Wainana v Head of Public Service & 3 others (Petition E129 of 2022)
[2022] KEELRC 1437 (KLR) (4 August 2022) (Ruling)

Neutral citation: [2022] KEELRC 1437 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E129 OF 2022

JK GAKERI, J

AUGUST 4, 2022

BETWEEN

PAUL KURIA WAINANA ..... CLAIMANT

AND

HEAD OF PUBLIC SERVICE ..... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION ..... 2ND RESPONDENT

COUNCIL OF KENYATTA UNIVERSITY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. Before me for determination is a Notice of Motion Application dated 21st July 2022 filed under Certificate of Urgency seeking orders:

    i. That this Application be certified urgent and heard ex-parte in the first instance for the purposes of prayers 2, 3, 4, 5, 6 & & herein.

    ii. That pending the hearing and determination of the Application inter-partes, a conservatory order be and is hereby issued suspending the decision contained in the letter dated 12th July, 2022 by Professor Crispus Kiamba purporting to suspend Professor Paul K. Wainaina as Vice Chancellor and appointing Professor Waceke Wanjohi as the Acting Vice Chancellor.

    iii. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to issue a temporary order suspending the implementation of the decision contained in the letter dated 12th July, 2022 by Professor Crispus Kiamba in toto suspending, terminating and/or dismissing the Petitioner from the Office of the Vice-Chancellor, rendering his position vacant and/or revoking his salary.

iv. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to issue a temporary order barring the advertising and/or appointment of any persons as the Vice-Chancellor of Kenyatta University.

v. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to issue a temporary order staying any or further disciplinary proceedings as against the Petitioner as may be initiated by the Respondents.

vi. That pending the hearing and determination of the Applicant's Petition a conservatory order be and is hereby issued suspending the decision contained in the letter dated 12th July, 2022 by Professor Crispus Kiamba purporting to suspend Professor Paul K. Wainaina as Vice Chancellor and appointing Professor Waceke Wanjohi as the Acting Vice Chancellor.

vii. That pending the hearing and determination of this Applicant's Petition this Honourable Court be pleased to issue a temporary order suspending the implementation of the decision contained in the letter dated 12th July, 2022 by Professor Crispus Kiamba in toto suspending, terminating and/or dismissing the Petitioner from the Office of the Vice-Chancellor, rendering his position vacant and/or revoking his salary.

viii. That pending the hearing and determination of this Applicant's Petition, this Honourable Court be pleased to issue an order barring the advertising and/or appointment of any persons as the Vice-chancellor of Kenyatta University.

ix. That pending the hearing and determination of this Applicant's Petition, this Honourable Court be pleased to issue a temporary order staying any or further disciplinary proceedings as against the Petitioner as may be initiated by the Respondents.

x. That this Honourable Court be pleased to issue such further or other orders as may appear to it just and convenient.

xi. That the cost of this application be provided for.

2. The application is stated under (Articles 22, 23, of *The Constitution* of Kenya, Rule 4, 13, 19 and 23, of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules of 2013, Order 51 of the *Civil Procedure Rules*, 2010, and all other enabling provisions of the law as set out in the various statutes cited in support of the petition).

3. The application is supported by the affidavit of Professor Paul Kuria Winainaand on the following grounds.

i. That on the 4th July 2022 and the 7th July 2022, the Head of Public Service Mr. Joseph Kinyua the 1st Respondent herein unconstitutionally without any legal authority and in excess of his mandate issued orders directing the applicant the Vice-Chancellor of Kenyatta University to surrender the Title Deed L.R No. 11026/2 with the view to enable the Ministry of Lands and Physical Planning carry out excision as purportedly directed by the cabinet secretary.

ii. That on the 5th July 2022 the Chairman of Kenyatta University responded to the said letter and highlighted the constitutional and statutory anomalies in the purported process of acquisition of the university's parcel of land.

iii. That due to the refusal of the applicant and the council to accede to the said directive, the President of the Republic of Kenya and the Cabinet Secretary, Ministry of Education sought

to disband the Kenyatta University Council and suspend the Vice-Chancellor the applicant herein from office.

iv. That the 1st and 2nd Respondent have acted in excess of their powers to purport to suspend the Vice-Chancellor and a professor of Kenyatta University a prerogative reserved under the law for the University Council.

v. That injustice has been perpetuated upon the applicant and prays that the honourable court remedies the aid injustice by urgently staying the impugned suspension.

vi. That the decision contained in the letter dated 12th July 2022 purporting to suspend the applicant and appoint Professor Waceke Wanjohi as the acting Vice chancellor is illegal, unconstitutional, arbitrary and utterly unprocedural and must be quashed by this Honourable court.

