



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Masinde Muliro University of Science and Technology & another; Muhehe & 5 others
(Interested Parties) (Petition E005 of 2021) [2022] KEELRC 1643 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E005 OF 2021**

JW KELI, J

JULY 7, 2022

**IN THE MATTER OF ARTICLE 1,2,10,22,23,27,41,47,48,50,73,75,232
AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
10,27 AND 232 OF THE CONSTITUTION OF KENYA 2010, RULE 3 OF
THE HARMONIZED CRITERIA & GUIDELINES FOR APPOINTMENT
AND PROMOTION OF ACADEMIC STAFF IN UNIVERSITIES IN KENYA**

AND

**IN THE MATTER OF THE ALLEGED UNCONSTITUTIONAL
AND IRREGULAR APPOINTMENT OF THE MASINDE MULIRO
UNIVERSITY OF SCIENCE AND TECHNOLOGY UNIVERSITY SENIOR
LECTURER, ASSOCIATE PROFESSORS AND FULL PROFESSORS**

AND

**IN THE MATTER OF THE DETERMINATION THAT THE APPOINTMENT
OF THE MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY
SENIOR LECTURER ASSOCIATE PROFESSORS AND FULL PROFESSORS
LACKED FAIR COMPETITION AND MERIT AS THE BASIS OF APPOINTMENT
AND PROMOTIONS BUT RATHER MARRED WITH DISCRIMINATIONS**

BETWEEN

FERDINAND CHIRURE NYONGESA PETITIONER

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY 1ST RESPONDENT**

**VICE CHANCELLOR MASINDE MULIRO UNIVERISTY OF SCIENCE AND
TECHNOLOGY 2ND RESPONDENT**



AND

MR. JOHN MUHEHE INTERESTED PARTY
DR. JANET N. KASILLY INTERESTED PARTY
DR. BERNADETTE SABUNI INTERESTED PARTY
DR. ALEXANDER KHAEMBA INTERESTED PARTY
DR. JOSEPH NASONGO WAMOCHA INTERESTED PARTY
DR. JUDAH NDIKU INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed an application by way of Notice of Motion dated February 23, 2022 seeking leave to be granted to amend his Petition dated September 9, 2021 to enjoin Kennedy Nyongesa as a Co-petitioner and the Chairman of the Council of Masinde Muliro University of Science and Technology as the 3rd Respondent.
2. The Application is premised on the grounds that the University Council that has the mandate in appointment and promotion of staff which inadvertently was left out; the enjoinder of the council will assist the court to determine the real question in controversy between the parties; That the amendment shall not work injustice to the adverse parties, and the amendment shall avoid multiplicity of proceedings. The Application is supported by affidavit of the Petitioner (Ferdinand Chirure Nyongesa) sworn on February 23, 2022 which adds that the intended 2nd Petitioner suffered the same fate like him which fate can be determined by this petition and for all.
3. The Petitioner/Applicant further filed supplementary affidavit sworn on the May 9, 2022 in response to the replying affidavit of the Respondent and annexed authority to swear affidavit by Intended Petitioner and a letter of his appeal on appointment.
4. The Application is opposed.

Respondents position

5. The Respondents filed Replying affidavit sworn on the March 28, 2022 by Prof. Solomon Shabairo in opposition to the application who avers he is the Current Vice Chancellor of the 1st Respondent University. The Respondents state that the Applicant cannot purport to speak for the intended co-petitioner Kennedy Nyongesa who has not challenged the lack of promotion decision against him. That the intended co-petitioner has not complained to the 1st Respondent of unfair treatment and the allegations by the Petitioner are merely hearsay.
6. The Respondents state that the prayer to enjoin the Chair of the Council of the University is an afterthought and an attempt by the Petitioner to counter the contention by the Respondent who had averred that the 2nd Respondent did not chair the interviews that the Petitioner undertook. That the enjoinder of the Chairman of the Council of the 1st Respondent will not change the Response by the Respondents as the 2nd Respondent is an ex-officio member of the Council neither will it determine the real question in controversy but an attempt by the petitioner to drag this case. That the prayer to enjoin the intended co-petitioner is an attempt by the Petitioner to counter the contention of the Respondents and the interested parties who had averred that save for the 1st interested party



all the other interested parties had been promoted to Associate professors and from professors and therefore bringing in of the intended petitioner who had applied to be full professor is an attempt by the Petitioner to justify the inclusions of the 2nd to 6th interested parties.

1st, 3rd & 4th interested parties position

7. The Position of the 1st, 3rd and 4th interested parties on the application, vide grounds of opposition dated 28.3.2022 mirrors that of the respondents outlined above. They add that the intended co-petitioner has never complained of the lack of promotion under the internal mechanisms of the 1st Respondent or appealed. That the application is tainted with ill will, calculated to take this court in circles, is an abuse of the court process and undermines access to justice and compromises the now established principle of judicial economy.
8. The Application was canvassed by way of written submissions. The Petitioner/Applicant's written submissions are drawn by Wamalwa Simiyu & Company Advocates, dated 6th May 2022 and received in court on the May 10, 2022. The Respondents' written submissions dated April 22, 2022 are drawn by Gilbert Tarus Senior State Counsel for Attorney General. The 1st, 3rd, and 4th interested parties did not lodge written submissions in court as at time of writing this ruling.

