



REPUBLIC OF KENYA



KENYA LAW
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**Malaya v Masinde Muliro University of Science and Technology (Petition
E015 of 2022) [2023] KEELRC 976 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 976 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E015 OF 2022**

JW KELI, J

APRIL 20, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
ARTICLES 2,3 (1),10,19,20,21 (1), 22,23,25,
(B),27,28,30(1),41(1)&(2)(A) 47 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007 AND THE
PUBLIC SERVICE COMMISSION ACT, 2017**

BETWEEN

BETWEEN

VINCENT CHIBINI MALAYA PETITIONER

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY RESPONDENT**

RULING

1. This is a consolidated ruling with respect to Application by the Petitioner dated 28th December 2022 and Application by the Respondent/University dated 18th January, 2023 respectively.
2. The Petitioner vide Application dated 28th December 2022 filed under vacation rules sought the following orders :-
 - a. That this application be certified urgent, service be dispensed with, be heard during the current Court Recess and heard *ex-parte* in the first instance.



- b. That pending inter-partes hearing and determination of this application, conservatory orders do issue suspending and or staying the Respondent, its agents and or servants be restrained from conducting interviews and or appointing anybody else other than the applicant as a substantive holder of the said position.
 - c. That pending inter-partes hearing and determination of this application conservatory orders do issue restraining the Respondent from taking any action against the applicant, victimizing him on account of filing this application and petition or interfering with his position of University Library in an unlawful manner.
 - d. That pending hearing and determination of the instant Petition, conservatory orders do issue suspending and or staying the Respondent's planned recruitment exercise for the position of the University Library. In particular, the Respondent, its agents and or servants be restrained from conducting interviews and or appointing anybody else other than the applicant as a substantive holder of the said position.
 - e. That pending hearing and determination of the instant petition, conservatory orders do issue restraining the Respondent from taking any action against the applicant, victimizing him on account of filing this application and petition or interfering with his position of University Library in an unlawful manner.
 - f. That the Petitioner/Applicant be at liberty to apply for further orders and/or directions as the Honourable court may deem just to grant.
 - g. That the costs of and incidental to this application be provided for.
3. The application was supported by the Petitioner's Affidavit under the Petition dated 28th December 2022 and sworn on even date and with annexures before court paginated 1-147.
 4. The Petitioner further filed Petition of even date seeking orders to effect that having acted for 7 years he was deemed lawfully appointed to the position of University librarian and or for the court to quash the proposed recruitment and for determination of violation of constitutional rights on how he was treated in the acting position and for special damages which were stated to be underpayment by Kshs. 12,375,877.76 as at time of filing the petition.
 5. The aforesaid application was placed before HON C. N. Baari under court vacation rules wherein inter alia interim order of stay stopping the recruitment process of University Librarian were issued and order to stop interference of the Applicant as University Librarian. The court order dated 3rd January, 2023 was issued in Bungoma on 4th January, 2023.
 6. The Respondent University being aggrieved by the Exparte ruling by Justice C N. Baari issued on 4th January 2023 under above application dated 28th December , 2022 filed Notice of Motion Application dated 18th January, 2023 seeking the following orders:-
 - a. That this matter be certified as urgent and the same be heard in the first instance "Exparte".
 - b. That this honourable court be pleased to set aside and/or vary its exparte order dated 4th January 2023 and specifically the court order that suspended the Respondent's planned recruitment exercise for the position of University Librarian and restraining the Respondent from taking action against the Applicant on account of his filing the Application and Petition or in any other way interfering with his position of University Librarian.