vii. That the actions of the president of the Republic of Kenya and the Cabinet Secretary Ministry of Education as set out in the petition are manifestly unconstitutional and unlawful and are prejudicial to the management of the affairs of Kenyatta University and the applicant herein and ought to be halted.

viii. That the applicant stands to suffer irreparable risk should the interlocutory orders sought are not be granted and no prejudice will be suffered by the respondents if the same is granted.

ix. That the right to a fair hearing of petitions in this nature include the inherent right to order stay of the injurious administrative action that infringes constitutional rights.

x. That the applicant stands to suffer a breach of his fundamental rights and freedoms as envisaged under *the Constitution* of Kenya if the Head of Public Service and the Cabinet Secretary Ministry of Education are allowed to continue with their irregular actions if the orders sought are not granted.

4. The affidavit of Professor Paul Kuria Wainainareinforces the facts and the law relied upon to urge the application.

5. The Applicant's further swore an affidavit on 28th July, 2022 in which he raises issues not captured in the previous affidavit.

6. The affiant states that on the 8th July 2022 the Kenyatta University Council was hurriedly reconstituted by the Cabinet Secretary for Education through Gazette Notice 8049 which amounted to the disbandment of the Kenyatta University Council.

7. That the reconstituted council without according the applicant a right to be heard arrived at a decision to suspend him for 30 days to allow investigations of gross misconduct which is not in compliance with the provision of section 69 of the *Public Service Commission Act*.

8. The affiant contends that the letter dated 12th July 2022 merely accuses him of gross misconduct an allegation that is not particularized and for reasons that are unknown.

9. The affiant further states that the court should take judicial notice of the pronouncements of the head of state and President of the Republic of Kenya while launching the WHO facility in the contested Kenyatta University land. "I will deal swiftly and effectively .....I will go home with them in three weeks"

10. The affiant states that he is apprehensive that a decision has already been reached from the utterances and the letters and the intention to subject him to a disciplinary committee is to ultimately terminate his employment.

11. The affiant is apprehensive that the intended disciplinary action is manifestly biased, vague and should the court orders issued on 26th July 2022 be vacated he will be condemned unheard and his rights to fair labour practices and proper hearing will be violated.

Respondent's Case

12. In response to the application the 1st,2nd and 4th respondents filed grounds of opposition dated 28th July 2022 which state the following:

13. That the Honourable court lacks jurisdiction as there is no employer-employee relationship between the petitioner and the 1st, 2nd and 4th Respondents and any alleged directives and decisions of the said respondent cannot be challenged in this court by virtue of the provisions of Article 162 of *the constitution*.

14. That the court lacks jurisdiction to hear and grant the orders sought in the application as the matter is sub-judice as there is Nairobi ELRC Petition 123 of 2022, Faith Ngugi & 2 others vs Attorney General pending before this honourable court.

15. That the suspension of the petitioner – Vice-Chancellor is a purely administrative process within the jurisdiction of the council of the institution and the same is premature before the court and the court has no right to interfere with internal processes.

16. That the proceedings herein are premature as no adverse action has been taken against the applicant to warrant the institution of these proceedings and the same is in contravention of the doctrine of fair administrative action actand constitutional avoidance.

17. That the matter does not fall in the purview of public interest litigation and it is purely an employer-employee issue between the petitioner and the 3rd Respondent.

18. That the application is frivolous, vexatious and an abuse of the court process.

19. The 2nd Respondent opposed the application by way of a replying affidavit sworn by Simon Nabukwesi the Principal Secretary in the State Department of University Education and Research.

20. The affiant states that section 35 of the *Universities Act* No. 42 of 2012 provides for the governing organs of public universities which include a council whose mandate includes employment of staff and all employment-related issues including staff discipline.

21. He further states that the Council of Kenyatta University is properly constituted and following the directions given in ELRC 352 of 2016 *Josephat K Mwatela vs technical University of Mombasa Council and 2 others*, the judge observed that the council of the public university is the employer of the Vice-Chancellor and other staff of the university.

22. The affiant states that it's therefore in order for the council to set up an Ad-Hoc Committee to investigate the issues that led to the suspension of the petitioner.

23. The affiant further states that the applicant has not demonstrated how his fundamental rights and freedoms under *the constitution* have been violated or threatened as the council was ready to accord him a fair hearing.

24. Further, the affiant states that ELRC Petition 123 of 2022 Faith Ngugi & 2 others vs Attorney General and another raises issues that are substantially similar to the ones raised in this petition which amounts to an abuse of the court process and urges the court to dismiss the application with costs.

