



**Wanjohi v Karatina University; Kakiya & another (Interested Parties) (Employment and Labour Relations Petition E004 of 2022) [2023] KEELRC 2601 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2601 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2022**  
**ON MAKAU, J**  
**OCTOBER 25, 2023**

**BETWEEN**

**JULIAN MACHERU WANJOHI ..... PETITIONER**

**AND**

**KARATINA UNIVERSITY ..... RESPONDENT**

**AND**

**GRACE GIRANGWA KAKIYA ..... INTERESTED PARTY**

**ETHICS & ANTI CORRUPTION COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. On 26<sup>th</sup> May, 2022 the Petitioner filed this suit challenging the appointment of the 1<sup>st</sup> Interested Party as the respondent's Finance officer. The petitioner's case turns on grounds that the recruitment procedure violated the Constitution and the 1<sup>st</sup> interested party did not merit the appointment. Therefore, the petitioner prayed for the following reliefs: -
  - a. A declaration be issued that failure to sufficiently advertise the vacancy in the office of the Finance Officer of the Respondent and irregularly appointing the 1<sup>st</sup> Interested Party to the position of the Respondent's Finance Officer violates and is contrary to Article 27, discriminates against potential applicants by denying them an equal opportunity to compete for the job; and
  - b. A declaration that the appointment of the 1<sup>st</sup> Interested Party as the Finance Officer of the Respondent without fair competition or merit to the position of Finance Officer of the Respondent violates Articles 10 (2) (c), 27(2) and (3), 73(2)(a), and 232(2)(g)-(i) of the Constitution;



- c. An order quashing the appointment of the 1<sup>st</sup> Interested Party as the Finance Officer of the Respondent;
  - d. Costs of the Petition.
2. The respondent and the 1<sup>st</sup> interested party have denied have any wrong doing in the impugned recruitment of the Finance officer and prayed for the petition to be dismissed with costs. The 2<sup>nd</sup> interested party on the other hand neither confirmed nor denied that the recruitment was unlawful and stated that some allegations raised by the petitioner are the subject of its investigation.
  3. Contemporaneously with the petition, the petitioner filed a Notice of Motion dated 20<sup>th</sup> May 2022 seeking conservatory orders to suspend the 1<sup>st</sup> Interested Party's appointment to the office of the Finance Officer of the Respondent pending the hearing and determination of the petition. After hearing all the parties, I granted the conservatory order by my ruling delivered on 15<sup>th</sup> February 2023 but allowed the 1<sup>st</sup> interested party to revert the acting capacity she enjoyed before the impugned appointment.

### **Factual background**

4. In a nutshell, the Petitioner is case is that the Respondent advertised for the post of the Finance Officer on 5<sup>th</sup> October 2023, and many candidates including the 1<sup>st</sup> Interested Party applied. The applications were reviewed and interviews were conducted by the Respondent's council on 22<sup>nd</sup> December 2021. However, the council found none qualified for the appointment including the 1<sup>st</sup> interested party. The petitioner averred that the position was re-advertised on 8<sup>th</sup> February 2021 after some members of the university council resigned and the 1<sup>st</sup> interested party was appointed.
5. The petitioner further averred that while serving as the acting Finance Officer, the 1<sup>st</sup> interested party's track record was marred with incidences of misappropriation of public funds, double payments of allowances, irregular payments in projects of the respondent, unconcluded insubordination cases and irregular remittances to KRA on behalf of the respondent. Many of the said incidents had been noted and queried in the Auditor General's report dated 9<sup>th</sup> October 2019.
6. According to the petitioner, the 1<sup>st</sup> interested party presided over the loss of revenue totaling to Kshs. 200,000,000, payment of Kshs.20,000,000 for work not done, and irregular payment of Kshs.26,000,000 to Vice Chancellor as allowances. Others were irregular remittance to KRA and failure to recover the same timeously, causing a loss of Kshs. 15,488,455.91 to the university in fines and penalties due to her negligence. A further irregularity was payment to the Vice Chancellor's wife while away on a 3-year study break of full salary instead of the permitted 80%.
7. On the basis of the above financial impropriety and indiscipline issues, the petitioner contended that the 1<sup>st</sup> interested party did not deserve the position of Finance Officer for the university. He contended that the Vice Chancellor who is also the secretary of council was conflicted by being a beneficiary of irregular payments by the 1<sup>st</sup> interested party. In the petitioner's view, Vice Chancellor should have disclosed the conflict of interest.
8. The Petitioner contended that the Respondent contravened the Constitution when it failed to look keenly into the integrity of the 1<sup>st</sup> Interested Party. The Petitioner also stated that the 1<sup>st</sup> Interested Party was on several occasions summoned to answer questions on mismanagement of funds, insubordination complaints by the Respondent, EACC and the Auditor General. The Petitioner also stated that the Auditor General had recommended to the Respondent not to hire incompetent and unqualified staff since it would implicate the Respondent in law suits.



