



**Universities Academic Staff Union v University of Nairobi; Ouma (Interested Party)  
(Cause E700 of 2023) [2023] KEELRC 3368 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3368 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E700 OF 2023  
L NDOLO, J  
DECEMBER 19, 2023**

**BETWEEN**  
**UNIVERSITIES ACADEMIC STAFF UNION ..... CLAIMANT**  
**AND**  
**UNIVERSITY OF NAIROBI ..... RESPONDENT**  
**AND**  
**BRIAN OUMA ..... INTERESTED PARTY**

**RULING**

1. This matter was initially within the judicial docket of my brother Dr. Gakeri J, who by a ruling delivered on 26<sup>th</sup> September 2023, recused himself.
2. I subsequently became seized of the matter on 4<sup>th</sup> October 2023, when the parties appeared before me for directions on the Claimant’s Notice of Motion dated 29<sup>th</sup> August 2023, which is the subject of this ruling.
3. By its Notice of Motion, which was filed alongside a Memorandum of Claim of even date, the Claimant seeks orders to stay implementation of the Respondent’s directive as contained in letter dated 24<sup>th</sup> July 2023, pending the hearing and determination of the claim.
4. The application is supported by an affidavit sworn by the Claimant’s General Secretary, Dr. Constantine Wasonga and is based on the following grounds:
  - a. That the Chairperson of the University Council is not the Chief Executive Officer of the Respondent, is not the administrative head of the University nor is he involved in the day-to-day management of the Respondent and does not have the power to make or communicate the appointment of any staff or issue directives as per the impugned letter dated 24<sup>th</sup> July 2023;



- b. That the Chairperson of the Council does not have powers to direct any staff of the Respondent to occupy a position in an acting capacity in perpetuity, with a view of avoiding creation of the position as by law envisaged, and competitive filling of the position, which amounts to entrenching unfair labour practices in the Respondent's institution;
  - c. That the position of Chief Operations Officer was first created in an unlawful manner by the Respondent on 12<sup>th</sup> July 2021 and the acting appointment was made purely as a transitional role only for 6 months, pending the alignment of the statutory instruments to fully birth the position and ensure subsequent appointments were to be subjected to competitive recruitment;
  - d. That no statutory instruments have been aligned and gazetted as by law required, creating the substantive position of Chief Operations Officer, designating the actual terms of reference, reporting structures and qualifications for the holder;
  - e. That Section 27 of the [Public Service Commission Act](#) provides clear conditions for establishment of new offices within the Public Service, including State Corporations and towards this end, the Public Service Commission has issued Guidelines for Development and Review of Human Resource Management Instruments for State Corporations and Public Universities stating:
    - ‘...Proposals for establishment of new offices, or abolition of offices should comply with the Guidelines herewith and be submitted to the Commission for consideration and approval’;
  - f. That the Respondent, in a bid to create a new office of Chief Operations Officer, has never submitted the proposal for creation of the said office for approval by the Public Service Commission;
  - g. That the acting appointment contravenes the provisions of Section 34 of the [Public Service Commission Act](#);
  - h. That the impugned letter dated 24<sup>th</sup> July 2023 has created uncertainty within the Claimant's membership, as the Interested Party has commenced the process of abrogating to himself non-existent powers and roles;
  - i. That vide a memo dated 10<sup>th</sup> August 2023, the Interested Party abrogated to himself powers to oversee all human resource functions, including recruitment, in essence seeking to oversee the recruitment of academic staff who are members of the Claimant, without the role designated as required by law and the University Charter, causing unrest within the membership of the Claimant.
5. In his affidavit in support of the application, the Claimant's General Secretary, Dr. Constantine Wasonga depones as follows:
- a. That on 14<sup>th</sup> July 2021, the Vice-Chancellor of the Respondent issued a memo communicating the decision of the Respondent's Council, to create new positions and effect new appointments, whereby a senior position of Chief Operations Officer, hitherto non-existent in the Respondent's Charter and Statutes, was created and the Interested Party appointed in an acting capacity;



- b. That at a Council meeting held on 12<sup>th</sup> July 2021, the Interested Party was appointed to the impugned position in an acting capacity subject to its birthing with clear conditions issued by the Respondent's Council as follows:

‘The Appointment to take effect immediately pending the alignment of statutory instruments...following the alignment of statutory instruments, all positions filled in acting capacity and subsequent vacancies to be subjected to competitive recruitment.’