- c. That this Honourable court be pleased to issue an order of stay of proceedings in ELRC Petition No. E015 of 2015 Vincent Chabini Makaya v Masinde Muliro University of Science and Technology pending the hearing and determination of this application interpartes.
- d. That costs of this Application be provided for:-
7. The gist of the application was that the Applicant in obtaining the Exparte orders did not disclose material facts to the court on his appointment as acting librarian having lapsed on 31st October 2022 and that he had further applied to be substantially recruited as University Librarian in a process envisaged to be competitive. That the Petitioner had misrepresented to the court that the Respondent had been underpaying him and not paying his due allowances as acting university librarian. He further concealed payment of car allowance. That the Petitioner failed to inform the court the University Council revises the qualifications of staff from time pursuant to university statutes with regard to revised qualification of university librarian. That it was unfair to grant the orders exparte causing difficulty in the operation of day today activities of the University, a statutory body corporate and chartered public university under the Universities Act 2012.
8. That the appointment of University librarian, a key officer, was necessary for smooth operation of the University. The Application was supported by the Supporting Affidavit of Prof. Solomon Shibairo sworn on the 18th January, 2023 which annexed the impugned exparte order issued on 4th January, 2023 (SS1) . That the acting appointment of the Petitioner lapsed on 31st October 2022 and he failed to apply for renewal which acting appointment would have ended upon appointment of a substantive office holder. Annexure SS2 was the letter of acting appointment lapsing on 31st October, 2022. That the Petitioner applied to be recruited in the substantive position of University librarian a process envisaged to be competitive (SS3) being list of submitted applications for the position of University Librarian.
9. That the Petitioner misrepresented claim for underpayment of allowance as he was paid per memo dated 20th January 2021 (SS-4) . Pro. Shibairo averred that the qualification for advertised position were revised by Council pursuant to its mandate under the University statutes (SS-4).
10. That the Petitioner misconstrued the exparte order to mean the Respondent cannot complete an open and competitive recruitment exercise as envisaged under the Universities Act and the Respondents statutes and Human Resources Policies and Procedures Manual.
11. The Application was opposed by the Petitioner vide his Replying affidavit (undated) filed in court on the 16th February 2023. The Petitioner states he was advised by his advocates that prayers 1 & 3 had been spent/overtaken by events. That the Applicant had not shown prejudice it will suffer should the intended recruitment be stayed pending determination of his petition. The Petitioner denied having concealed information from the court as stated by Prof Shibairo in his affidavit and states he disclosed the lapse of appointment letter (VCM1) and stated that end of October 2022 the Secretary to Vice Chancellor informed him he had to apply for renewal of appointment , that on 2nd November,2022 he applied. The Petitioner reiterated paragraph 30 of his supporting affidavit that the requirements of the advertised position were significant different from what the previous holder had as well as those indicated in the Respondents scheme of service (alleged to be at page 226 -233). The bundle by the Petitioner in court file is paginated 1-147. The said document was not available for the court to peruse. That after 31st October 2022 he continued to perform the duties of the office of University Librarian and was recognized as such in Capacity as university Librarian (VCM 2) . That he was advised by his advocates his petition raised weighty constitutional & employment rights to be determined before the recruitment exercise is done. That he had been forced into acting position by the respondent for more



than 7 years hence allegation of difficulty in operation by the university was unfounded and that Justice C.N. BAARI must have satisfied herself the conditions for granting conservatory orders, *ex parte*, to preserve the subject matter of the Petition and application so that in event of the petition succeeding the same was not rendered nugatory. That he would be prejudiced if application is granted. That he was advised by his advocates that the power of court in this case should be exercised with great caution and that interfering with discretion of Justice Baari would be tantamount to sitting on appeal from the decision of the court with equal jurisdiction.

Grounds of Application dated 28th December 2022

12. The Application was premised on grounds that the Petitioner had been in acting position of University Librarian since acting appointing of 23rd February 2017. That section 34 (3) of the *Public Service Act* provided for 6 months acting after which an individual can only be a substantive holder that under Clause 14 of the 2015 Human Resource Policies and procedures Manual for the Public Service which that for an employee to be appointed to act and eligible acting allowance, the employee must have qualification to hold the vacant position substantively. That the Applicant was qualified to hold the position of University Librarian. That the Respondents/University had advertised position of University Librarian and invited applications for interviews to commence on the 28th December, 2022 or 3rd January 2023.
13. The Petitioner was granted interim orders which stopped the process by justice CN Baari on 4th January, 2023.

Written submissions

14. The Court directed that the parties canvass the two applications together by way of written submissions as they were interrelated. The parties complied.
15. The Petitioner's written submissions drawn by Muma & Kanjama Advocates were dated 10th February, 2023. The Respondent's written submissions were dated 1st March, 2023 drawn by G&A Advocates LLP.

Decision

Issues for determination

16. The Petitioner submits that the issues for determination in the applications are whether the court should issue orders to set aside /vary or confirm the *ex parte* orders of Hon. C. N. Baari Judge pending the final determination of the Petition given on 3rd January 2023 in the Petitioner's Application dated 28th December, 2022 and who should bear costs of the Application.
17. The Respondent identified the issues:-
 - a. Whether the Applicant has met the threshold for grant of orders sought .
 - b. Whether the court should vacate the interim orders dated 3rd January, 2023 and whether the Applicant is entitled to the said orders.
18. The court having considered the submissions by the parties was of the considered opinion that Justice C N Baari vide her interim orders issued on 4th January 2023 already established that the said application dated 28th December 2022 had met the threshold for grant of the said conservatory order. The court then considered that the only issue at this stage, the court being of equal status as the said Judge, would be whether there was basis established to vary the said order of 28th December 2022.