9. The Respondent filed Replying Affidavits sworn by Dr. Humphrey Omondi, the Respondent's Registrar Planning and Administration, dated 15<sup>th</sup> June 2022, 27<sup>th</sup> October 2022 and 27<sup>th</sup> April 2023. In brief the Petitioner's claim was denied totally on grounds that the proper procedure was followed and the appointment of the 1<sup>st</sup> interested party was merited. Allegedly, the Council approved recruitment of several employees among them the position of Finance Officer in the Financial Year 2021/2022. That the position of Finance Officer is on permanent and pensionable terms under Grade 15 as per the University's service scheme wherein the grading structure and qualifications are provided for as No. 48 in the Scheme of Service.
10. Admittedly, the advertisement for the position of Finance Officer was first made and relayed through the Government Advertising Agency on 14<sup>th</sup> September 2021 as required. The Respondent received 14 applications out of which 3 applicants were shortlisted. However, the Council directed that there be a re-advertisement of the position considering all levels of entry into the position. The advertisement was published on 18<sup>th</sup> January 2022 and it contained the requirements for both direct entry and for those that were already serving as employees of the University. The advertisement included the position of Deputy University Librarian.
11. The second advertisement attracted 22 applicants out of which three were shortlisted including the 1<sup>st</sup> Interested Party. The Council conducted interviews on 21<sup>st</sup> March 2022 in which the 1<sup>st</sup> Interested Party garnered the highest score being 27.6 out of 30. As such the Respondent contended that the 1<sup>st</sup> Interested Party was appointed through an open, competitive and fair process in accordance with the provisions of its Human Resource Policy. It was clarified that the two council members, Hon FCPA Omingo Magara and Rebecca Tonkei, resigned on 7<sup>th</sup> and 8<sup>th</sup> February, 2022 respectively to run for elective seats in the general election of August 2022. As such, it was not true that the 2<sup>nd</sup> Advertisement was run after their resignation.
12. The Respondent contended that the 1<sup>st</sup> Interested Party has headed its Finance Department since 2012 and she became Deputy Finance Officer in February 2015. It admitted that there were allegations tabled before the Council through whistleblowing mechanisms on the morning of 22<sup>nd</sup> December 2021 when the Council was conducting the first interview. However, it was clarified that the Council allegedly held special meetings to look into the allegations and thereafter communicated its finding to the employees.
13. The Respondent further stated that the Karatina University Scheme of Service has been in force since August of 2013 and it contains the basic requirements for direct entry into any position within the university and promotion of employees who have served in immediate lower grade. Further, the Schemes of service provide that due to financial issues and inability to secure a qualified person, there may be instances where a department is not headed by a person in the highest established grade.
14. The Respondent also stated that Grade 13 in the University grading system was equated to job group Q in the civil service grading structure by the Public Service Commission. The Respondent stated that for job group 12 and above, all vacancies were required to be advertised externally so as to meet the requirements of competitive recruitment. Consequently, the second advertisement was expanded to include the second level entry for those serving in the university.
15. Finally, the Respondent contended that most of the allegations raised are the subject of investigations by the EACC against the Vice Chancellor and not the 1<sup>st</sup> Interested Party. Further, there are no court proceedings pending in any Court against the 1<sup>st</sup> Interested Party.
16. The 1<sup>st</sup> Interested Party also denied the allegations by the Petitioner vide her Replying Affidavit dated 8 July 2022 wherein she deposed that the Petition is devoid of merit. From the onset she contended



that the petition is based on evidence that was obtained illegally and in contravention of Article 50(4) of the *Constitution*. She clarified that the Petitioner is not an employee, part of the Respondent's management, author, addressee or correspondent in any of the documents produced. There is also no evidence to show that the said documents were requested in accordance with Article 35(1) of the *Constitution*. The documents, KRA data, the Auditor General's report and management letter which are privileged. In that regard, she prayed that the evidence be expunged from the Court's record and found to be inadmissible.