25. The 1st Respondent opposed the application by way of a replying Affidavit sworn by Joseph K. Kinyua on 28th July 2022.

26. The affiant states that the Cabinet approved the replanning of Kenyatta University land on the basis of Article 60 of *the Constitution* which action was in pursuit of public interest.

27. The affiant states that the petitioner being an employee of Kenyatta University, a public institution that executes public function is duty bound to implement cabinet decisions.

28. He further states that Kenyatta University Council was variously consulted on the intended decision and benefit of the replanning exercise but the petitioner refused and or disobeyed a lawful instruction.

29. The affiant states that Kenyatta University Council is responsible of undertaking the disciplinary action against the petitioner and not the 1st and 2nd Respondents.

30. He states that the suspension of the petitioner was undertaken by the council and that the court cannot interfere with the employers internal disciplinary proceedings unless the court is satisfied that the process is marred with irregularities.

31. The affiant states that the council appears to have just initiated the disciplinary process through the issuance of the 30 days suspension letter pending investigations and the petitioner through the acquisition of the interim orders has sought to interfere with the conclusion of the investigations.

32. The affiant states that the petitioner has not demonstrated how his fundamental rights and freedoms have been violated or threatened.

33. The affiant states that the application has not met the threshold of grant of interlocutory injunctions as set out under *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358.

34. He states that the petitioner has not established a prima facie case with a possibility of success nor established that they will suffer irreparable injury that would not be adequately compensated by way of damages.

35. The third respondent opposed the application by a replying Affidavit sworn by Professor Crispus Makau Kiamba, the Chairman of the Council of Kenyatta University on 28th July 2022.

36. The affiant states that the 3rd Respondent held a special meeting on 12th July 2022 and made the following resolutions that were communicated to the applicant.

    a. Professor Paul K. Wainaina was suspended as the Vice-Chancellor for a period of 30 days to allow investigations of gross misconduct against him.

    b. Professor Waceke Wanjohi the Deputy Vice-Chancellor academics was appointed as the acting Vice-Chancellor for a period of 30 days.

37. The affiant states that an employer enjoys the prerogative to suspend an employee as an administrative measure pending investigations which is a primary step in a disciplinary process.

38. The affiant further states that the applicant misrepresented the content of the letter dated 12th July 2022 as it did not amount to a termination letter and was not written at the behest of the 1st and 2nd Respondent.

39. The affiant states that an Ad Hoc Committee was formed to look into the issues that prompted the suspension in accordance with section 37 of the *Universities Act*, 2012.

40. The affiant states that if the application is allowed and the orders granted, the 3rd respondent in the exercise of its statutory mandate will be unjustifiably and unlawfully fettered.

41. The affiant further states that there exists another petition that seeks the same orders being petition E123 of 2022 Faith Ngugi & 2 others vs The Attorney General pending ruling.

42. The affiant urges the court to dismiss the application.

Petitioners/Applicant's Submissions

43. The applicant identifies the following issues for determination;

    i. Whether the court has jurisdiction to hear and determine the Application and the Petition herein;

    ii. Whether the matter herein is sub-judice;

    iii. Whether the Petition violates the doctrine of Constitutional avoidance;

    iv. Whether the Applicant's Suspension and the intended disciplinary process would be in breach of his constitutional rights;

    v. Whether the Petitioner/Applicant has a prima facie case and met the threshold for issuance of interim injunctive orders sought;

    vi. Whether the decision-making process was legally sufficient such that it was done by a properly constituted Council; and

44. On the first issue the counsel for the applicant submits that the court is established pursuant to the provisions of Article 162(2) of *the constitution* and its jurisdiction set out under Article 165(5)(b) and section 12(1) of the Employment and *Labour Relations Act*, 2011.

45. He submits that the provisions are meant to safeguard against political patronage and further submits that the decision by the respondent contained in the letter dated 12th July 2022 purporting to suspend the applicant falls within the jurisdiction of the court.

46. He further submits that the matter concerns the constitutionality of disbarment of The Kenyatta University Council and suspension of the Vice-Chancellor and their purported replacement to enable unconstitutionally and unlawfully annex and alienate the university land and the court herein is vested with jurisdiction to deal with constitutional issues. The applicant relied on the holding in *Okiya Omtatah Okoiti vs Kenyatta University Council & 4 Others*, Nairobi ELRC Petition No 89 of 2015 where the Court correctly and effectively addressed its jurisdiction to entertain such matters, a finding was made that the court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it relating to employment and labour relations; including the violation of rights and the interpretation of *the Constitution*, including questions of contradiction between any law and *the Constitution*.

