 2010 that provides that every person has the right to administrative action that is expeditious, effective, lawful, reasonable and procedurally fair.
18. Moreover, by advertising for recruitment of persons to the position of the Registrar on a reduced term without giving written reasons to the Applicants and prospective applicants contravened Article 47 (2) of *the Constitution* as the ultimate office holders will be adversely affected by administrative action.



Respondent's Case

19. The Vice chancellor, stated on behalf of the Respondents that the 1st Respondent is a chartered Public University, having received its charter on 1st March, 2013. In the university, is a council that is tasked under clause 19 with several functions including employing staff, approving staff terms and conditions of service.
20. On the issue before court, he stated that on 7th November, 2021, he prepared a brief to the University council requesting approval for the recruitment of the Chief procurement officer level 15 and Registrar-Human Capital and Administration Grade 15.
21. This request was informed by the fact that the office of Registrar-Human Capital and Administration was to fall vacant on the 27th March, 2022. This request was approved by the 177th council meeting held on 9th December, 2021 and the advertisement was to be done externally.
22. He stated that, the council resolve in that meeting to have all future recruitment on contract basis because of financial crisis the university was facing, which resolution was in accordance with Clause 1.6.2 of the Human Capital Manual, 2018.
23. He stated that it is on that strength that they caused an advertisement to be made for the position of Registrar-Human Capital and Administration, Chief Procurement officer and Internal Auditor on the 26th May, 2022, all these position were on contractual basis running between 3-5 years.
24. He avers that on receiving application from interested applicant, they shortlisted four applicants for interview for the position of Registrar- Human Capital and Administration and the Petitioner herein had not applied for the said Position. On the acting Registrar, one Stella Kereto, he stated that the said applicant had not meet the required criteria because she did not hold a PHD degree in Human Resource management, Public Administration, Business administration or related field as required in the advertisement.
25. He avers that the Egerton University Statute 2013, which was relied upon by the Petitioner has not been gazetted as required under section 23 of the Universities Act and clause 19(k) of the said charter, therefore the said statute is not yet operationalized to give the contents therein effect as such any reliance on the said charter is null and void and cannot be used to fault the recruitment process.
26. On the allegations that the Respondent acquiesced the appointment of the acting Registrar, Stella Kereto, the Affiant stated that the office fell vacant on 27th March, 2022, way after the process of recruitment of a substantive office holder had begun as such the officer assumed the said office in acting capacity awaiting the finalization of the recruitment process, for the substantive office holder.
27. It is the Respondents' case that clause C14 of the Human Resource Policies and Procedures manual does not apply in this case because the said acting registrar was not qualified for appointment to the office of the Registrar.
28. The deponent maintained that the Respondents have no violated any article of the constitution or section of statute for the way in which it carried out the recruitment exercise, On the contrary that they followed the law to the latter in the recruitment exercise.
29. He also stated that the terms of service for the said officer were changed because of financial constrains which the 1st Respondent if facing. In any case that the changes only affect the offices which have fell vacant not staff who are already in the system.
30. The Respondents, in conclusion, urge this Court to dismiss the Petition with costs for lacking merit.



Rejoinder.

31. In reply, the petitioner filed a supplementary affidavit on the 20th February, 2023, stating that the University Council is the one that is tasked under Section 23 of the [Universities Act](#) to make such statutes and regulations and having come up with such a statute, the same becomes the primary reference document for terms and conditions of engagement for the university staff.
32. He stated that such statute as per section 23(2) of the [Universities Act](#), ought to be submitted by the university council to the Cabinet secretary within 3 months after making to be published in the Kenya Gazette. Therefore, that by mere fact of alleging that a statute of 2013 has not been gazetted is in itself breach of the law which the Respondent cannot use to their benefit. Also that if indeed the said statute and charter has not been gazetted then the entire recruitment process undertaken by the university, including the current one is null and void.
33. Furthermore, that under the statute, the council is not allowed to make any amendment without reference to the senate. In fact, that section 40 of the [Universities Act](#), states that the primary documents for appointment of staff shall be the Universities Charter.
34. The Petitioner stated that in the minutes of the 177th Council meeting, there is no mention of change of terms of engagement as alleged by the Respondents. Indeed, that the terms of engagement are those contained in the statute that the Respondents have failed to gazette, raising questions as to the terms of reference that the new employees will base their employment on.
35. Contrary to the allegation by Respondents, the petitioner stated that the office of Registrar-Human Capital and Administration feel vacant on 26th March, 2021 when the office bearer retired as such the said office has been vacant for more than 6 months.
36. On the qualification of Stella Kereto, the acting Registrar, the Petitioner stated that the said officer is qualified in all fronts because, the position sought for a PHD holder in Human Resource management, Public Administration, Business Administration and other relevant fields which Stella Kereto is qualified because she has not only a PHD in Education management but also wide span experience in similar filed for over 25 years. Thus the allegation by the Respondent is without basis.
37. The Petitioner also stated that the reasons given by the Respondent of changing terms because of financial constrains is baseless because, the said position attract similar salaries and allowances, defeating the very purpose of reducing financial burden shouldered by the Respondent.
38. The petitioner avers that several court cases such us the case of Joyce Chepkoech Too V Egerton University and another [2021] eklr have been heard and the Court relied on the said Egerton University statute in finding for the University, they cannot therefore disown the said statute when the same speaks against them them. He urged this Court to estoppe the Respondent from disowning it own statute.