17. She deposed that she has never been subjected to investigation by any competent authority. She has also never been found culpable of any gross misconduct, violation of leadership and integrity standards as encapsulated under the *Constitution*.
18. She considered herself qualified for the position of Finance Officer of the respondent having served as the Deputy Finance Officer and for holding a Doctorate Degree in Business Management, Master's Degree in Business Administration (Finance Option) and a Bachelor's Degree in Business Management (Accounting Option).
19. She further contended that the re-advertisement of the vacancy was not as a result of lack of academic and professional qualifications by the candidates but because of lack of required duration of service in senior management position. She indicated that the 1<sup>st</sup> Advertisement set the cut off points for such senior management qualifications internally so that only persons who served as senior accountants would qualify to apply. Therefore, she denied that there was favoritism towards her and averred that she independently and voluntarily applied for the position as she believed that she matched the qualifications. She also deposed that the Council deliberated the allegations raised and made a determination vindicating her and which decision was never appealed against.
20. Finally, she contended that she has no record of gross misconduct of any nature including integrity issues. Further, she has never been charged and convicted for any criminal offence. Consequently, she maintained that the Petitioner's claims are baseless, frivolous and vexatious.
21. The 2<sup>nd</sup> Interested Party responded to the Petition vide the Affidavit sworn on 16<sup>th</sup> June 2022 by one Ben Keverenge, who deposed that he was a member of the team that is investigating the matters raised in the Petitioner's Affidavit. He confirmed the issues raised in the said affidavit are among the complaints that the 2<sup>nd</sup> Interested party had received and investigations are ongoing.
22. He stated that the 2<sup>nd</sup> Interested Party was a stranger to issues raised in paragraph 6 (a), (c), (d), (f), (h), (k), (i), (n) and 7 of the Petitioner's Affidavit, but has taken note of the same for investigation purposes. Further, the 2<sup>nd</sup> Interested Party cannot confirm whether the appointment of the Finance Officer was done in accordance with the law but has also picked it up for investigation.

### **Petitioner's submissions**

23. The Petitioner submitted on two issues, whether the 1<sup>st</sup> Interested Party was appointed through a competent process; and whether the 1<sup>st</sup> Interested Party is fit to be appointed as the Respondent's Finance Officer. He submitted that section 35 (1) of the *Universities Act* provides for establishment of a Council to employ staff. Section 40 of the Act requires that the employment is to be done as provided for in the University Charter. Further, clause 3.2.1 of the respondent's Human Resource Policy provides that recruitment shall be based on fair competition and merit with regard to Kenya's diverse communities.
24. The Petitioner submitted that the re-advertisement of the position of Finance Officer was done after the Universities Academic Staff Union (UASU), raised a complaint on 22<sup>nd</sup> December 2021. The



complaint was about the secret manner in which the interview was to be conducted and the intention to promote the 1<sup>st</sup> Interested Party unprocedurally. The Complaint was based on the queries raised in the Auditor General's letter dated 9<sup>th</sup> October 2019 and EACC 2019/2020 Report. The Petitioner further submitted that the Respondent's response to the complaint by way of letter was questionable. The Petitioner also submitted that the purpose of re-advertisement was to attract the wider public but the same was defeated by the selection of the 1<sup>st</sup> Interested party.

25. They relied upon the case of *Republic v Masai Mara University Council & Another; Ex Parte Okiya Omtatab Okoiti* [2021] eKLR where the court held that Article 73(2) of the *Constitution* demands objectivity from public officer in their decision making.
26. In this case the Petitioner argued that the 1<sup>st</sup> Interested Party was only successful by virtue of the Vice Chancellor sitting as the Chairman and secretary of the Council after two members of the council had resigned to pursue elective seats. The Petitioner therefore urged this Court to quash the appointment of the 1<sup>st</sup> Interested Party in order to maintain the sanctity of the public institutions as the same was irregular, illegal and undeserving.
27. The Petitioner further submitted that the 1<sup>st</sup> Interested Party was unfit for appointment since her tenure as acting Finance Officer was marred with integrity issues and immense financial loss and impropriety. Besides, she had pending gross insubordination cases. The Petitioner submitted that the 1<sup>st</sup> Interested Party has not controverted the said allegations. The Petitioner also argued that the impugned appointment ought to be quashed since he has proved the appointment process irregular and biased.