- c. That at a subsequent Council meeting of 20<sup>th</sup> August 2021, the Council proceeded to further clarify the nature of appointment of the Interested Party as follows:

‘The Appointments made at the meeting held on 12<sup>th</sup> July 2021, were made pending alignment of statutory instruments to the governance and management reforms as may be appropriate hence the acting capacity designation.’

- d. That by a letter dated 12<sup>th</sup> July 2021, the Interested Party was appointed to act in the yet to be created and formalised position of Chief Operations Officer and it was clear that the appointment was to last for a period of 6 months, with effect from 12<sup>th</sup> July 2021 or until a substantive officer bearer is appointed, whichever comes earlier;

- e. That no substantive officer was appointed at the expiry of the said 6 months and since the 6 month period was the earlier in time, the acting position lapsed with the natural and automatic consequence that the Interested Party reverted to his previous post;

- f. That to date, the University Council has not promulgated a Statute for the creation of the position of Chief Operations Officer;

- g. That on 24<sup>th</sup> July 2023, the Chairman of the Council wrote to the Interested Party as follows:

‘Therefore, I hereby affirm that until the Council directs for the position to be filled substantively, you will continue to hold office and discharge its mandate without hindrance. You will continue to be paid acting allowance due to a Division Head alongside commensurate benefits. By a copy of this letter, the Vice Chancellor and all other relevant officers of the University are directed to take note and ensure the status quo remains.’

- h. That the above directive is patently illegal in that:

- i. There exists no promulgation and gazettelement of a Statute creating the position of Chief Operating Officer close to 2 years after the Interested Party's term to act lapsed;
- ii) The Chairperson has usurped the functions of the Council and Vice-Chancellor of the Respondent and seeks to be involved in the day-to-day management and operations of the Respondent, contrary to the express provisions of the *Universities Act*, the Charter and the relevant instruments governing the position of Chairperson of the Council;
- iii) The Chairperson of the Council has no powers to set and communicate directly to staff, the benefits or allowances attached to a position;
- iv) The Chairperson cannot abrogate to himself the jurisdiction and authority to fix, vary or determine any aspect of remuneration of a public officer, which is a function of the Salaries and Remuneration Commission.