47. The applicant submits that the court has jurisdiction pursuant to section 12 of the *Employment and Labour Relations court Act*.

48. On the 2nd issue on sub-judice the applicant submits that ELRC Petition E123 of 2022 has similar respondents and emanates from the same subject matter but the petitioner herein is not the petitioner in the said petition and the petitioners in the said matter has no authority to plead on matters touching employment of the Vice-Chancellor Kenyatta University.

49. Further the applicant submits that the orders sought in the two petitions are different and unique to the respective petitioners therefore the matter herein is not sub-judice.

50. On the third issue the 1st 2nd and 3rd respondents have raised an objection on the basis of the doctrine of constitutional avoidance, they purport that the proceedings herein are premature as no adverse action has been taken against the Vice-Chancellor.

51. The applicant relies on the Supreme Court decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR where the court observed thus: -

> "We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Con.s1i1u1ion.ol-Avoidonce Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:
>
> > "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion."

52. The applicant submits that the matter herein touches on the constitutionality of the disciplinary process and the only available remedy was the Public Service Commission and the said office is under the same oppressor which is not an appropriate remedy to solve his concerns.

53. The applicant submits that the application herein seeks to enforce fundamental rights and freedoms of the petitioner therefore the court is not barred by the doctrine of exhaustion of the respondent's internal mechanisms.

54. The applicant further submits that in addition to the matter being a matter of protection and enforcement of the applicant's fundamental rights it also regards public interest as the subject matter in question is university land.

55. The applicant submits that the actions of the President of the Republic of Kenya, the Head of Public Service and Cabinet Secretary, Ministry of Education as set out in the petition are manifestly unconstitutional and unlawful and are prejudicial to the management of the affairs of Kenyatta University and the applicant and ought to be halted pending the hearing and determination of the questions raised in the petition.

56. On the fourth issue the applicant submits that the 3rd respondent's move to serve the applicant with a letter inviting him to the disciplinary committee he was trying to cover its tracks with a predetermined motive to eventually suspend the applicant.

57. The applicant submits that the Cabinet Secretary for Education hurriedly reconstituted a council which without according to the applicant an opportunity to be heard or defend himself arrived at a decision to suspend him for 30 days to allow investigations for gross misconduct.

58. The applicant submits that he could not seek redress from the same committee that had disbanded the original committee hence his seeking redress in court. Reliance is made on holding in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR where the Judge held that: -

> "However, in a case where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or stage managed towards their dismissal, the court will intervene, not to stop the process altogether but to put things right."

59. The applicant submits that the court is allowed to intervene in the internal disciplinary and such intervention does not necessarily mean to stop the process but to put things right to avoid violation of the employee's rights.

60. The applicant further submitted that the court's intervention is also permitted where there is non-compliance with the mandatory procedures and conditions precedent, procedural unfairness and errors of the law, bias or reasonable suspension of bias as well as in situations where the Petitioner was denied a reasonable opportunity to state his case.

61. The applicant submits that he should not be subjected to the disciplinary process as the same is already pre-determined and awaiting execution in this case termination from the office of the Vice-Chancellor.

62. On the 5th issue the applicant submits that it has satisfied all the conditions for granting an interlocutory injunction as settled in *Giella vs Cassman Brown & Company Limited* (1973) EA 358.

63. The applicant submits that the matter before the court raises arguable constitutional issues and that the intended disciplinary procedure stands at odds with the rules of natural justice.

64. The applicant submits that if the conservatory orders issued are not maintained the objective of the petition to forestall the continued threatened violation of rights and fundamental freedoms will irredeemably be lost and there will be no need to pursue the petition.

65. The applicant further submits that the balance of convenience tilts on retaining the orders sought as denying the same will greatly prejudice the applicant while no prejudice will be suffered by the respondent if the decision in the letter dated 12th July 2022 is suspended.

66. The applicant submits that the petition raises certain public interest concerns that militate towards maintaining the conservatory orders as the petition not only raises the constitutional rights of the petitioner but raises questions about the office of the Vice-Chancellor which is a public office.

67. Finally, the applicant submits that the chronological of events which culminated to the present petition outrightly violates the Petitioners constitutional rights particularly Article 41 and 47 of *the Constitution* of Kenya, 2010.

Respondents Submissions

The respondents did not file written submissions. They relied on the grounds of opposition and Replying affidavits.

Oral Submissions

68. Counsel for the parties were in court for the hearing of the Application dated 21st May, 2022 as directed by Rika J. The matter was however placed before Gakeri J. since he had granted the temporal order which overruled the 3rd respondent's decision to suspend the applicant.