### **Respondent's submissions**

28. The Respondent submitted on the following issues: -
  - a. Whether the Petitioner has met the threshold of proof that there were violations of the *Constitution* by the Respondent in the recruitment process of the 1<sup>st</sup> Interested Party addressing:
    - i. The sufficiency of the advertisement
    - ii. The competency of the recruiting authority that is Council
    - iii. On whether there was fair competition and merit used in recruiting the 1<sup>st</sup> Interested Party.
  - b. Whether the 1<sup>st</sup> Interested Party was suitable to be appointed to the position in light of the alleged corruption malpractices
  - c. Whether the Petitioner has locus to file the Petition in light of demonstrated unclean hands
  - d. The nature of remedies available if indeed there is proof of constitutional violations
  - e. Who bears the cost,
29. The Respondent submitted, from the onset that, the Petition is shallow as pleadings lack the particulars of the manner in which it violated the constitutional provisions cited in the petition. The Respondent further submitted that the Petitioner did not plead the particulars of the inadequacy of the advertisement and he has not adduced proof of the same. According to the respondent the advertisement was placed in a newspaper of nationwide circulation on 18<sup>th</sup> January 2022 giving period 21 days within which to make applications. It was also published in the university website. The



- advertisement attracted 22 applicants compared to 14 in the first advertisement in September 2021. It submitted that the petitioner has not adduced any evidence to prove that the circulation of the advertisement was not adequate or that the time for making the application was not reasonable. Further, he has not adduced proof that the advertisement offended the Constitution.
30. As regards the competence of the council to recruit, the Respondent submitted that the Council met the quorum specified under clause 1.8 of the Mwongozo Code of Governance for State Corporations issued through Executive Order No. 7 of 2015. Consequently, it submitted that the Petitioner's allegation that the council was not competent has been unsubstantiated. Further, the petitioner has not demonstrated what prejudice was occasioned to the public by the respondent conducting its statutory function as then constituted.
  31. On the issue of fair competition and merit, the Respondent drew the Court's attention to the deliberations of the Council meeting of 22<sup>nd</sup> December 2021 marked as exhibit HO-4, clause 9.4 in page 5 of 7 and page 60 of bundle of documents. It submitted that after analyzing process of shortlisting, the council noted that none of the candidates had met the requirement of the duration served in senior management. The Scheme of service provided that a person should have served for 10 years' in Senior Management. The 1<sup>st</sup> Interested Party fell short by 6 months whereas another candidate Humphrey Mwenda Murugu fell short by 3 months. Based on the foregoing, the Respondent argued that the 1<sup>st</sup> Interested Party was not favoured.
  32. The Respondent submitted that the 1<sup>st</sup> Interested Party was promoted from a lower position to senior management as that was another form of entry as provided for in the Respondent's scheme of service. The Respondent also contended that the 1<sup>st</sup> Interested Party was treated the same as the other applicants who were serving in public universities. It also argued that the purpose of advertising was to promote equity and providing fair competition as opposed to going directly to promote the 1<sup>st</sup> Interested Party. It further argued it has produced the score sheet for all the applicants which show that the 1<sup>st</sup> Interested Party was the best candidate. The said evidence has not been rebutted by the petitioner.
  33. The Respondent urged the Court to evaluate the cumulative effect of the entire process and not only condemn it for an impropriety detected in the process. The Respondent relied on the case of Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others [2013] eKLR where the Court held that a finding of impropriety must be as substantive as to impeach the entire process.
  34. As regards the alleged unsuitability, the Respondent submitted that the Petitioner has not produced sufficient evidence to prove that the 1<sup>st</sup> Interested Party participated in corruption and thus not suitable for appointment. It relied on the case of Mumo Matemu supra to buttress submission. The Respondent argued that the Auditor General's management letter of 9<sup>th</sup> October 2019, cited by the petitioner, could not be relied upon to prove corruption as it was only offering the management an opportunity to respond to the findings. Further, the letter gave recommendations on improvement of internal control systems. The letter did not point at the 1<sup>st</sup> Interested Party alone but the management in general.
  35. The Respondent further submitted that a qualified audit opinion is not an adverse opinion and it cannot be used to prove corruption allegations on a balance of probability. For emphasis, it relied on Standard 705 of the International Standards of Auditing issued by the International Audit and Assurance Standards Board.