Petitioner's Submissions.

39. The Petitioner submitted on four issues; What instrument governs terms and conditions of service of the 1st Respondent's staff, Whether Estoppel can be invoked to estop the Respondents from denying the applicability of the Egerton Statutes, 2013, Whether the Respondents are in breach of the Egerton Statutes, 2013 and/or a threat to the Constitutional rights of the Petitioner and Who shall bear the costs.
40. On the first issue it was submitted that Clause 22 of the Charter of the 1st Respondent provides for how members of the staff are employed and states that it is upon the terms and conditions of service



prescribed by the Statute, which thus is the primary reference document for terms and conditions of service of the staff of the 1st Respondent, which has now been breached by the Respondent in unilaterally varying its terms. He argued that under Clause 28 of the Charter, the Respondents have a mandatory obligation to make Statutes generally for the government, control and administration of the university and for the better carrying of the purposes of the Charter and in particular, among others, settling the terms and conditions of service, and schemes of service, appointment of the members of staff of the University. Further that clause 28 (2) sets out in mandatory terms that: “the Council shall not make, amend or revoke any statutes without reference to Senate. On that basis, it was submitted that while the Council of the 1st Respondent has powers to employ staff, they are governed by the Charter and the Statute and they cannot make arbitrary decisions on variation of the terms.

41. On the second issue it was submitted that the 2nd Respondent is a member of the Council that is tasked under Section 23 of the Universities Act to make such statutes and regulations as it considers appropriate to regulate the affairs of the university. He therefore has a strict obligation to submit Statute or regulation to the Cabinet Secretary for publication in the Gazette not later than 3 months after making of the same, as provided for under section 23(2) of the Universities Act. The allegations by the Respondent that they have not forwarded the statute for gazette is in total breach of the law and he should be estopped from running away from the import of the said statute.
42. It was submitted further that by averring that Egerton University Statutes 2013 have never been gazetted renders various recruitment processes including the impugned one null and void for violation of the Universities Act, Charter and Statutes. Nonetheless, that there is no provision in the Universities Act outlawing a non-gazetted Statute or declaring the same to be of no legal effect. More importantly, that the averment that Egerton University Statutes are of no legal effect cannot stand for the reasons inter alia that the Respondents have always relied on the Statute to govern them and in dealing with students, this was seen in the case of *Joyce Chepkoech Too v Egerton University & another* [2021] eKLR, which the University relied on the Statute in resolving a dispute against it, where the Court held that;

“The 1st respondent also exhibited the documents marked Annexure JB 12 to JB 18 to prove that the petitioner was accorded a second opportunity to defend her thesis and that upon being deferred a second time, was discontinued in accordance with Statute 39(11) (i) of the Egerton University Statutes. Paragraph 86, I have no hesitation in holding that this prayer is also untenable. Untenable because there is a policy consideration behind the promulgation of the Egerton University Statutes, 2013; and therefore the 1st respondent is best placed to determine whether or not the petitioner qualifies for the award of the subject degree. To that end, it is not only undesirable but also unwarranted for the Court to issue an order compelling the petitioner to be awarded with a Master’s degree in Education as proposed... “An order be and is hereby issued to the 1st respondent compelling it to provide the petitioner with an opportunity to re-submit and defend her thesis Page 8 of 13 in the manner envisaged by Statute 39(11) of the Egerton University Statutes, 2013, within 90 days from the date hereof.”

43. From the foregoing, the petitioner submitted that having relied on the said statute before, the Respondent are barred from now disowning the very document they relied on in obtaining favorable orders from the Court and urged this Court to estoppe the Respondent in accordance with section 120 of the Evidence Act.
44. On the third issues, whether the petitioner’s constitutional rights have been infringed, it was submitted that Statute 15 (4) of the Egerton University Statutes, 2013 provide that the term of the occupant of the



office of the Registrar- Human Capital and Administration-Grade 15, is permanent and pensionable and not on contract as advertised by the Respondents and the unilateral change of terms was in violation of both statute and Articles 10, 41 and 47 of the Constitution which this Court should consider and quash such act.

