



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E036 OF 2021

IN THE MATTER OF ARTICLE 22(1)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(1) & (4),

3, 10, 19(1) & (2), 20(1), 22(2), 27(11), 28, 35, 47(1), 48, 73(2)

and 259 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
CHAPTER 4 ARTICLES 22 AND 23(1) & (3), ARTICLE 162(2)(a) AND 232 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 24, 27, 41,
73, 75, 129, 153(4)(a), 229(1), 232, 249(1) & (2), (3) & (4) AND 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF VIOLATION OF PART V OF THE UNIVERSITIES ACT, 2012 AS READ
TOGETHER WITH THE STATUTE LAW (MISCELLANEOUS AMENDMENT) ACT NO. 18 OF 2014**

AND

**IN THE MATTER OF THE CONSTITUTION AND LEGAL VALIDITY OF THE
DECISION OF THE COUNCIL OF THE UNIVERSITY OF JARAMOGI OGINGA ODINGA
UNIVERSITY OF SCIENCE AND TECHNOLOGY TO SUBJUGATE COMPETITIVE**

RECRUITMENT OF THE DEPUTY VICE-CHANCELLOR (PLANNING,

ADMINISTRATION AND FINANCE)

AND

IN THE MATTER OF LEGITIMATE EXPECTATION

BETWEEN

NICHOLAS OUMA.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1st RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION.....2nd RESPONDENT

HON ATTORNEY GENERAL.....3rd RESPONDENT

COUNCIL OF THE UNIVERSITY OF JARAMOGI OGINGA ODINGA

UNIVERSITY OF SCIENCE AND TECHNOLOGY.....4th RESPONDENT

PROF ISAIAH I.C. WAKINDIKI.....5th RESPONDENT

AND

PROF AGGREY DANIEL MAINA THUO.....1st INTERESTED PARTY

PROF PETER ANYANGA OTIENDE WASAMBA.....2nd INTERESTED PARTY

PROF FRANCIS ANGAWA OKERE.....3rd INTERESTED PARTY

Consolidated with

KISUMU PETITION NO. 4 OF 2021

ANTHONY OTIENDE OTIENDE.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1st RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION.....2nd RESPONDENT

HON ATTORNEY GENERAL.....3rd RESPONDENT

COUNCIL OF THE UNIVERSITY OF JARAMOGI OGONGA ODINGA

UNIVERSITY OF SCIENCE AND TECHNOLOGY.....4th RESPONDENT

PROF ISAIAH WAKINDIKI.....5th RESPONDENT

AND

PROF AGGREY DANIEL MAINA THUO.....1st INTERESTED PARTY

PROF ANYANGA OTIENDE OWINO.....2nd INTERESTED PARTY

PROF FRANCIS ANGAWA OKERE.....3rd INTERESTED PARTY

JUDGMENT

1. Nicholas Ouma and Anthony Otiende Otiende (the Petitioners) separately instituted proceedings against the Public Service Commission (the Commission), the Cabinet Secretary, Education (the Cabinet Secretary), the Hon Attorney General, the Council of Jaramogi Oginga Odinga University of Science and Technology (the Council) and Prof Isaiah Wakindiki alleging that the appointment of Prof Francis Angawa Okere (the 3rd Interested Party) as the Deputy Vice-Chancellor, Planning, Administration and Finance, Jaramogi Oginga Odinga University of Science and Technology instead of Prof Aggrey Daniel Maina Thuo (1st Interested Party) was illegal.

2. The 3rd Interested Party filed Grounds of Opposition and a Replying Affidavit on 4 June 2021, the Cabinet Secretary and Hon Attorney General caused a replying affidavit sworn by the Principal Secretary to be filed on 7 June 2021, the 1st Interested Party filed a replying affidavit on 8 June 2021, the Council caused a replying affidavit to be filed on 10 June 2021, while the 5th Respondent filed a Notice of Preliminary Objection on 29 June 2021 and a replying affidavit on 5 August 2021.