36. The Respondent also discredited the reliance of the Tax Ledger as proof of corruption by the petitioner and submitted that the said document cannot stand as evidence of corruption malpractices on a balance of probabilities.
37. As regards allegation of EACC investigations, the Respondent submitted that there was no investigation against the 1<sup>st</sup> Interested Party on abuse of office as the same were only against the Vice Chancellor. Further that, the summoning of the 1<sup>st</sup> Interested Party to record statements was no indication that prosecution would follow. The Respondent also argued that the 1<sup>st</sup> Interested Party's life could not continue being held in abeyance on account of pending investigations.
38. The Respondent submitted that it played an oversight role over the management of the institution and being mandated to look into corruption issues of the institution, it had the benefit of more documentation than a public interest litigator. It further submitted that it has adduced evidence to prove that it investigated the allegation. In that regard, the Respondent submitted that the Court had no jurisdiction to delve into the substance of corruption allegations. Consequently, contended that the fact that allegations were made should not form basis for quashing a well-deserved appointment. For emphasis, the Respondent relied on the case of *Evans Ladtema Muswahili v Vibiga County Public Service Board & 2 Others*; Marley Ezekiel Ayiego (Interested Party) [2021] eKLR.
39. The Respondent also contended that the Petitioner lacks locus to bring this case as the documents he relied upon were private documents and hence it was unclear how the same were acquired and therefore the court ought to disregard the petition on grounds that the Petitioner did not approach court with clean hands. The Respondent relied on the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 3 Others* [2014] eKLR at paragraph 122.
40. The Respondent submitted without prejudice that the Court ought to evaluate the kind of remedies to grant if indeed it found that there was a breach of constitutional provisions. The Respondent in submitting that the Court should grant constitutional remedies relied on the case of *Stanley Munga Gitbunguri v Kenya National Highways Authority & 2 others* [2017] eKLR. The Respondent urged the Court to dismiss the petition with costs and that the 1<sup>st</sup> Interested Party be reinstated as the Substantive Finance Officer with reinstatement of all benefits stopped by the order of 15<sup>th</sup> February 2023.

### **1<sup>st</sup> Interested Party's submissions**

41. The 1<sup>st</sup> Interested Party submitted on following issues:-
  - a. Whether the advertisement of the Finance Officer position was sufficiently issued?
  - b. Whether there was a competitive interview process appointing the 1<sup>st</sup> Interested Party?
  - c. Whether the 1<sup>st</sup> Interested Party is fit to be appointed as the Respondent's finance officer?
  - d. Whether an order to quash the decision by the Respondent to appoint the 1<sup>st</sup> Interested Party as the Finance Officer should be granted?
  - e. Cost to be borne by the Petitioner.
42. It was submitted for the 1<sup>st</sup> interested party that, the Petitioner has conceded to the fact that an advertisement was made and that the vacancy was available. Further, the Petitioner has not produced any evidence to prove the manner in which the advertisement was prejudicial to him or any other person. For emphasis, she relied on section 108 of the *Evidence Act* and the case of *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013.



43. It was submitted that the Petitioner's has not proved that the re-advertisement within a period of less than one and a half month amounted to a violation of any law. It was submitted that the decision by the Council to re-advertise was made on 22<sup>nd</sup> December 2021 after it failed to find a successful candidate.
44. It was submitted that the allegation by the Petitioner that the two advertisements were similar was inaccurate. It was clarified that 1<sup>st</sup> advertisement failed to consider serving employees under group 14 and the second advertisement corrected that error by including serving officers in accordance with clause 48 (13) (c) of the Respondent's Scheme of service, 2013. Consequently, it was submitted that the advertisement was sufficient and the Petitioner has failed to show that there were any disadvantaged parties.
45. It was further submitted that the decision to issue the re-advertisement was made when all the Council members were present and as such the Petitioner's allegation that it was tailor made for the 1<sup>st</sup> Interested Party is baseless. Further, the re-advertisement attracted more applicants than the first. It was also submitted the 1<sup>st</sup> Interested Party was not barred from applying for the position after the re-advertisement.
46. It was submitted that, the allegation of a track record was marred with financial impropriety was baseless because the 1<sup>st</sup> interested party has produced clearance certificates to demonstrate that she has no record of financial impropriety, leadership and integrity issues or any professional misconduct. She has further shown that there is no record of breach of the law or the Respondent's regulations. It was therefore submitted that the Petitioner has failed to prove the alleged record of impropriety and integrity issues. They relied on paragraph 9.4 of the minutes of council at page 60.
47. It was again submitted that the 1<sup>st</sup> Interested party was fit for appointment as she emerged the best candidate among the three interviewees. They argued that the evidence by the Petitioner was inadmissible as it was obtained illegally and thus impacted the probative value of the information. They relied on the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 Others* [2020] eKLR where the Court cited the case of *Njonjo Mue & Another v Chairperson of the Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR.
48. It was also submitted that the 2<sup>nd</sup> Interested Party in its Replying Affidavit has admitted that it had no record of financial impropriety, leadership and integrity issues or any professional misconduct by the 1<sup>st</sup> interested party. It was argued that compliance with Chapter 6 of the *Constitution* was demonstrated by compliance certificates issued by the relevant authorities. They therefore urged this Court to evaluate the proportionality of the 1<sup>st</sup> Interested party's rights and the other applicants against the individual rights of the Petitioner before making its decision. In support, they relied on the case of *Center for Right Education and Awareness & Another v John Harun Mwau & 6 Others* [2012] eKLR and *Brian Asin & 2 Others v Wafula Chebukati & 9 Others* [2017] eKLR. They therefore urged the Court to find the 1<sup>st</sup> Interested Party fit to hold the Office as the allegations had not been substantiated.