45. In conclusion, the Petitioner submitted that the recruitment exercise was done in contravention of the existing law and urged the Court to allow the petition as prayed. In this he relied on the case of Joy Brenda Masinde v Law Society of Kenya & another [2015] eKLR, where the Court found that the law was not followed in a recruitment process and the Law Society of Kenya made an additional requirement for one to be a CEO, which additional requirement was not provided for in the law. The court found that it was ultra vires and the impugned advertisement was quashed.

Respondent's Submissions.

46. The Respondents submitted also on four issues; What is the effect of non-gazettement of the 1st Respondent's Statutes 2013, Whether by converting the terms of employment of the registrar from permanent and pensionable to contract basis by the Respondent is a threat to the Petitioner's right to fair labour practices under Article 41(1) of the Constitution, Whether the acting Registrar Human Capital and Administration of the 1st Respondent should be deemed as a substantive office holder and Who should bear the costs of this Petition.
47. On the first issue it was submitted that Section 35 of the Universities Act provides for the governing organs of the University which include council whose function include approval of statute of the university and causing them to be gazetted. Section 23 of the University Act, provides that the Council may make a statute and regulations for the the regulations of the Universities' affairs also that section 34 of the Universities Act provide for the university to be governed in accordance with the charter, letter of interim authority granted under the Act and the statute made by this council. Based on that, it was submitted that the Egerton University Statutes 2013, are purported to be made "in exercise of the powers conferred under Section 33 of the Egerton University Charter 2013" which charter does not have clause 33. The said Statute also purport to repeal the Egerton University Statutes (1998) and (2008), which he argued that the said statutes would not repeal the Egerton University Statutes (1998) and (2008) without being gazetted. That in effect means that the statutes which are applicable are the Egerton University Statutes (1998) and (2008) because the recent statute is yet to be gazetted.
48. It was submitted that the doctrine of estoppel cannot apply to oust an express provision of the law and being that Egerton University Statutes was not gazetted, it did not acquire the force of law and we urge the court to so find and hold. To support this argument the Respondents relied on the case of Otieno & another v Council of Legal Education (Civil Appeal 38 of 2018) [2021] KECA 349 (KLR) (17 December 2021) (Judgment), where the Court of Appeal considered the effect of subsidiary legislation that had been passed without following the procedure laid down in the Statutory Instrument Act, 2013 and opined as follows:-

"The record does not disclose that following gazetting of the impugned regulations, that they were thereafter laid before Parliament and adopted. In point of fact Prof Kulundu avers;

"16. I am aware that because Parliament was on recess at the time of the publication aforesaid, the Draft of the Regulations was never laid before Parliament in time or at all, with the consequence that the Draft became void under section 11(4) of the Act, of course until re-published, which has not been done."



Since there is nothing that shows that they were at any time passed into law in accordance with the procedures set out in the above cited provision, and which shortcoming the appellants have conceded, it becomes evident that the impugned regulations were not adopted by Parliament and as a consequence, did not acquire the force of law. As such, we agree with the learned judge that they were inapplicable for want of legality, and therefore could not have been the basis upon which the appellants were denied admission to the Roll of Advocates, and we so find.”

49. The Respondent also relied on the case of Republic v Institute of Certified Public Secretaries of Kenya Ex- Parte Mundia Njeru Geteria [2010] eKLR this court held as follows:-

“There is no evidence that the impugned Regulations were ever gazetted as required by law. It is not known when they came into force. I will find and hold that KPSK had no power to promulgate any Regulations and whatever is held out as Regulations has not been gazetted and has no force of law. If the Minister had delayed in the promulgation of the Rules the best that KPSK could do is prepare the Regulations, present them to the Minister for approval and gazette. As observed by the Applicant, the By-laws purportedly promulgated by KPSK do not even indicate what provisions of law empowered KPSK to make the By-laws and they lack the force of law.”

50. On the second issue, the Respondents submitted that Clause 19(2) of the Charter empowers the university council to employ staff and approve staff terms and conditions of service, while clause 22(3) (b) provides for all employment to be on permanent and pensionable terms with a proviso, allowing the council to employ staff on contractual basis. Further that clause 1.6.2 of the Human Capital manual, 2018 allows for employment of staff on contractual basis for any other reason, which the Respondent submitted, they relied on in seeking to employ the Registrar of Human capital on contractual basis, because of the financial crisis it is facing. In any case that this change does not affect the employees already in the system like the petitioner, thus his rights cannot be said to have been affected by the said advertisement and eventual recruitment. To support this argument, the Respondent cited the case of Geoffrey Mworira v Water Resources Management Authority & 2 others [2015] eKLR this court opined as follows:-

“The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

51. They also cited the case of Kenya Plantation and Agricultural Workers Union V James Finlay (K) Limited[2013]eKLR this court expressed itself as follows:-