3. Pursuant to Court directions, the 5th Respondent filed his submissions on 5 August 2021, the Petitioners on 8 September 2021 and 14 September 2021 (respectively), the 1st Interested Party on 20 September 2021, 3rd Interested Party on 19 October 2021, and the Cabinet Secretary and the Hon Attorney General on 3 December 2021.

Background

4. Sometime in January 2020, the Commission declared a vacancy in the office of Deputy Vice-Chancellor, Planning, Administration and Finance, Jaramogi Oginga Odinga University of Science and Technology.

5. The Commission conducted interviews and the 1st Interested Party was ranked first while the 3rd Interested Party was ranked third.

6. On 3 March 2021, the Commission notified the Council of the outcome of the interviews and its recommendations.

7. The Council deliberated on the Report from the Commission on 26 March 2021 and resolved to uphold the results of the interviews with a recommendation to the Cabinet Secretary to appoint the 1st Interested Party for a term of 5-years.

8. On 30 March 2021, the 5th Respondent, as Chair of Council wrote to the Cabinet Secretary recommending the appointment of the 1st Interested Party.

9. However, on 12 April 2021, the 5th Respondent in his capacity as Chairperson of the Council issued an appointment letter to the 3rd Interested Party.

10. The 3rd Interested Party accepted the appointment through a letter dated 15 April 2021.

11. The appointment of the 3rd Interested Party prompted the filing of the consolidated Petitions.

Case for the Petitioners

12. The case for the Petitioners was that the appointment of the 3rd Interested Party did not meet the threshold envisaged by the national values and principles of governance required of the public service because it was not competitive or valid since the 3rd Interested Party had not been recommended by the Council.

13. The Petitioners made the assertion on the ground that the Council was not reconvened to reconsider the recommendation it had earlier made to the Cabinet Secretary to appoint the 1st Interested Party.

14. According to the Petitioners, the withdrawal of the recommendation to appoint the 1st Interested Party and the subsequent appointment of the 3rd Interested Party was made on the basis of cronyism or nepotism and was *ultra vires*.

15. The Petitioners also took the view that the Cabinet Secretary could only act upon the recommendation of the Council and that in the instant case, there was no evidence that the Council had recommended the 3rd Interested Party or had resolved to reverse the recommendation to appoint the 1st Interested Party.

16. The recommendation and appointment of the 1st Interested Party, the Petitioners argued, had created a legitimate expectation that he would serve in the position for 5-years and the alteration of the decision had violated his right to legitimate expectation.

17. The Petitioners further challenged the legal capacity of the 5th Respondent to serve as Chair of the Council on the ground that at the particular time he was serving elsewhere as a public officer (Vice-Chancellor of KCA University), and thus could not hold two public offices.

18. The Petitioners cited various Articles of the Constitution including 10, 35 and 232 as well as sections 35(1) and 39 of the Universities Act, 2012, and section 7(2) of the Fair Administrative Action Act amongst other statutes.

The Respondents' assertions

Cabinet Secretary and Hon Attorney General

19. The Cabinet Secretary and the Hon Attorney General made the first assertion that the Petition did not meet the standard as set out in the case of *Anarita Karimi Njeru v R* (No. 1) – (1979) KLR 154 for failure to plead precisely the constitutional provisions violated and the manner of violation.

20. These Respondents justified the appointment of the 3rd Interested Party on the grounds that it was meritorious as he was 1 of the 3 who passed the interview and who was recommended for appointment.

21. These Respondents also justified the appointment on the ground that the appointment of the 3rd Interested Party was made upon consideration of other factors such as the need to reflect the face of Kenya and regional balance.

22. The appointment, it was contended was made after consultations between the Council and the Cabinet Secretary.

23. The Respondents also made the argument that the appointment of the 1st Interested Party was not preceded with consultations between the Council and the Cabinet Secretary and was, therefore, in contravention of the law.