19. The court rejects the call to determine the 3 limbs of primafacie case, irreparable damages and balance of convenience under the Application dated 28th December 2022 as doing so would be tantamount to sitting on appeal of decision of Judge C. N. Baari.
20. The court considers that the only basis of proceeding would be on review jurisdiction under which the facts of non disclosure of material facts would apply as the said order was exparte consistent decision in *Republic v Vice-Chancellor Moi University & 3 Others Exparte Benjamin J Gikenyi Magaro* (2018) eKLR cited in *Republic v Cabinet Secretary Ministry of Labour & 2 Others Exparte Central Organization of Trade Unions (K)* 2022 eKLR where the court stated:-
- “I will not attempt to re-invent the court regarding the issue of setting aside stay orders issued when leave had been granted to operate as stay. I say so because a loss of judicial decision have now settled the position that setting such stay orders would only be merited if:-
- a. There is non – disclosure of material facts
 - b. Concealment of material documents
 - c. Misrepresentation of material facts”.
21. The court finds that the parties are in agreement on the issue for determination being whether the court should vary the exparte orders. The court upholds the holding *Republic v Vice-Chancellor Moi University & 3 Others* (*supra*) on the applicable principles in application to set aside stay orders. The Principles are in accordance with holding in *Bloggers Association Kenya (Bake) v Attorney General & 5 Others* (2018) eKLR to effect that “ power of review should be exercised with great caution and ordinarily only to correct an error or oversight or to effect a review of a purported order so that the parties may be able to deal more effectively with the issues as litigated by parties”.
22. The Respondent/University alleged concealment by the Petitioner of fact of the petitioner’s acting appointment having lapsed and not having applied for renewal, of having concealed he had applied for consideration under the advertisement and had been paid his acting dues and that the council had powers to revise qualification of the University Librarian position. The petitioner refuted the allegation by relying on his supporting affidavit to the petition paragraph 25,27,28,29.
23. The court found that there was non- disclosure by the petitioner having applied to be considered for the position he had been acting in as summarized under paragraph 18 of the submissions and 8 of his replying affidavit filed in court on 16th February, 2018.
24. The court did not find the alleged letter of 2nd November 2022 stated to be in VCM1 pages 283 – 285 with the petitioner’s documents in court ending at page 147. There was no evidence the acting was renewed after end of October 2022. The court finds the fact of having applied to be considered in the recruitment for the university librarian, the fact of acting contract having expired and not renewed and fact of power of council to revise qualifications of the said position were an material facts and were concealed to the court. The court found evidence of the petitioner having been paid acting dues for the position vide the memo to finance even if not adequate. The court found that there was a claim for special damages in the petition related to the 7 years of acting. The court holds that Petition would not be rendered nugatory if the recruitment was allowed to proceed as the Petitioner had opportunity to participate having submitted application for the position (SS3) . That open and competitive appointment was consistent with national value and principles of governance under article 10 (2)of the *Constitution* being: ‘ (c) good governance, integrity, transparency and accountability;’- That the Petitioner could still be awarded compensation damages for any violation of his rights the court may



find. Under Clause C14 of the Public Service Commission Human Resources Policies and procedure Manual for the Public Service 2015 it is provided that in acting in post pending advertisement of the post and acting allowance is not be paid to officer for more than 6 months. The advertisement had made been. The said clause was silent on consequences of acting for more than 6 moths and unlike the judiciary policy stated in *Susan Oyatsi v Judicial Service Commission* (2022)eKLR being Judiciary Human Resources Polices & Procedures Manual providing for Maximum 18 months of acting in a post after which the officer is to be confirmed to position or taken back to actual position. The Public Service Commission manual was silent.

25. On *prima facie* basis taking into consideration the Respondent had a statutory mandate to competitively fill the vacant position of university librarian, the court finds it is in public interest to vary the order of 4th January, 2023 on basis of there having been concealment of material facts as stated. The Court Order of 3rd January 2023 by Justice C.N Baari is set aside and substituted as follows:-
- a. Order No. 1 - spent
 - b. Order No. 2 being conservatory order suspending and or staying the respondent's planned recruitment exercise for the position of University Librarian is set aside and vacated.
 - c. Order No. 3 is varied to read " Conservatory order is issued restraining the respondent from taking action against the Applicant nor victimizing him on account of filing the application and the petition."
 - d. Order No. 4 - spent.

26. It is so ordered

DATED, SIGNED, DELIVERED AT BUNGOMA THIS 20TH DAY OF APRIL, 2023.

JEMIMAH KELL,

JUDGE.

In the presence of :-

Court Assistant: Lucy*

Petitioner: Wambui holding brief for Kanyama

Respondent: Ochola

