



REPUBLIC OF KENYA



KENYA LAW
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**Itolondo v Vice Chancellor of Kenyatta University (Petition
E153 of 2022) [2023] KEELRC 882 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 882 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E153 OF 2022

SC RUTTO, J

APRIL 14, 2023

**IN THE MATTER OF: ARTICLES 2, 3, 10, 20, 21, 22, 23, 41, 47, 48, 50, 73,
159, 162, 165, 232 & 258 OF THE CONSTITUTION OF KENYA, 2010,**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 3, 10,
21, 35, 47, 73 & 232 THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS &
FUNDAMENTAL FREEDOMS IN ARTICLES 35 AND 47 OF THE
CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 3, 4, 5, 6,
7, 8, 9 & 11 OF THE ACCESS TO INFORMATION ACT OF 2016 AND
SECTIONS 4, 5, 6, 7 AND 11 OF THE FAIR ADMINISTRATIVE ACTION
ACT, 2015**

AND

**IN THE MATTER OF: FAILURE TO PROVIDE THE REPORT OF REFORM
AND RESTRUCTURING OF KENYATTA UNIVERSITY**

AND

**IN THE MATTER OF: FAILURE TO ENSURE TRANSPARENCY AND
ACTIVE INVOLVEMENT BY KENYATTA UNIVERSITY STAFF AND THE
GENERAL PUBLIC IN THE REFORMS AND RESTRUCTURING OF
KENYATTA UNIVERSITY**



BETWEEN

DR. WILFRIDA A. ITOLONDO PETITIONER

AND

THE VICE CHANCELLOR OF KENYATTA UNIVERSITY RESPONDENT

RULING

1. What comes up for determination are the Petitioner's/Applicant's two Applications dated August 18, 2022 and September 16, 2022 as well as the Respondent's Notice of Preliminary Objection. Both Applications seek similar orders thus:-
 - a. Spent
 - b. That pending interpartes hearing and determination of the instant application, the Honourable court be pleased to issue a stay order staying the on-going implementation of the Report on Restructuring of Kenyatta University until the Application and petition have been heard and determined.
 - c. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may deem necessary to give effect to the foregoing orders, and/or favour the case of justice.
2. Both Applications are supported on the Affidavits of Dr. Wilfrida Itolondo, the Applicant herein. Briefly, she avers that: -
 - d. The Applications relate to a Report on Reforms and Restructuring of Kenyatta University that was produced without following the required law, on-going implementation of reforms and restructuring of Kenyatta University and failure by the Respondent to provide the full Report on Reforms and Restructuring at Kenyatta University upon request by the Applicant and other staff of Kenyatta University and thus denying her and the other employees their Constitutional Right to information.
 - e. Kenyatta University is public entity and therefore, its leadership must be guided by the principles of governance as laid down in the Constitution of Kenya 2010 when carrying out their mandate.
 - f. On March 31, 2022 she received a memo through her corporate email from the Acting Deputy Vice Chancellor, Administration whose title was Vice Chancellors address on the status of The University.
 - g. She attended the meeting partially and left to go to search for fuel.
 - h. At the start of the meeting, the Respondent briefed staff present about the purpose of the meeting and made highlights.
 - i. After the brief from the Respondent, the Chair of the Committee Prof John Okumu presented a summary of



the Report on the Reforms and Restructuring of Kenyatta University using power-point.

- j. It is clear from the brief by the Respondent and the summary presented by Prof Okumu versus the title and content of the letter dated March 31, 2022 inviting staff to the meeting, that there was deliberate non-disclosure of the purpose of the meeting.
- k. There was no explanation given as to why the time for the invitation of staff to the meeting was very short and yet clearly there was no emergency.
- l. On April 19, 2022 she wrote to the Respondent requesting that she be given a copy of the Full Report on Reforms and Restructuring at Kenyatta University within seven (7) days from the date of the letter before it is presented to the Council for adoption and ratification for implementation. The letter was sent by G4S Courier service and email. The Respondent did not receive any acknowledgement or response from the Respondent.
- m. In addition, she requested that the report be made public and more especially to Kenyatta University employees since its outcome would affect them directly.
- n. On May 8, 2022, she wrote to the Respondent a reminder and sent it by way of email and another one by Fargo Courier on May 9, 2022.
- o. On May 9, 2022 she received a call from Fargo Courier and was informed that the office of the Respondent had refused to receive the letter dated May 8, 2022.
- p. She also came to learn later that some Senior Academic staff of Kenyatta University among them three (3) Professors had written to the Respondent a letter dated April 11, 2022 requesting for the same Full Report on Reforms and Restructuring of the University and also asked him to publicize it and make it available for Kenyatta University staff.
- q. She is privy to information that an Implementation Committee had been put in place though the names of the members of the said committee have not been disclosed to date.
- r. Due to failure by the Respondent to respond to her letters, she has no option but to rely on any other sources at her disposal including mainstream and social media.
- s. Failure by the Respondent to respond to her letters informing her about the non-existence of the Report also leaves her with the assumption that the Report exists.
- t. In a letter dated August 8, 2022 from the Deputy Vice Chancellor (DVC) Academic, the Deans of Schools and Heads of Department were reminded that the University Council and Senate had approved restructuring of the University operations to reduce costs, enhance efficiency and effectiveness. Among other things, the letter indicated that the workload for tutorial fellows was now 3 (units) while for lecturers, senior lecturers and professors (without administrative duties) was 4 (units).