### **Analysis & determination**

49. I have considered the Petition, affidavits and the submissions by all the parties. There is no dispute in the fact that the respondent advertised the position of Finance Officer on 14<sup>th</sup> September 2021 and conducted interviews on 22<sup>nd</sup> December 2021; that all the candidates including the 1<sup>st</sup> interested party did not meet the requirements for appointment because they had not served in senior management position for 10 years; that the university council resolved that the position be re-advertised taking into consideration all the levels of entry as provided in the Scheme of service; and that the position was re-advertised, interviews conducted and the 1<sup>st</sup> interested party got the appointment.



50. The following issues fall for determination: -
- a. Whether the petition meets competence threshold.
  - b. Whether procedure followed in the recruitment of the 1<sup>st</sup> interested party violated the Constitution.
  - c. Whether the 1<sup>st</sup> interested party qualified for the appointment.
  - d. Whether the appointment of the 1<sup>st</sup> interested party should be quashed

### **Competence threshold**

51. The respondent and the 1<sup>st</sup> interested party submitted that the petition herein falls short of the threshold of a constitutional pleading. They made the allegation on the basis of the decision in the case of Anarita Karimi Njeru v Republic [1979] 1 KLR, 54. Where the court held that: -

“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the Constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

52. The petitioner never responded that argument, possibly because he had no opportunity to do so due to the time when it was raised. Never the less, I have carefully considered the petition, and confirmed that it lacks some material particulars. However, I am satisfied that it discloses a reasonable cause of action founded on violation of the Constitution. It sets out with some degree of precision the violations complained of, the provisions of the Constitution that are alleged to have been violated, and the manner in which the violation has been done. Consequently, I find that the petition meets the competence threshold.

### **Whether the recruitment procedure violated the Constitution**

53. The petitioner alleged in paragraph 15 of the petition that the appointment of the 1<sup>st</sup> interested party was contrary to Article 73(2)(a) and 232(1)(g) of the Constitution because it was not preceded by fair competition and merit as the basis for the appointment. Article 73(2) provides as follows: -

“(2) The guiding principles of leadership and integrity include –

- (a) selection on the basis of personal integrity, competence and suitability, or election in a free and fair elections;”

54. Article 232(1)(g), on the other hand provides for one the values and principles of public service, thus: -

“(g) subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions”

55. In view of the foregoing provisions, it is mandatory for public entities to uphold procedural propriety when recruiting its employees. This should include open, competitive and inclusive process which is guided by merit and integrity. There should be fair interviews that should inquire into any allegations of impropriety and lack fitness to serve. In default, the recruitment may be challenged for violating procedural propriety.



56. The burden of proof of the alleged violations, lies with the person alleging the same and the standard of proof is on balance of probabilities. I gather support from the case of *Muema v OCS Langata Police Station & 4 others* (Constitutional Petition E089 of 2021) [2022] KEHC 13194 (KLR) where the court held that the *Evidence Act* applies to Constitutional petitions like the present case.
57. I have carefully considered the evidence presented by the parties. The petitioner acknowledged that the recruitment was preceded by two advertisements. The advertinments attracted both internal and external candidates who participated in the process. Shortlisting was done and thereafter interviews were conducted by the university council. None of the candidates has come out to complain that the advertisement, shortlisting, the interviews and the appointment was unfair, unlawful or unconstitutional. The advertisement was through a newspaper with a nationwide circulation and it was in accordance with the scheme of service. The advertisement was also posted in the university website.
58. In the circumstances I am satisfied that the respondent conducted recruitment of its Finance Officer through an open, fair, and competitive process. Further, the evidence adduced demonstrate that merit and competence was the basis upon which appointment was to be made. This view is fortified by the minutes of the Council meeting of 22<sup>nd</sup> December, 2021 where the council decided to re-advertise the position after it failed to get a qualified candidate.
59. The petitioner further contended that the appointment of the 1<sup>st</sup> interested party violated Article 232(1)(i) of the *Constitution* in so far as it failed to consider representation of Kenya's diverse communities; and afford adequate and equal opportunities for appointment of men and women, the members of all ethnic groups; and persons with disabilities. However, the petitioner has not adduced any evidence to prove that the provisions of Article 232(1)(i) were never considered while recruiting the Finance Officer. It is not enough for the petitioner to make allegation. He has a duty to adduce evidence to prove the allegations on a balance of probability.
60. The Respondent produced newspaper adverts to prove that it invited candidates from the public to apply for the vacancy without discrimination. The adverts had a notice at the bottom that read as follows:
- “Karatina University is an equal opportunity employer and therefore applicants of either gender, persons with disability and those from marginalized areas are encouraged to apply.”
61. The above statement was evidence of fair competition and inclusivity. I also find that the same to be in line with Clause 32 of the Public Service Regulations, 2020 which provides that:
- “ 32. Affirmative Action  
A public institution shall—
- (a) develop and implement employment equity plans;
  - (b) review their recruitment policies to ensure that the mode of advertisement of job vacancies, the pre-selection and conducting of interviews do not in any way disadvantage any particular group; and
  - (c) take deliberate measures including targeted advertisements to bring on board marginalized groups.”