5th Respondent

24. Like the Cabinet Secretary and the Hon Attorney General, the 5th Respondent also challenged the competency of the Petition on the ground that it did not meet the pleading threshold as outlined in the *Anarita* case.

25. On the merits of the Petition, the Respondent asserted that the appointment of the 3rd Interested Party was lawful because the Commission sent 3 names to the Council with a recommendation for appointment as Deputy Vice-Chancellor and that after consultations with the Cabinet Secretary, the initial recommendation to appoint the 1st Interested Party was reversed leading to the dropping of the 1st Interested Party and appointment of the 3rd Interested Party.

26. Further, this Respondent countered that the doctrine of legitimate expectation did not avail the 1st Interested Party because no promise had been made to him and also because there was no past practice that would have entitled him to have such an expectation.

27. In the view of the 5th Respondent, there was no obligation upon the Council to appoint the best-ranked applicant for the position of Deputy Vice-Chancellor since the Commission had forwarded to the Council the names of 3 persons and any one of them could be appointed.

28. To support the contention, it was argued that under Article 232 of the Constitution, other factors apart from merit or ranking were to be considered.

29. Lastly, the 5th Respondent contended that he was lawfully in office as Chairperson of the Council as he had been gazetted and the gazettelement had not been challenged.

30. On this point, it was further submitted that the Petitioners had not provided evidence that the 5th Respondent was a public officer as alleged at the material time.

1st Interested Parties position

31. According to the 1st Interested Party, the power to appoint a Deputy Vice-Chancellor was exclusively vested by section 35(1)(a)(v) of the Universities Act upon the Council, and the need to consult did not take away the legal power of the Council.

32. By recommending his appointment and then appointing him but later on reversing the appointment and appointing the 3rd Interested Party who had not been recommended, the 1st Interested Party argued that the Respondents had abrogated the normative requirements of transparency, accountability, merit and equal opportunity for appointments to public office.

33. According to the 1st Interested Party, any consultations (if at all) which led to the revocation of his appointment were not transparent.

34. To further his case, this Interested Party pointed out that a representative of the Cabinet Secretary was present in the Council meeting wherein it was resolved to have him appointed as Deputy Vice-Chancellor.

35. The 1st Interested Party further urged that he had a legitimate expectation since the Council had written to the Cabinet Secretary recommending his appointment on 30 March 2021.

3rd Interested Party's contentions

36. The 3rd Interested Party contended that the Council was not the ultimate authority in the decision to appoint a Deputy Vice-Chancellor since the applicable statute required consultations with the Cabinet Secretary.

37. In the view of this Interested Party, his appointment was the culmination of consultations between the Council and the Cabinet Secretary as contemplated by section 35(1)(v) of the Universities Act.

38. The Court has considered the Petition, affidavits and submissions.

Whether Petition raised Constitutional questions

39. The Petitions were challenging the appointment of the 3rd Interested Party to a public office.

40. Appointments to (a) public office is underpinned by the normative values and principles outlined in Article 232 of the Constitution and these include public participation, accountability, transparency, the face of Kenya, competition and merit amongst others.

41. The Petitioners alleged that the appointment of the 3rd Interested Party did not meet the normative values expected in the public service.

42. The Respondents were aware of the case advanced by the Petitioners and they responded to the case without demonstrating any prejudice suffered because of the *deficient* nature of pleadings by the Petitioners.

43. The Court also notes that under the epistolary jurisdiction of Article 22(3) of the Constitution, it can entertain proceedings on the basis of informal proceedings.

44. The Court finds the challenge based on the test set out in the case of *Anarita* not determinative of the Petition.

45. The Respondents also raised other preliminary points such as parallel proceedings which the Court find would not be decisive in the determination of the Petition as the 2 Petitions were eventually consolidated.

Merits of the Petition

46. It is not in dispute that the Commission wrote to the Council on 3 March 2021 stating that:

Based on the outcome of the interviews and having considered regional distribution/spread, gender, PWD and any other information on past performance of the candidates, the Commission recommends the following three (3) candidates for consideration for an appointment:

1. Prof Aggrey Daniel Maina Thuo.

2. Prof Peter Anyanga Otiende Wasamba.

3. Prof Francis Angawa Okere.

The purpose of this letter, therefore, is to forward the interview results to the Council to facilitate the appointment of Deputy Vice-Chancellor (Planning, Administration and Finance) after consultations with the Cabinet Secretary for Education as required by law.

47. The letter indicates that apart from merit, the Commission had considered the factors contemplated by Article 232 of the Constitution while recommending the 3 candidates.

48. In its meeting of 26 March 2021, the Council considered the Report/letter from the Commission and resolved:

To uphold the result of the interview as relayed by the PSC to Chairman of Council and thus recommend to the Cabinet Secretary (CS), Ministry of Education the appointment of Prof Aggrey Daniel Maina Thuo to the position of Deputy Vice-Chancellor (Planning, Administration and Finance) for a period of five years. The decision is on the basis of merit and performance of the candidate as relayed to the Council by the PSC and Council's interrogation of the CV of the candidate.

49. The minute is a demonstration that the Council as a collective settled on the 1st Interested Party for an appointment.

50. In the Court's view, therefore and following upon the resolution from the Council, any consultations with the Cabinet Secretary were to revolve around the appointment of the 1st Interested Party and not the other 2 candidates. The Council had made a firm resolution.

51. The Council and Cabinet Secretary did not provide any records that the recommendation to appoint the 1st Interested Party had been the subject of formal consultations with the Cabinet Secretary or that the Cabinet Secretary had declined to endorse the recommendation.

52. Similarly, in regard to the decision to substitute the 1st Interested Party with the 3rd Interested Party, the Council and the Cabinet Secretary did not provide any evidence that any formal consultations were held with the Council as a collective.

53. Equally, there was no evidence by the Respondents that consultations were held between the Cabinet Secretary and the 5th Respondent as Chairperson of the Council, on behalf of the Council.

54. And since the decision ultimately lies with the Council, the Council ought to have met again to approve any outcome of the consultations between its Chair and the Cabinet Secretary if the full Council was not involved in the consultations.

55. The Council did not place any records before the Court to demonstrate that it gave its imprimatur to the appointment of the 3rd Interested

Party as the Deputy Vice-Chancellor.

56. In this Court's considered view, the consultations as envisaged under section 35(1)(a)(v) of the Universities Act, 2012 cannot be conducted informally as the same are subject to the values of transparency, accountability and equal opportunity in the public service.

57. The Court is satisfied that the reversal of the recommendation to appoint the 1st Interested Party and the decision to appoint the 3rd Interested Party instead did not meet the normative standard set by the Constitution.

Conclusion and Orders

58. From the foregoing, the Court finds merit in the Petition and orders:

(a) A declaration is hereby issued that the appointment of Francis Angawa Okere, the 3rd Interested Party herein as the Deputy Vice-Chancellor (Planning, Administration and Finance) of Jaramogi Oginga Odinga University of Science and Technology is unconstitutional, invalid, null and void.

(b) An order is hereby issued invalidating the appointment of Francis Angawa Okere, the 3rd Interested Party herein as the Deputy Vice-Chancellor (Planning, Administration and Finance) of Jaramogi Oginga Odinga University of Science and Technology.

59. The Petition was in the public interest. Each party to bear its own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 26th day of January 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioners Mr Nyanga instructed by Mtalaki & Associates Oduor Okello & Co. Advocates

For 1st – 3rd Respondents Mr Cheruiyot, Office of the Attorney General

For 4th Respondent Ms Nyamita, Legal Officer

For 5th Respondent Mr Muga instructed by Prof Tom Ojienda & Associates Advocates

For 1st Interested Party Ms Mwangi instructed by Nderi Mwangi Advocates

For 2nd Interested Party absent

For 3rd Interested party Mr Oluoch instructed by Oluoch & Co. Advocates

Court Assistant Chrispo Aura