- u. According to the 2013/2017 CBA, which is still in operation the teaching load should be three (3) Units (10) hours per week except for the Tutorial Fellows who will have a teaching load of a maximum of two (2) units (six hours per week). That variation to the CBA cannot be done by one party unilaterally which is the gist of this Application.
 - v. She is aware that schools have been merged among many other reforms though that has not been made public especially to Kenyatta University fraternity through formal communication and hence it remains a secret.
 - w. The reforms that are being implemented secretly at Kenyatta University have generated disquiet among the University employees because they touch on their welfare as workers of the university.
3. Upon being served with the two Applications, the Respondent responded by filing a Notice of Preliminary Objection dated September 30, 2022 and a Replying Affidavit sworn on October 3, 2022 by Prof Joseph Ngeranwa who describes himself as the Acting Deputy Vice Chancellor (Administration) of Kenyatta University. Briefly, he avers that: -
- a. He is advised by the Respondent's Advocates on record, which advice he verily believe to be sound, that this Court does not have jurisdiction to determine the predominant issues arising in this Suit including the alleged non-compliance with a request for information and alleged transfer of certain schools of the University from main campus in Nairobi to Kitui Campus.
 - b. All public Universities, are currently operating on scarce resources due to reduced government funding and reduced student numbers, information which is in the public domain.
 - c. He is aware that some public Universities have had to pay staff half salaries. That the University has not taken such drastic steps but has endeavored to take steps to improve efficiency at the University without increasing the workload of members of staff.
 - d. As regards the Memo by the University's Deputy Vice Chancellor (Academic) dated August 8, 2022, he notes as follows: -
 - i. The Memo does not increase the lecturers' workload
 - ii. In fact, the memo observes that the workload of academic members of staff remains at forty (40) hours per week.
 - e. He verily believes that the matters the Petitioner is complaining about are matters that deal with allocation and re-allocation of duties to members of staff by the management of the University. That the Petitioner seems to complain about alleged transfer of certain institutions of the University from one campus to another and which matters are better left to the discretion of the University as opposed to intervention by the Court.
 - f. Before issuing the subject memo, the University management consulted widely with stakeholders and even members of staff as partly admitted by the Petitioner. That the Petitioner admitted that she once attended one such consultative meeting but left mid-way to attend to certain personal matters.



- ii. If the answer to (i) is in the affirmative, whether the Court should stay implementation of the Report on Reforms and Restructuring of Kenyatta University.

The question of jurisdiction

10. The Respondent's preliminary objection is premised on grounds that the Court lacks jurisdiction to hear and determine the issues raised in the Petition as the same relate to access to information hence should be dealt with through the dispute resolution mechanism mandatorily set out under Sections 14 and 23 of the [Access to Information Act](#). That the dispute ought to be reviewed, heard and determined by the Office of the Commission on Administrative Justice (CAJ) established under the [Commission on Administrative Justice Act](#). Essentially, the Respondent's objection is based on the doctrine of exhaustion of remedies.
11. On this issue, the Respondent submitted that the case is within the purview of the CAJ's jurisdiction and mandate. That under [Access to Information Act](#), the CAJ is empowered with the function and power to enforce its provisions. That the CAJ is the oversight authority under Section 20(1) of the said [Act](#). That the person seeking information should first exhaust or satisfy the laid down mechanism. That further, the CAJ is the body mandated to receive complaints and investigate on the refusal by a public body to issue information. On this score, the Respondent urged that the suit was filed prematurely.
12. On her part, the Applicant submitted that the CAJ does not have capacity to issue the orders sought in the Application and the process of coming up with the Report in question. That the Petition originated from violation of the [Constitution](#). That further, no suit ought to be summarily dismissed unless it is so hopeless and obviously discloses no reasonable cause of action.
13. To put the matter in context, it is imperative to revisit the issues in dispute which can be discerned from the Petition and the two Applications. In terms of the Petition and the Applications, the genesis of the entire dispute is what the Applicant has termed as the Report on Reform and Restructuring of Kenyatta University. The Applicant has cited the Respondent for violation of the [Constitution](#) in that the said report was generated without involvement of the employees of Kenyatta University and the general public. That the said Report is being implemented in secrecy to the extent and the Respondent declined to avail the report and refused to accept the Applicant's request to access information. Consequently, the Applicant has cited the Respondent for constitutional violations under Articles, 3,10,21, 35, 41,47,73 and 232 of the [Constitution](#).
14. The Applicant avers that she wrote to the Respondent on April 19, 2022 requesting for a copy of the Report but received no response or acknowledgment. She further avers that failure by the Respondent to respond to her letters informing her of the non existence of the report leaves her with assumption that the Report exists.
15. As stated herein, the Respondent's objection is premised on Sections 14 and 23 of [Access to Information Act](#). The said Section 14 provides for review of decisions by the CAJ. It provides thus under subsection (1): -