69. After hearing both sides on their remedies to prosecute the application, the court heard oral submissions by counsel for the Petitioner, 1st, 2nd and 4th respondent and counsel for the 3rd respondent.

70. Mr.Manwa, for the Petitioner submitted that the matter was urgent and required canvassing for purposes of extension of the orders issued on 26th July, 2022 pending the hearing and determination of the Application. The Petitioner/Applicant relied on the submissions on record.

71. It was submitted that the Petitioner refused to perform an act not within his prerogative to perform and was as a consequence suspended by the Council of the 3rd respondent.

72. It is the Petitioner's case that the decision to terminate his employment had already been made and the only thing pending was the actual termination. It was urged that the invitation letter dated 19th July, 2022 invited him to discuss his suspension.

73. Reliance was made on certain words allegedly made by the President of the Republic of Kenya. Counsel did not disclose where, when and the context in which the alleged statements were made.

74. Counsel argued that the Petitioner had established a prima facie case and the balance of convenience was in his favour.

75. He contended that the suspension was not supported by reasons.

76. In conclusion, counsel urged that the Application was merited and the orders sought ought to be granted.

77. Mbilo, for the 1st, 2nd and 4th respondents submitted that there was another case before Ruto J. Petition No. E123 of 2022 that raises similar issues as it sought the lifting of the suspension of the Petitioner and the respondents had raised a preliminary objection. Counsel, however did not disclose the nature of the preliminary objection.

78. Counsel urged the court to vacate the order made on 26th July, 2022 on the premise that;

    i. The suspension letter was issued on 12th July, 2022 and the Petitioner did challenge it.

    ii. The suspension was for a duration of one (1) month only, which is definite and reasonably short.

    iii. The suspension was made procedurally and the court should permit the process to continue to its logic conclusion as the decision made on 12th July, 2022 was implemented on the same day and changes had taken place.

    iv. The court order reversed the decision of the institution as there was an acting Vice-Chancellor.

79. Counsel further submitted that the Petitioner only acted after the letter inviting him to appear before the Ad Hoc Committee was served.

80. Counsel urged that it was prudent that the suspension be maintained for 30 days as the 3rd respondent is a public institution and the greater public interest should prevail over private interest.

81. Counsel further urged that the Petitioner's Application did not meet the threshold for the issuance of conservatory orders as enunciated in Gitaura Peter Munya vDickson Mwenda Kithinji & 2 others.

82. Counsel further urged that the court order issued on 26th July, 2022 suspended an internal process and the court should thus apply the doctrine of constitutional avoidance to allow the 3rd respondent to carry on its processes. The decision in *Kenyatta University & another v Fred Obare* (2017) eKLR was relied upon to reinforce the submission.

83. Mr. Mogere for the 3rd respondent submitted that the Application herein had been filed three (3) times which was not a normal occurrence. Counsel submitted that the letter dated 19th July, 2022 had been mischaracterized yet it was an innocuous letter which the Petitioner brought to court and no decision had been made.

84. Counsel urged that the order granted on 26th July, 2022 reversed the suspension and had led to an untidy situation at the 3rd respondent's and ought to be reversed. Counsel submitted that there was no need for a formal application to urge the vacation of the order.

85. Counsel further submitted that the issue for determination was whether the 3rd respondent had power to suspend and investigate the Petitioner. Counsel urged that the 3rd respondent had the power to do so provided it was exercised reasonably. That the letter dated 19th July, 2022 was an invitation to an inquiry. According to the counsel, the Petitioner was invited to give his views on the issue under investigation.

86. Finally, counsel urged that employees are amenable to employer's powers to investigate and the process should be allowed to proceed as the outcome is unknown and the Petitioner had the right to challenge the decision once it is made. Reliance was made on the decisions of this court and those of the Court of Appeal on the issue of suspension of an employee.

Determination

87. The issues for determination are;

i. Whether the Application is sub-judice.

ii. Whether the doctrine of constitutional avoidance applies to this case.

iii. Whether the Application meets the threshold for issuance of interim injunctive orders.

88. As to whether the suit herein is sub-judice, the starting point are the provisions of the *Civil Procedure Act*.

Section 6 provides;

> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.

89. The foregoing provision is couched in mandatory terms and has been interpreted to mean that no court ought to proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in the previously instituted suit or proceeding.

90. In *Kenya National Commission on Human Rights v Attorney General & Independent Electoral and Boundaries Commission & 16 others* (2020), the Supreme Court pronounced itself on sub-judice as follows;

> " The term sub-judice is defined in Black's Dictionary 9th Edition as "Before the 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. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly that the suits are between the same parties or their representatives."