Determination

9. The Petitioner /Applicant identified 2 issues for determination in this ruling, namely:-
 - (a) Whether this Honorable court should grant leave to the applicant to amend his Petition.
 - (b) Whether the amended Petition should be deemed duly filed upon payment of the requisite court fees.
10. The Respondents identified the issues for determination to be:-

a. Whether the Applicant is entitled to orders sought.

11. Having considered the issues raised by the parties and their pleadings the court is of the considered opinion that the issue for determination in the Application is whether the Application is merited.

Whether the Application is merited.

The Applicable law.

12. The Application is brought under order 8 rule 3 (5) order 51 rule 1, 3 & 4 of the *Civil Procedure Rules*. Order 8 rule (3) (1) of the *Civil Procedure Rules* provides that:-“ the court may at any stage of the proceedings , or such terms as to costs or otherwise as may be just and in such a manner as it may direct, allow any party to amend his pleadings”.
13. Order 1 Rule 10 (2) of the *Civil Procedure Rules* provides that:- “ The court may at any stage of proceedings order that the name of any person who ought to have been joined and whose preservice may be necessary in order to enable the court effectually and completely adjudicate upon and settle all question involved in the suit be added. This court's positions that same test or rules the litigation under Civil litigation being the Civil Procedure Rules apply with even force in constitutional petitions.
14. Rule 18 of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practices and Procedure Rules* 2013 (herein after “ the Matunga Rules”) provides ‘ a party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court”.



15. The Applicant has sought to be granted leave to amend and enjoin other parties to his petition. Rule 5 (d) of the Mutunga Rules provides:- “ The court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear just -
- (i)**
Order that the name of any party improperly joined, be struck out; and
- (ii) that the name of any person who ought to have been joined or whose preservice before the court may be necessary in order to enable the court adjudicate upon and settle the matter be added”.
16. The test for amendment of pleadings was set out in *Central Kenya Ltd -vs- Trust Bank Ltd & 5 others* (2000) eKLR where the court of Appeal at Nairobi held “ That the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. The policy of the law is that amendments to pleadings are to be freely allowed. Unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated in costs”.
17. On joining of parties in the same decision(supra) the Court of Appeal held that , “the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. Applying the above Provisions of the law and the decision of the court of appeal, it is the finding of this court the granting of leave is an exercise of discretion of the court guided by the law and facts.”
18. The intended Co-petitioner has not sworn any affidavit in the suit. It was disclosed he had applied for a different position for the petitioner. The cause of action by the Petitioner/ Applicant is not similar or related to the case of the intended co-petitioner. The court notes the supplementary affidavit was filed on May 10, 2022 after the Respondent’s had filed their submissions. Nevertheless the said affidavit does not meet the test of the intended party being necessary for the effectual and complete adjudication of all questions involved in the suit. The Application for leave with respect to the intended co-petitioner is disallowed for lack of merit.
19. On the Application to join the Chairman of the Council as the Respondent. The Applicant avers that it is the University Council that is mandated to appoint and promote staff for the 1st Respondent hence joining it will assist the court to determine the real question in controversy between the parties.
20. The Respondents submit that the prayer to introduce the Chair of the University Council as the 3rd Respondent is an afterthought and an attempt by the Petitioner to counter the contention by the Respondent who have averred that the 2nd Respondent did not chair the interviews that the Petitioner undertook and further the enjoinder of the Chair of the Council of the 1st Respondent will not change the response of the Respondents as the 2nd Respondent is an ex-officio member of the Council neither will it determine the real question in controversy but an attempt by the Petitioner to drag the case.
21. The Respondents’ in replying affidavit paragraph 5 averred that it is the Chairman who chairs the Council of the 1st Respondent which does the promotions of staff.
22. The Respondents and the interested parties did not plead any prejudice they would suffer that cannot be compensated by way of costs if the application to join the Chairman of the Council is allowed. Applying the law on amendments and the Central Kenya Ltd decision (supra) the court finds that the Chairman of the Council of the 1st Respondent is a necessary party having chaired the meeting



where the impugned decision of the promotion of the Petitioner/Applicant was made. The joining of the Chairman meets the test of necessary party for the effectual and complete adjudication of all the questions involved in the Petition. The court also finds that the test of lack inordinate delay is met the petition having been filed on 30th September 2021 and application filed on February 24, 2022.

Final orders

23. The court has found merit on joining of the Chairman of the Council of the 1st Respondent only.
24. Consequently leave is granted to the Petitioner to file and serve amended petition to join the Chairman of the 1st Respondent within 14 days of this Ruling.
25. Costs in the cause.
26. It is so ordered.

SIGNED, DATED, DELIVERED AT BUNGOMA THIS 7TH DAY OF JULY 2022.

J. W KELI,

JUDGE.

In the Presence of:-

Court Assistant: Ms. Wesonga

Petitioner: Absent

Respondents: Mr. Tarus, Senior State Counsel

1st to 4th Interested Parties- Mr. Magaya

5th and 6th Interested parties- Mr. Shifwoka