14[1] Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;
16. A reading of the foregoing provision reveals that it is not couched in mandatory terms hence it is open for a party to elect whether or not to move the CAJ in respect of a decision relating to a request for



access to information. Therefore, in my view, it is not mandatory to apply to the CAJ for Review. In any event, I do not discern anything in that provision that impliedly or expressly ousts the jurisdiction of the Court to hear and determine the matter as the one herein in the first instance.

17. Besides, the Petition and Applications as framed, do not expressly seek orders of access to the said Report. If anything, the orders sought go beyond access the Report and relate to stopping implementation of the said Report, quashing the Report and prohibiting the ongoing implementation of the Report.
18. Therefore, it cannot be said that the matter is outside the jurisdiction of this Court by dint of Section 14 of the [Access to Information Act](#).
19. In light of the foregoing, I return that the Court has jurisdiction to hear and determine the dispute.
20. Before I pen off on this issue, I must point out that it is not clear why the Respondent has not addressed the Applicant with regards to the Report in question and would rather that she moves the CAJ.
Whether the Court should stay implementation of the Report on Reforms and Restructuring of Kenyatta University
21. As stated herein, the Applicant seeks an interlocutory order to stay implementation of the Report on Reforms and Restructuring of Kenyatta University.
22. The Applicant has argued that the Respondent has not produced the Report on Reforms and Restructuring of Kenyatta University before Court and has further not denied the existence of the said Report. She further argues that there is an indication that the Report exists in that in his highlight, at the meeting of March 31, 2022, the Respondent appointed a committee in August, 2022 chaired by Prof Okumu to come up with the Report on Reforms and Restructuring of Kenyatta University. That the Report had been presented to the University Senate for approval. That further, the Respondent had used the communication from the National Treasury to justify the ongoing Reforms.
23. The Respondent arguing against grant of the orders, submitted that the Applicant has not demonstrated how Articles 10,22,35 and 41 of the [Constitution](#) have been infringed. That she has failed to demonstrate the exceptional circumstances that warrant granting of the aforesaid conservatory orders. It was further argued that the alleged implementation of the Reforms and Restructuring of Kenyatta University does not violate Articles 3, 10, 21, 35, 41, 47, 73 and 232 of the [Constitution](#). That the only proof the Applicant has adduced is in relation to the Memo dated August 8, 2022 merely addressing the workload of staff members as well as the University's efforts in increasing efficiency in the learning modules. That the Applicant has based her case on a Report which the Respondent does not admit.
24. As stated herein, the Applicant seeks to stay implementation of a Report on Reforms and Restructuring of Kenyatta University. For starters, the said Report is not on record hence the Court has had no benefit to consider the same as well as its import. The Applicant has stated that she is aware that the Report exists as the Respondent has not denied the same. It is instructive to note that the Applicant has not sought orders at this juncture, to access the said Report. Therefore, if at all the Report exists, its scope is unknown.
25. Therefore, issuing interim orders at this stage to stay implementation of a Report which has not been produced in Court and whose existence is still unclear, will be akin to issuing orders blindly, not knowing what is actually being stayed. Such orders will be speculative, general and will be lacking in precision.



26. On this score, I pose to ask, what is the Court being asked to stay? What is the scope of the orders to be issued? There being no clear answers to these questions, it would not be prudent to issue the orders sought at this stage.
27. The total sum of my consideration is that the Respondent's Preliminary Objection dated September 30, 2022 is declined and the Applicant's Applications dated October 16, 2022 and August 18, 2022, are found to be without merit hence are dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

STELLA RUTTO

JUDGE

Appearance:

Dr. Wilfrida Itolondo the Applicant (in person)

Mr. Thuo for the Respondent

Abdimalik Hussein Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