91. The doctrine of sub-judice was also explained by Mativo J (as he then was) in *Republic v Paul Kihara Kariuki, Attorney General and 2 others Ex parte Law Society of Kenya* (2020) eKLR.

92. The court is guided by these sentiments.

93. The existence of two suits is not in dispute. Petition No. 123 of 2022, *Faith Ngugi & 2 others v Attorney General* was filed before this court earlier and is pending determination and the issues raised are substantially similar to those raised in the instant application.

94. The respondents argue that the current Application is an abuse of court process and urge the court to dismiss the same.

95. In his oral submissions, counsel for the Petitioner disowned the earlier petition and argued that the Petitioners had no locus standi to institute the suit. Counsel submitted that the other suit is substantially different from the current suit.

96. The Notice of Motion Application dated 15th July, 2022 seeks inter alia conservatory order pending the hearing and determination of the petition, suspending the decision for the disbandment of Kenyatta University Council and suspension on 12th July, 2022 of Professor Paul K. Wainaina as Vice-Chancellor of the University.

97. It also seeks the suspension of the appointment of Professor Crispus Kiamba as Chairman of the Council as well as other members and the appointment of Professor Waceke Wanjohi as Acting Vice-Chancellor.

98. The instant Application seeks substantially similar orders but also seeks additional orders.

99. The two suits are challenging the same decisions though differently and are founded on similar fact patterns. While the orders sought in Petition E123 of 2022 relate to the alleged disbandment of the Kenyatta University Council and directives of the 1st respondent to the Petitioner, the orders sought in the instant application relate to the Petitioner's position as Vice-Chancellor exclusively.

100. In the court's view, the issues in Petition No. E123 of 2022 and the instant application are directly and substantially similar, the Petitioner's denial notwithstanding.

101. Be that as it may, the order granted on 26th July, 2022 was made before the court was made aware of the existence of Petition E123 of 2022, and fortunately the duration of the order is the hearing and determination of the application unless the same is merited.

102. The natural consequence of the sub-judice rule is to have the latter suit stayed until the earlier one is heard and determined. However, the court will not stay this suit to accord the Petitioner an opportunity to explore the possibility of having the two file consolidated or having one of the suits withdrawn altogether.

103. It would be exceedingly untidy for the two Petitions to proceed independently and such an eventuality must be avoided.

104. The court is alive to the fact that striking out of the current suit or a stay would not only be draconian but would also not augur well with the enforcement of the Petitioner's rights guaranteed by *the Constitution* of Kenya, 2010. It behoves the Petitioner to determine the next course of action.

105. The Petitioner/Applicant addresses the issue of jurisdiction of this court to hear and determine the Application and the petition as much as it is not a contested issue. The court is not persuaded that anything turns on it. Suffice it to say that a Court of law derives its jurisdiction from *the Constitution*

or legislation or both. Without either of these two sources, the court has no jurisdiction and cannot arrogate unto itself any jurisdiction.

106. It requires no belabouring that *the Constitution* of Kenya, 2010 and the provisions of section 12 of the Employment and Labour Relations Court, 2011 are explicit on the jurisdiction of this court.

107. As to whether the doctrine of Constitutional avoidance applies to the instant case, the homeport is the doctrine itself, its parameters and scope.

108. In *Communications Commission of Kenya & 5 others vRoyal Media Services & 5 others* (2014) eKLR, the court expressed itself as follows;

> " We shall now turn to the Constitutional Avoidance Doctrine. The doctrine at times referred to as Constitutional Avoidance rule. Black's Law Dictionary, 10th Edition at page 377 defines it as "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion . . . The principle of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis."

109. The doctrine promote the resolution of disputes by ways other than reliance on the provisions of the constitutions as the primary foundation and is accepted in many jurisdictions to guard against inter alia trivialization of *the constitution*. (See *Josphat Koli Nanok & another V Ethic & Anti-Corruption Commission* (2018) eKLR.

110. The doctrine "arises when a litigant is aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. "The doctrine serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party, is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* . . ." (See *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (2020) eKLR.

111. However, the law has developed exceptions to the doctrine such as;

i. Where the mechanism would not serve the values enshrined in *the Constitution* or Law (See Moffat Kamau & 9 others v Aelous (K) Ltd and 9 others.

ii. Where the person before the court lacks adequate audience before a forum created by a statue or the forum is disproportionate to the interests of stake.

iii. Where a person seeks to enforce fundamental rights and freedoms that have been violated by the respondent (s) demonstrably.