62. The Petitioner argued that the re-advertisement was made on 8<sup>th</sup> February 2022 after the resignation of two council members. However, that averment is not correct considering the date of the actual advertisements produced as exhibits. The correct position is that 8<sup>th</sup> February 2022 was the deadline for submitting applications by the candidates. The re-advertisement was done on 18<sup>th</sup> January, 2022. The decision to re-advertise the position was made by the full council on 22<sup>nd</sup> December 2021, way before the said resignation. The Petitioner has not adduced any evidence to show the Council acted without quorum either before or after the two members resigned.
63. Finally, there is no evidence upon which to hold that the council did not inquire into the claims of impropriety and integrity issues against the 1<sup>st</sup> interested party. The minutes of the council did not and should not have indicated the questions put to the candidates and the answers given. However, it was noted that UASU made written allegations against the 1<sup>st</sup> interested party but they were found to be without supporting evidence and bordering on bad faith. Consequently, I find and hold that the petitioner has not proved on a balance of probability that the procedure followed in recruiting the 1<sup>st</sup> interested party as Finance Officer violated the Constitution.

#### **Whether the 1<sup>st</sup> interested party's qualified for the appointment.**

64. The Petitioner alleged that the 1<sup>st</sup> Interested Party's appointment was not merited because she lacked the required qualification. However, the petitioner has not contested the fact that the 1<sup>st</sup> interested party holds PHD in Business Administration and a CPA(K). What seems to bother him is the interested party's alleged financial impropriety and integrity issues. He pleaded in paragraph 17 of the petition that the appointment of the 1<sup>st</sup> interested party goes against the grain of Article 10 of the Constitution.
65. He contended that the 1<sup>st</sup> interested party was tainted with instances of financial misappropriations and irregularities which would be perpetuated upon assumption of office. He alleged that the issues had been brought to the respondent's attention by whistle blowers on diverse dates in 2021. The Petitioner produced a letter from the UASU leadership to the Respondent's council putting forth complaints against the 1<sup>st</sup> Interested Party and inviting the Board to look into the same.
66. On the other hand, the Council in its minutes of 22<sup>nd</sup> December 2021 stated that most of the said issues had been considered in the special session of Council, that they were concluded, and communication issued to the staff. It was further noted that the Secretary General's threats to forward the corruption allegation to the national office were in bad taste since he was accusing the Council without providing any evidence. It was also noted that it was not fair to condemn the acting Finance Officer without giving her a chance to defend herself. The Council also opined that the Secretary General was acting independently of other officials.
67. What comes out clearly from the foregoing minutes of the Council is that there were complaints made to the council against the 1<sup>st</sup> interested party on the day of the first interview on 22<sup>nd</sup> December 2021 vide a letter by the General Secretary of UASU. No other evidence has been produced to show that there were previous complaints against the 1<sup>st</sup> interested party personally. All what I can say at this point is that there are minutes of the council dated 22<sup>nd</sup> December 2021 that say that the matters raised by UASU against the 1<sup>st</sup> interested party were considered by the council during her interview.
68. The respondent and the 1<sup>st</sup> interested party further contended that the investigations by 2<sup>nd</sup> interested Party (EACC) were only against the Vice Chancellor. They produced a letter from EACC dated 9<sup>th</sup> January 2020 to the Council Chairman stating as follow:



“Re: Summons for Interview and Statement Recording

The Commission pursuant to its Constitutional and Statutory mandate as set out inter alia under... is carrying out investigations into the allegations of Abuse of office against the Vice Chancellor Karatina University Prof. Mucai Muchiri.

To facilitate the investigation, you are requested to appear before the Ethics and Anti-corruption Commission – Central Regional Office – Nyeri on ... for interview and statement recording. The office is located...”