6. The Respondent's response is contained in a replying affidavit sworn by the Chairperson of the University Council, Prof. Amukowa Anangwe, on 12<sup>th</sup> October 2023.
7. Prof. Anangwe depones that UASU has filed the present suit despite having raised similar issues regarding the actions by the Respondent's Council taken on 12<sup>th</sup> July 2021 and 20<sup>th</sup> August 2021, in respect of the governance and management reforms at the Respondent in ELRC Petition No E118 of 2021: Universities Academic Staff Union (UASU) v University of Nairobi, which has been the subject of litigation in this Court and is pending before the Court of Appeal as Civil Appeal No E771 of 2021: University of Nairobi & 2 others v Universities Academic Staff Union (UASU) & 4 others.
8. According to Prof. Anangwe, the issues raised by UASU in Petition No E118 of 2021, include the legality of the position of Acting Chief Operations Officer, held by the Interested Party.
9. He contends that although disguised as a challenge to the extension of the tenure of the Interested Party as Acting Chief Operations Officer, the main issue under challenge in this suit is the creation of the position of Chief Operations Officer and enactment of the Statutes to give effect to the position.
10. Prof. Anangwe further depones that by a ruling dated 21<sup>st</sup> January 2022, the Court of Appeal stayed further proceedings in Petition No E118 of 2021 pending the hearing and determination of Civil Appeal No E771 of 2021.
11. Prof. Anangwe defends the appointment of the Interested Party to the position of Chief Operations Officer in an acting capacity pending regularisation of the University Statutes. He accuses the Claimant of unfairly singling out this position, without mention of other acting positions occupied by the Claimant's members.
12. He asserts that employment of staff of the University is the mandate of the Council and not the Vice-Chancellor.
13. The Interested Party filed Grounds of Opposition dated 3<sup>rd</sup> October 2023 stating that:
  - a. The Claimant has no locus standi to institute and continue these proceedings;
  - b. The suit is an abuse of the court process as it is sub judice, purporting to litigate matters which are pending determination in ELRC Petition No. 118 of 2021;
  - c. The Claimant relies on the following illegally obtained evidence, which ought to be expunged from the court record;
    - i) The Respondent's memo dated 14<sup>th</sup> July 2021;
    - ii) The minutes of the Respondent's meetings of 12<sup>th</sup> July 2021 and 20<sup>th</sup> August 2021;
    - iii) The Respondent's letters dated 12<sup>th</sup> July 2021 and 24<sup>th</sup> July 2023;
    - iv) The Respondent's internal memos of 27<sup>th</sup> July 2023 and 10<sup>th</sup> August 2023.
14. Dr. Constantine Wasonga swore a further affidavit on 31<sup>st</sup> October 2023. In response to the issue of locus standi raised by the Interested Party in his Grounds of Opposition, Dr. Wasonga points out that there is a valid Recognition Agreement between the Claimant and the Respondent.
15. He adds that the Union Constitution mandates the Claimant to represent the interests of its members in disputes touching on labour practices at the Respondent, which may prejudice the members of the Union.
16. Dr. Wasonga denies that any of the documents exhibited by the Claimant were obtained illegally.



17. Dr. Wasonga seeks to create a distinction between the current claim and Petition No E118 of 2021, stating that the present claim is based on the unilateral decision by the Chairperson of the Council, to extend the tenure of the Interested Party contrary to resolutions of the Council abandoning creation of the position of Chief Operations Officer.
18. According to Dr. Wasonga, the Claimant does not question the decision of the Council to create the position of Chief Operations Officer; rather, it questions the subsequent actions taken after the Council's decision of 12<sup>th</sup> July 2021.
19. In further response, Prof. Amukowa Anangwe swore a supplementary affidavit on 22<sup>nd</sup> November 2023. He denies the averment by Dr. Wasonga that the establishment of the position of Chief Operations Officer had been abandoned.
20. From the pleadings and submissions filed by the parties, the first issue that emerges for determination is whether the present suit and application are sub judice on account of Petition No E118 of 2021.
21. In urging its position, the Respondent relies on the decision in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR where the Supreme Court of Kenya stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before any Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.”
22. On its part, the Claimant relies on the decision in Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 others [2012] eKLR where it was held that in adjudging a matter as sub judice, the entire subject matter in controversy in the subsequent suit must have been covered by the previously instituted suit.
23. In warding off the sword of sub judice, the Claimant states that its present case is based on communication by letter dated 24<sup>th</sup> July 2023, from the Chairperson of the University Council, extending the tenure of the Interested Party as Acting Chief Operations Officer, which according to the Claimant, is contrary to a resolution of the Council abandoning creation of the position of Chief Operations Officer.
24. Significantly, the Respondent denies that it had abandoned the decision to fully establish the position of Chief Operations Officer and the Claimant did not adduce any evidence to support its position in this regard.
25. Looking at the pleadings in the present case, it is evident that creation of the office of Chief Operations Officer, which the Interested Party occupies in an acting capacity is the real issue in controversy. This is the same issue in Petition No E118 of 2021 and I therefore agree with the Respondent that the subject matter of this claim is sub judice.
26. For this reason, I will withhold any further action on this matter, pending final determination of Petition No E118 of 2021.
27. I make no order for costs at this stage.
28. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2023**



**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ogembo for the Claimant

Miss Mbilo for the Respondent

Mr. Morara for the Interested Party