112. In the instance case, the Respondents contend that the Applicant is raising issues that are internal and have not been addressed internally. It is urged that the Applicant did not challenge the suspension letter dated 12th July, 2022 nor engage the respondents after the letter dated 19th July, 2022 was issued. That it took the Petitioner/Applicant more than one (1) week to fault the respondents.

113. It is not in dispute that the Petitioner was appointed the Vice-Chancellor of the 3rd respondent on 28th January, 2018 for a five (5) year term and was directed to consult the chairman of the 3rd respondent's Council to discuss the terms and conditions of service.

114. The Petitioner signed a contract with the Council of the 3rd respondent on 5th March, 2018. The effective date was 26th January, 2018.

115. It is also not in dispute that by letter dated 12th July, 2012, the Council of the 3rd respondent suspended the Petitioner from office. The letter read in part;

> " Please note that the Council of Kenyatta University made the following resolutions during its special meeting held on 12th July, 2022.
>
> i. Suspended the Vice-chancellor Professor Paul Wainaina for a period of upto thirty (30) days to allow for investigations of gross misconduct against him.
>
> ii. Appointed the Deputy Vice-Chancellor Academics Professor Waceke Wanjohi, as the Acting Vice-Chancellor for a period of upto thirty (30) days.
>
> Accordingly, you are hereby suspended from office as above resolved and it is expected that you will hand-over the responsibilities of the office and any other related facilities and resources with immediate effect . . ."

116. The letter, signed by one Professor Cripus Kiamba, Chairperson of the Council made no changes to the Petitioner's other terms and conditions of service.

117. From the evidence on record, it is unclear if the Petitioner handed over as directed by the letter.

118. In its response to the Application herein, the 3rd respondent, through Professor Cripus Kiamba, the Chairperson of Council of the 3rd respondent depones that the letter dated 12th July, 2022 was neither a termination nor dismissal letter and was not written at the behest of the 1st and 2nd respondents.

119. It is the 3rd respondent's evidence that acting in consonance with section 37 of the *Universities Act*, 2012, the Council formed an Ad Hoc Committee to investigate the issues that led to the suspension of the Petitioner and the Committee invited the Petitioner for a meeting scheduled for 27th July, 2022.

120. The letter states in part;

> " Further to the letter from the Chairman of Council in forming you of the decision regarding your suspension, the council has appointed an Ad Hoc Committee to look into the issue that prompted the decision to suspend you from office.
>
> As one of the steps in this process, the committee would wish to meet with you with a view to getting your perspective on the issues that led to your suspension.
>
> Accordingly, on behalf of the council, I hereby wish to extend an invitation to you to meet the Ad Hoc Committee on Wednesday 27th July, 2022 in the Council Boardroom . . . at 10.00 am."
>
> Yours sincerely,
>
> Signed.
>
> Professor Crispus Kiamba.
>
> Chairman of Council, Kenyatta University.

121. Contrary to the Petitioner's submission that a decision to terminate his employment with the 3rd respondent had already been made, neither the suspension letter nor the invitation letter particularize the alleged gross misconduct or make reference to a disciplinary process or termination of employment.

122. The Petitioner has not adduced congent evidence of the alleged termination of his employment.

123. On the face of it, the invitation letter dated 19th July, 2022 is an invitation by the Ad Hoc Committee of the Council of the 3rd respondent for the Petitioner to give his perspective on the issues at hand.

124. Needless to emphasize, formation of investigatory/inquiry committees is typical and the outcome largely determines the next course of action which may be initiation of the disciplinary process, typically by a notice to show cause or the matter rests at that stage.

125. For the foregoing reasons, it is the finding of the court that the Council of the 3rd Respondent had not commenced any disciplinary proceedings against the Petitioner/Applicant and as submitted by the counsel for the 1st, 2nd and 4th Respondents, the Petitioner/Applicant shall be at liberty to challenge any decision made by the Ad-Hoc Committee or the Council of the 3rd Respondent.

126. In a similar vein, the court is in agreement with the submissions of the Respondents that the Council of the 3rd Respondent is vested with powers to suspend and investigate an employee including the Vice-Chancellor subject to observance of the relevant principles such as the suspension must be for a definite period and other processes ought to be undertaken with reasonable dispatch as was the case here.