69. A similar letter dated 11<sup>th</sup> November 2019 had earlier been served on the Vice Chancellor but there is no evidence of what transpired thereafter. Based on the said correspondences I agree that the person targeted by the investigations was not the 1<sup>st</sup> interested party but the Vice Chancellor.
70. I have also carefully considered the material before me and saw no evidence that the 1<sup>st</sup> interested party has been the subject of any disciplinary proceedings. In fact, the respondent’s Council does not seem to have any problem with her performance nor does it blame her for any financial impropriety.
71. The respondents and the 1<sup>st</sup> interested party admitted that some concerns were raised by the Auditor General’s report and the Management Letter. However, they contended that the concerns were not directed at the 1<sup>st</sup> interested party personally but the entire management. They further protested that the said documents were inadmissible since they were illegally obtained as no permission was sought from the respondent. The petitioner did not adduce any evidence to show that he acquired the documents lawfully. Consequently, I find and hold that the documents are inadmissible for being obtained illegally.
72. I have further noted that some of the documents filed by the petitioner in respect of taxes are computer generated and there is no certificate of electronic evidence as required under section 106B of the Evidence Act. Consequently, the said documents are not admissible as evidence.
73. The foregoing inadmissibility put aside, it is evident that the respondent’s records and financial affairs are messy. The question that begs for answer is, who was responsible for the mess? The 2<sup>nd</sup> interested party (EACC) has acknowledged in its Replying Affidavit that some of the issues raised in the petition were reported to it and they are the subject of ongoing investigations. However, some of the allegations are strange to it but have now been picked for investigations.
74. In the Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others [2013] eKLR, the Court of Appeal held that:
  - “78. It was the 1<sup>st</sup> respondent’s case that the appellant herein was not suitable for appointment on account of allegations centering on claims of financial impropriety, negligence of duty, failure to prevent fraud, and perjury. On the basis of these allegations, the 1<sup>st</sup> respondent averred that there remained unresolved questions which rendered the appellant unfit for appointment to any state or public office.
  79. The determination of unsuitability or unfitness of a person to hold state or public office on grounds of lack of integrity is a factual issue dependent upon evaluation of material evidence. When presented as a constitutional challenge, the evidentiary standard is on a balance of probabilities...
  86. We have examined each of these grounds and our finding is that the evidence before the High Court or before us is not probative of any of the claims.



We note that the High Court itself noted the evidentiary shortcomings by stating that it was not in a position to make any finding whether the above allegations had been proved or not. Therefore, we respectively hold that the court had misdirected itself by concluding that the appellant was unsuitable to hold office despite its own finding that there had been no conclusive proof of the allegations. It is our considered view that in cases seeking review of an appointment on grounds of the integrity of the appointee, the review cannot be half-hearted. It must be conclusive, fair and just.”

75. In this case it has been confirmed that there are investigations going on against the Vice Chancellor of the university but not the 1<sup>st</sup> interested party. There is no conclusive evidence that can be the basis of a finding that the 1<sup>st</sup> interested party is unfit for appointment as the respondent’s Finance Officer due to past record of financial impropriety and integrity issues. The 2<sup>nd</sup> Interested Party must first conclude its investigation.
76. By now it is clear from the evidence on record that the 1<sup>st</sup> interested party possess both academic and professional qualifications required for a serving officer to be appointed as Finance Officer of the respondent. It is further clear that the petitioner has not placed before this court probative evidence implicating the 1<sup>st</sup> interested party of the alleged financial impropriety and integrity issues. All that is before the court are serious allegations which have not been proved on a balance of probability.

#### **Whether the reliefs sought should be allowed?**

77. As highlighted above, the petitioner has failed to adduce evidence to prove that the procedure followed in recruiting the 1<sup>st</sup> Interested Party as the finance officer violated the Constitution. On the contrary the respondent has adduced evidence that show that the recruitment was done through an open and competitive process.
78. Further the petitioner has not proved by evidence that the 1<sup>st</sup> interested party had a record tainted with financial impropriety and integrity issues. On the contrary, the court was only treated to serious allegations some of which are being investigated by the 2<sup>nd</sup> interested party. The investigations are not against the 1<sup>st</sup> interested party but the Vice Chancellor of the University.
79. In view of the foregoing observations, I find and hold that the petitioner has failed to prove that the appointment of the 1<sup>st</sup> interested party as Finance Officer has violated the Constitution. Consequently, he is not entitled to the reliefs sought and the petition stands dismissed. Since the suit was in the form of public litigation, I will not condemn the petitioner to pay costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 25<sup>TH</sup> DAY OF OCTOBER 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