“The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court shall not interfere in the employer’s entitlement to undertake these functions and interference by the court shall



be exercised very sparingly. The court's rare intervention can be justified on account of obvious breach by the employer of the statutory or agreed due process or such other manifest injustice and in circumstances whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

52. On whether the acting registrar should be deemed as substantive office holder after acting for more than 6 months, it was submitted that Even though the Petitioner has prayed for the said declaration, he has not submitted on the issue in his submissions and thus deemed to have abandoned that prayer as stated in the case of Joshua Momanyi Moranga v Ethics and Anti- Corruption Commission & Attorney General [2018] Eklr and the case of William Kinyanjui Kamau v Secretary Hospital Board PCEA Tumutumu Hospital [2017] eKLR where the court opined as follows:-

"In the respondent's written submissions there is a summation of the evidence and indeed there was no mention of evidence given in that regard. Further the respondent's submissions urged nothing about that prayer. Thus the court returns that the prayer is deemed abandoned and is therefore declined."

53. In any case that the said acting Registrar, did not qualify for the position and therefore cannot be offered the said position for simply being in the system.

54. On costs, it was submitted that costs follow even and since, the petitioner has not justified his claim on alleged violation of his constitutional right, he should be condemned to pay costs of this Petition to deter him and other likeminded people from filling frivolous suits.

55. I have considered the evidence and submissions of the parties herein. The petitioner avers that the intended recruitment of the officers herein contravened the University regulations and in particular clause 22 of the University Charter on how members of staff are employed.

56. The respondents on their part contend that they acted within the law and in particular in accordance with the provisions of clause 1.6.2 of the HR Manual after court's resolution.

57. The petitioners further contend that the process of recruitment contravenes Section 18 (4) of Egerton University Statutes 2013 which also violates Article 10 of *the Constitution* and also Article 4 (1) of *the Constitution* on Labour rights.

58. The respondent also aver that the Egerton University Statute 2013 relied upon by the petitioner has not been gazetted as required under Section 23 of the *Universities Act* and clause 19 (k) of the said charter.

59. They also aver that clause (14) of the HR Policies & Procedure Manual does not apply in this case.

60. I have looked at the exhibits submitted by the parties and especially the Egerton Universities Statutes which established the Egerton University constituted under the charter.

61. I note that indeed that this document lacks any authentic signature showing it received council approval. The document also remains undated and so it is also not clear from the document when the document became operational.

62. I will however refer to the Egerton *Universities Act*, Cap 214 which was assented on 30th June 1987 and came in force on 1/10/1981.

63. This act was repealed and replaced by the *Universities Act* No. 42 of 2012 which came in force on 13th December 2012. The University was then chartered afresh in 2013 under this Act.



64. Under the universities Act 2012, Egerton University, the university was chartered on 1/3/2013 under Section 19 (k) of the Universities charter. One of the functions of the council is “shall approve the statutes of the University and cause them to be published in the Kenya Gazette”.

65. Section 23 of the Universities Act provide as follows;-

“23. Statutes

(1) Subject to this Act and to the Charter a University Council or Senate 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 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”.

66. It is indeed true that the law envisages that where the council or secretariat makes subsidiary regulation, the same must be gazetted by the Cabinet Secretary.

67. In the instant case, it is clear that the Universities Statutes is not gazetted and therefore lacks the force of the law.

68. The respondent averred that they relied on their HR Manual in proceeding with the intended recruitment. Clause 1.6.2 of the HR Manual provides as follows;

“6.2 Contract Terms

Where vacancies cannot be filled on permanent and pensionable terms for whatever reasons, candidates recruited to fill such vacancies shall be appointed on contract terms. Two months before the expiry of the contract an employee serving on renewable contract shall notify the University on the intention to extend the contract”.

69. Indeed under the HR Manual, the University the respondent herein, has the authority to employ employees on terms other than permanent and pensionable.

70. Section 10(3) (c) of the Employment Act States;-

“(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;”

71. This is a prerogative of an employer and the employer is allowed to employ an employee on terms other than permanent and pensionable.

72. This prerogative cannot be taken away by the court or a prospective employee as the petitioner herein.

73. The employer has the prerogative to determine terms and conditions of employment of an employee or prospective employee so long as it is within the law. The petitioner has not shown any law that does not mandate the respondent to determine terms and conditions of employment of the employees.

74. Section 10 (5) of the employment Act states as follows;-

“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing”.



75. It is only under this section that the respondent can vary terms of employment of an employee after consultation and this is in respect of a continuing employment.
76. The petitioner also sought to rely on a HR Manual of PSC which manual does not apply to the petitioners.
77. Having analysed as above, I find that the petition as set lacks merit and I dismiss it.
78. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Bosibori holding brief for Ndubi for Respondent – present

Ekesa holding brief for Konosi for Respondent – present

Kipkurui & Kigen for Petitioner – present

Court Assistant – Fred