127. In the Canadian decision in *Cabiakman v Industrial Alliance life Insurance* (2004) 3 S.CR SCCSS, the court distinguished between disciplinary and administrative suspension as follows;

> Disciplinary suspension is defined as "a punitive measure for a reproachable act made during work" while administrative suspension is "a preventive measure which can be taken when the interest of the employers business require it, even in the absence of an act made by the employee while working."
>
> > "In the Cabiakman case, the court set the criteria for administrative suspension as follows, sufficient link between the reproached act and the type of employment, the nature of the accusations; the existence of reasonable grounds to believe that maintaining even temporarily, the employment relationship would be prejudicial to the employer or to his reputation, the existence of immediate, important inconveniences that cannot be practically countered by alternative measure (for example assigning the employee to another post), and the necessity of protecting the public." (See *Donald C. Avude V Kenya Forest Service* (2015) eKLR.

128. The court is guided by these sentiments.

129. The Petitioner's suspension is more administrative than punitive.

130. As to whether the Application meets the threshold for injunctive orders, the starting point are the prerequisites as enunciated in Giella v Cassman Brown & Co. Ltd (1973) EA 358 as restated in *Nguruman Ltd v Jan Bunde Nielsen and 2 others* (2014) eKLR as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages

are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

Prima facie case

131. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR the court explained the requirements of a Prima facie case as follows;

> "A Prima facie case is more that an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher that an arguable case."

132. This holding is consistent with that in *David Ndii and others v Attorney General and others* (2021) eKLR. From the documentary evidence on record, it is evident that the Petitioner has an arguable case.

133. As regards irreparable injury, in Nguruman Ltd V Jan Bunde Nielsen and 2 others (Supra), the court stated as follows;

> ". . . An injury is irreparable where there is not standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy."

134. Contrary to the Petitioner/Applicant's submission that the temporal orders issued will preserve the status quo, the court is unconvinced that the Petitioner/Applicant will suffer or is likely to suffer irreparable injury if the order is vacated and at any rate the Petitioner/Applicant has the inalienable constitutional right to challenge whatever decision the 3rd Respondent may take, it any.

135. It is the finding of the court that the second requirement is not satisfied.

Balance of convenience

136. In the words of Ombwayo J. in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR.

> The court should issue an injunction where the balance of convenience is in favour of the Plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the Plaintiff is that, if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiff, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really a balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants should the inconvenience be equal, it is the Plaintiffs who suffer. In other words, the Plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it".

137. The court is in agreement with these sentiments.

138. There is no doubt that both the Petitioner/Applicant and the Respondent in this case stand to suffer inconvenience depending on the outcome of the suit ultimately, but as will become clearer shortly, the Respondent is in a more precarious situation in the circumstances.

Public interest

139. According to Black's Law Dictionary 10th Edition, Public Interest is defined as;

> The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

140. In Gatirau Peter Munya V Dickson Mwenda Kithinji and 2 others, the Supreme Court of Kenya stated as follows;

> ". . . 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 courses"

141. While the Applicant urges that the petition raises questions about the office of the Vice-Chancellor, a public office established by the *Universities Act* 2012, counsel for the 1st, 2nd and 4th Respondents submitted that the Respondent is a Public Institution funded by the tax payer and its continued running was imperative. Counsel urged that Public interest in this matter should prevail over private interest. See Office of the Director of Public Prosecutions V Senator James Aggrey Bob Orengo, Daniel Ogwoka Manduku & 3 others.

142. There is no dispute the order granted by the court on 26th July, 2022 reversed actions taken on 12th July, 2022 to the detriment of the 3rd Respondent as a public institution.

143. Guided by the principle that public interest generally outweighs private interests of an individual, the court is satisfied that public interest prevails in this case.

144. For the foregoing reasons, it is the finding of the court that the Petitioner has not met the threshold for the award of injunctive orders.

145. Finally, the Petitioner/Applicant submits that the entire Kenyatta University Council was reconstituted by Gazette Notice 8049 which appointed three members of the Council and revoked the membership of one Annald N Yasinga Ongwenyi and the reconstituted council made the impugned decisions.

146. The Petitioner/Applicant has not provided evidence of the total membership of the Council of the 3rd Respondent to demonstrate the alleged reconstitution or whether the law was violated by the reconstitution if any.

147. Puzzlingly, while the Petitioner/Applicant depones that the Council of the 3rd Respondent was reconstituted by the Cabinet Secretary for Education via Gazette Notice 8049, the written submissions dated 28th July, 2022 allege that the President of the Republic of Kenya acted Ultra Vires.

148. Noteworthy, the Respondents did not address this issue.

149. Intriguingly, copies of the alleged Gazette Notices were not produced as evidence. In the circumstances, this is the furthest the court is prepared to go on this issue.

150. For the above stated reasons, it is the finding of the court that the Notice of Motion Application dated 21st July, 2022 is unmerited and is accordingly dismissed.

151. Parties to bear own costs.

152. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF AUGUST 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE