



**Mulongo v Public Service Commission & 3 others (Petition
E031 of 2022) [2022] KEELRC 1387 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1387 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E031 OF 2022
NZIOKI WA MAKAU, J
JUNE 27, 2022**

BETWEEN

MESHACK ONZERE MULONGO PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. In the Petition and supporting affidavit dated 17th February 2022, the Petitioner is seeking a myriad of declaratory and prerogative orders against the four (4) Respondents. He is aggrieved with the 1st to 3rd Respondents' failure to declare results or conclude the process of recruitment of the Deputy Vice-Chancellor (Academic and Student Affairs) at Meru University of Science and Technology.
2. The Petitioner avers that in the year 2019, the Respondent advertised for the position of Deputy Vice-Chancellor (Academic and Student Affairs) for Meru University after which several people applied for the position. That the 1st Respondent then published a list of 28 persons with professorial qualifications who had applied for the said position and also published a list of 8 persons holding professorial positions as having been shortlisted for interview for the said position. That simultaneously, the 1st Respondent also advertised for the positions of Deputy Vice-Chancellor (Administration, Finance and Development) at Kibabii University, and Deputy Vice-Chancellor (Administration, Finance and Planning) at Laikipia University. That the 1st Respondent further advertised for interviews for management positions in Kibabii University, Masinde Muliro University of Science and Technology, Kaimosi University College, Kenyatta University and Taita Taveta University. It is the Petitioner's contention that whereas the 1st Respondent has announced results of



- and concluded the process of recruitment of the above-named officials at Masinde Muliro, Kaimosi, Kenyatta, and Taita Taveta Universities, it has without justification failed to do so for Meru University.
3. The Petitioner avers that pursuant to Article 35 of the Constitution of Kenya, he by Request for Information dated 2nd December 2021 demanded the 1st and 2nd Respondents to furnish him with information on the recruitment process for the position of Deputy Vice-Chancellor (Academic and Student Affairs) for Meru University. That to the extent that the Respondents have failed, refused and or neglected to respond to his said Request for Information, they have violated Article 35 of the Constitution that entitles him as a citizen, to: information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. That the Respondents are also in violation of Article 41 of the Constitution because they subjected candidates at Meru University to an interview process for which it has declined to release results in an unfair labour practices. That they have further violated Article 232 of the Constitution which obligates the Respondents to exercise accountability for administrative acts and to practise transparency and provision to the public of timely and accurate information. That the Respondents are involved in imprudently using public resources and have failed the test of accountability for administrative acts and that it is just and equitable that these issues be admitted to pave way for the recruitment of the Deputy Vice-Chancellor (Academic and Student Affairs) at Meru University of Science and Technology without any further delay.
 4. In response, the 1st Respondent filed a Replying Affidavit sworn on 14th March 2022 by Mr. Simon Rotich who avers that the Public Service Commission (PSC) conducted interviews on 23rd January 2020 and the results were forwarded to the Council vide a letter dated 17th February 2020 for the council to facilitate the appointment of the Deputy Vice- Chancellor (Academic and Student Affairs), after consultations with the Cabinet Secretary for Education. That upon the 1st Respondent forwarding the results of the interviews, it has no other role to play in the consideration of the results by the University Council in consultation with the Cabinet Secretary and that the Petitioner's averments are thus not true. He prays that the Petition being unmeritorious and bad in law, the same should be dismissed with costs to the 1st Respondent.
 5. The 2nd Respondent filed a Replying Affidavit sworn on 14th March 2022 by Prof. Bosire Monari Mwebi who confirms that the 2nd Respondent did receive the recommendations from the PSC and was supposed to seek concurrence with the Cabinet Secretary Ministry of Education as provided for under Section 35(1)(a)(v) of the Universities Act No. 42 of 2012. That shortly after the 2nd Respondent wrote to the CS of Education for concurrence, it received a circular from the Ministry of Education dated 14th July 2021 instructing the Chairs of University Councils, Vice-Chancellors and Principals to undertake restructuring exercises of their institutions. The deponent avers that therefore no appointment can be done while the process of restructuring is ongoing since the outcome of the exercise could determine if the position subject matter of this suit shall be retained by the 2nd Respondent. That even if there was no restructuring, the hands of the 2nd Respondent would be tied for as long as concurrence by the CS Ministry of Education has not been received. Furthermore, since the Petitioner herein neither applied nor was shortlisted for the said position at Meru University that is subject of this petition, he is not entitled to the information sought. It is his averment that the Petitioner has no claim whatsoever against the 2nd Respondent.
 6. The 3rd Respondent filed a Replying Affidavit sworn on 16th March 2022 by Mr. Simon Nabukwesi who denies that the 3rd Respondent has failed, refused or neglected to respond to the request for information as alleged by the Petitioner. He avers that the Petitioner does not have evidence to support the allegation that he sought the information from the 3rd Respondent and the same was denied



and that the Petitioner ought to show how the denial of information would affect the enforcement or protection of his fundamental rights and freedoms. He asserts that the 3rd Respondent kept the recruitment of the Deputy VC in abeyance due to the restructuring taking place and whose reports he awaits from the institutions.

7. Petitioner's Submissions

The Petitioner submits that this Court should hold that there is no evidence that the 3rd Respondent acted on the letter dated 4th March 2020 and has not done so to date and to further find that the Respondents' argument that the restructuring exercise is what stalled the process of filling the Deputy Vice-Chancellor Position which was at its final stage. He submits that Article 24(1) of *the Constitution* of Kenya, 2010 provides that a right in the Bill of Rights shall not be limited except by law and therefore there was no law that allowed the 2nd Respondent to violate the rights of the persons who applied for the position advertised. That in fact the circular dated 14th July did not direct any University to forestall any pending appointments. On this submission he cites the case of *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties)* [2020] eKLR wherein the High Court in quoting the Kosovo case in *President of the Republic of Kosovo (Applicant) - Constitutional Review of the Decision No [Government] 15/01, 23 March 2020*, noted that to confirm whether a limitation of right is unconstitutional the first question the court should ask is whether the limitation of the right is "prescribed by law" and if the answer is negative, the Court stated that the constitutional analysis ends there as no limitation of the rights and freedoms guaranteed by *the Constitution* can be done otherwise than by "law" of the Assembly and to the extent permitted by law. It is the Petitioner's submission that since the Respondents have not pointed out the law they relied on to limit the rights of the applicants, it should only be concluded that the Respondents violated the rights of the applicants.

8. The Petitioner further submits that the Respondents, in short, violated his right to access to information when it failed to provide the information he sought. He cites the case of *Katiba Institute v President's Delivery Unit & 3 Others* [2017] eKLR where the court held that once a citizen places a request to access information, the information should be availed to the citizen without delay and that Article 35 of *the Constitution* does not place conditions for accessing information. He submits that the 2nd Respondent has conveniently failed to explain which part of the information requested for would undermine its ability to give adequate judicious consideration to the matter or how it would do so. He is of the view that the 1st to 3rd Respondents were bound by Articles 35(1)(a) and 232(1)(f) to provide the information sought and they failed in this duty and that Article 231(1)(f) requires transparency and provision to the public of timely accurate information in the public service.

9. Respondents' Submissions

The 2nd Respondent submits that the Petitioner does not deserve the orders sought as he has no constitutional or legal basis for seeking the said information. That the Petitioner describes himself as the Branch Chairman of the Kenya Universities Staff Union and indicates that he brings the petition in the public interest, but does not produce any evidence to prove the same and what right or fundamental freedom he seeks to protect. The 2nd Respondent cites the case of *Nairobi High Court Petition No. 29 of 2014, Charles Omanga & Others v The Hon. Attorney General & Another* [2014] eKLR where the court dealt with what a petitioner should prove in order to prove that access to information is required and held that "...Under Article 35(1)(b) of *the Constitution*, the petitioner must demonstrate that the information sought is required for the protection or exercise of any right or fundamental freedom. "

10. It is the 2nd Respondent's submission that however should the court find that the Petitioner meets the requirements set out under *the Constitution* and the *Access to Information Act* (No. 31 of 2016), it



ought to then deal with the issue whether the 2nd Respondent would be justified in withholding the same pending communication from the Cabinet Secretary, Ministry of Education. That guidance on this issue is found at Section 6(1)(g) of the [Access to Information Act](#) which provides that pursuant to Article 24 of [the Constitution](#), the right to access to information under Article 35 of [the Constitution](#) shall be limited in respect of information whose disclosure is likely to significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remain the subject of active consideration. That from the replying affidavit by the 2nd Respondent, it is clear that the matter of recruitment subject of this petition is still under active consideration. On this submission it relies on ELRC at Nairobi Petition No. 206 of 2019 [Okiya Omtatah Okoiti v Public Service Commission & Others](#) where the court upheld the supremacy of Section 35(1)(a)(v) of the [Universities Act](#) over Section 39(1)(a) of the said Act. The 2nd Respondent submits that the Circular of 14th July 2021 should be viewed in light of the powers bestowed upon the CS including the restructuring of the 2nd Respondent and for the Court to then find that the recruitment for the position subject of this suit cannot proceed.

11. The 3rd and 4th Respondents submit that the right to information as envisioned in Article 35 of [the Constitution](#) ought to be exercised when it is to assist in the protection of another right. That however the Petitioner in the present case has not stated how the information he seeks will help in exercising or protecting any of his rights. That to this end, the Respondents should not be compelled to grant access to the said information and that this Court should be persuaded by the case of [Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others](#) (10/99) [2001] ZASCA 56 as quoted in the case of [Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others](#) [2013] eKLR where the Court held that "...in order to make out a case for access to information . . . an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right. "
12. The 3rd and 4th Respondents further submit that the claim made in this Petition is private in nature does not hence satisfy the public interest requirement expounded in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR where the Supreme Court held that conservatory orders should consequently be granted on the inherent merit of a case, bearing in mind the public interest. That it is in the best interest of justice that this Honourable Court declines to grant the Orders sought in the Petition.
13. The Petition seeks a myriad of declaratory and prerogative orders. In the case of [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others](#) supra the learned Judges of the Supreme Court (Ojwang, Wanjala SCJJ) held as follows:-

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. (emphasis mine)

14. The Petitioner has demonstrated that the Respondents conducted interviews but the results of the interviews have been withheld ostensibly in response to a Ministry of Education circular. Is there a



sufficiency of interest, specifically public interest in the declaration of the outcome? On the one hand, the Petitioner has demonstrated there is sufficiency of interest that goes beyond a personal interest as he is not one of the aspirants for the jobs the Respondents sought to have filled in the recruitment exercises that have not resulted in actual appointments. As such the Petition demonstrates the intention to protect the welfare or well-being of the general public and society in as far as the appointments go. On the other hand, applying the test in the Gatirau Peter Munya case, the orderly functioning of public entities eschews the wastage of resources as would occur if the Respondents do not conclude the recruitment process within the dictates of the law. At present it is asserted there was a directive from the Ministry dated 14th July 2021 instructing the Chairs of University Councils, Vice-Chancellors and Principals to undertake restructuring exercises of their institutions. Granted that the same was issued almost a year ago, it would be in the interests of justice to allow the conclusion of the restructure which of necessity must be concluded before the anniversary of the directive by the Minister of Education and thereafter the institutions named as Respondents in this Petition would have the opportunity to recruit in accordance with the new structures in place. The Petitioner though perfectly entitled to seek the reliefs in the public interest, having not made out a fit and proper case for the myriad reliefs he seeks, the Petition is hereby dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

