



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 68 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND**

**PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL)**

**HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLE 2, (10)2, 35(3), 20, 22, 23, 27 (1) & (2) & 47 REGARDING THE EQUALITY**

**AND FREEDOM FROM DISCRIMINATION OF THE CONSTITUTION OF KENYA**

**AND ACCESS TO JUSTICE**

**AND**

**IN THE MATTER OF UNIVERSITIES ACT 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF MASINDE MULIRO UNIVERSITY CHAPTER AND STATUTES**

**PROFESSOR SAMSON ROSANA ONDIGI.....PETITIONER**

**AND**

**COUNCIL OF MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT**

**JUDGMENT**

1. In its ruling delivered on 2<sup>nd</sup> May, 2019, this Court declined to grant Conservatory Orders to restrain the respondent from conducting interviews that were scheduled on 9/11/2018 to fill in the position of Deputy Vice Chancellor (***Administration and Finance***) hereinafter (***DVC A & F***)
2. This Judgment comes many months down the line and the Court is unaware whether the issues raised herein are now moot and/or the suit has been spent.
3. The Petitioner prays for the following Orders in the petition itself *interlia*:-
  - (a) A Declaration that the shortlisting process for the position of Deputy Vice Chancellor (Administration & Finance) was unfair, inequitable, arbitrary, unreasonable, irrational and illegal.
  - (b) A Declaration that the disqualification of the 19 candidates on the basis of the provided documents from Higher Education Loans Board (HELB), Kenya Revenue Authority (KRA), Directorate of Criminal Investigation (DCIO) , Credit Reference

Bureaus( CRBSs) and Ethics and Anti-Corruption Commissions (EACC) before due diligence was premature and pre-emptive.

(c) A Declaration that the inclusion of unqualified/undeserving candidates in the short-list is abuse of office and illegal.

(e) A Declaration that the re-advertisement for the position of Deputy Vice Chancellor (Administration & Finance) dated 31/8/2018 is illegal, null and void and the same be nullified.

(f) A Declaration that the denied and/or delayed access to information on the short list of the candidates for the position of Deputy Vice Chancellor (Administration & Finance) is unconstitutional and an obstruction of justice.

### **Facts**

4. The petition is premised on facts set out in paragraphs 3 to 25 of the petition and the nub of the dispute as set out is that on 12/10/2018 the *Ad hoc* Committee established by the University Council to shortlist candidates for the position of Deputy Vice Chancellor (Administration & Finance), shortlisted only 5 candidates out of 24 applicants, and disqualified the remaining 19 applicants on frivolous and suspicious grounds.

5. That the respondent failed to inform the 19 applicants singly or severally the reasons for their disqualification contrary to the provisions of Article 47 of the Constitution of Kenya 2010.

6. That on 23/10/2018, the respondent published the list of all the 24 applicant's and 5 shortlisted candidates in the Daily Nation Newspaper.

7. That a request by the petitioner through Omondi Abande Advocates for the information on the shortlisting was responded to by the respondent by a letter dated 31/10/2018 wherein Council stated it would deliberate the matter and revert to the Petitioner.

8. The Petitioner states that the actions and omissions of the respondent amount to discrimination contrary to the provisions of Article 27 of the Constitution of Kenya, 2010. That the said actions are unfair, inequitable, arbitrary, irregular, unreasonable, irrational, illegal, and contrary to the provisions of Article 47 of the Constitution of Kenya, 2010.

9. That the said conduct is contrary to the provisions of Article 41 of the Constitution of Kenya which guarantees the right to fair Labour Practice.

10. That the conduct by the respondent also violates Article 35 of the Constitution of Kenya, 2010 which guarantees the right of access to any information held by the state by any citizen of the Republic of Kenya.

11. That the Legitimate expectations of the 19 candidates was frustrated and/or violated by the illegal, skewed, flawed and discriminatory actions of the Respondent.

12. The petitioner prays for the reliefs sought.

13. The petition is buttressed by annexures and supporting affidavit of Professor Samson Rosana Ondigi, the Petitioner

### **Replying Affidavit**

14. The Petition is opposed vide replying affidavit of Dr. Jeremy Bundi who deposes *inter alia* that he was the Chairman of the Council of Masinde Muliro University of Science and Technology and was competent to swear the affidavit.

15. That the petitioner was not an applicant of the advertised position and therefore lacks *locus standi* to bring the petition.

16. That the respondent advertised in the Daily Nation Newspaper on 12/10/2018 for the position of Deputy Vice Chancellor (Administration & Finance). That 24 candidates applied for the position.

17. That upon evaluation of the applications, only one applicant met the mandatory requirements of Chapter 6 of the Constitution of Kenya, 2010 but had not served as a Dean or Director which was one of the other mandatory requirements.

18. The respondent made a decision to re-advertise the position which happened on 3/8/2018. 24 candidates submitted their application as at 27/8/2018.

19. That in the advertisement it was stated that all applicants must have valid documents from the following institutions.

(a) Clearance from Kenya Revenue Authority.

(b) Clearance from Higher Education Loans Board.

(c) Clearance from Ethics and Anti-Corruption Commission.

(d) Clearance from Directorate of Criminal Investigations.

(e) Clearance from Registered and recognized Credit Reference Bureau.

20. That only 6 out of the 24 candidates produced valid clearance documents from the aforesaid institutions. That these are mandatory requirements of Chapter 6 of the Constitution of Kenya and are not a creation of the Respondent.

21. This was also the basis of the re-advertisement since all previous applicants did not provide the valid statutory documents save for one applicant who had not been Dean or Director.

22. Other requirements were that an applicant must be a holder of a PHD from a reputable university as well as a full Professor or Associate Professor of a recognized University; that must have attained 10 years academic and research experience with scholarly record demonstrated by publications in internationally peer reviewed journals in their areas of specialization and Supervision of Masters and Doctoral students and must have successfully served in a Senior Administrative and Management position at the Level of either a Dean/Director or Deputy Principal of constituent college/principal of a campus college in a University or in other comparable level(s) for at least 3 years.

23. That only five (5) applicants out of 24 candidates qualified for shortlisting second time round. The rest 19 candidates were not shortlisted therefore.

24. That the respondent as a demonstration of good faith and as an act of transparency during the interview resolved to invite two observers during the interview process. Further in line with this resolve, the respondent advertised in the newspaper the list of all the applicants and the list of the shortlisted candidates for the position.

25. That the respondent also invited views and opinions from members of the public on any of the shortlisted candidates through an advertisement which invited shortlisted candidates for interviews on 23/10/2018.

26. That the respondent did not shortlist any candidate who did not meet the set criteria.

27. That the documents annexed to the supporting affidavit marked SR 02(a) and S RO2(b) do not originate from the respondent and are a creation of the Petitioner.

28. That the petitioner is not honest and is not acting in good faith when he states on one hand that he was not supplied with information by the respondent regarding the interview whereas on the other hand he has annexed the Respondent's confidential documents to his petition.

29. That the Petitioner does not explain how he got the confidential information held by the respondent and is acting in bad faith. That equity should not come to his aid therefore.

30. That none of the applicants not shortlisted have raised any complaint with the Respondent or any relevant institutions, and neither of the applicants has complained that their fundamental rights have been violated.

31. The petitioner has not demonstrated by way of affidavit or otherwise what loss he has suffered, he is likely to suffer and/or that the general public has suffered or is likely to suffer.

32. That all the applicants were subjected to fair competition based on both statutory requirements and meritocracy.

33. That the respondent adhered to the requirements of Chapter 6 of the Constitution of Kenya, 2010 and the Mandatory requirements of the advertisement dated 3/8/2018.

34. That the petition lacks merit and it be dismissed with costs.

### **Determination**

35. The issues for determination in this petition are:-

(a) Whether the petitioner has proved violation and/or threatened violation of his stated rights in the petition being rights guaranteed under Article 27, 35, 41 and 47 of the Constitution of Kenya, 2010.

(b) Whether the petitioner is entitled to the reliefs sought.

36. In answer to issue (a) above, and from the totality of the evidence deposed by the parties herein, it is apparent that none of the candidates who applied for the position of Deputy Vice Chancellor (Administration & Finance), advertised on 3/8/2018 whether shortlisted by the respondent or not have complained about the process and/or procedure followed by the respondent in the recruitment of the holder of that office.

37. The petitioner was not a candidate for the position and did not apply for the same.

38. The alleged aggrieved applicants have not attached any supporting affidavit and/or any documentation related to their applications for

appointment to the position of Deputy Vice Chancellor – (Administration & Finance) to the petition.

39. What is more critical however is that the petitioner did not respond to the matters of fact set out in the replying affidavit of Dr. Jeremy Bundi sworn 22/11/2018 and filed on 23/11/2018 in a further and/or supplementary affidavit.

40. The facts presented by the respondent therefore regarding the lawfulness, openness and fairness of the process of recruitment of the Deputy Vice Chancellor – (Administration and Finance) remain uncontroverted and therefore factual in the Court's considered finding.

41. To this end, the Court finds that the respondent initially advertised for the position of Deputy Vice Chancellor – (Administration and Finance) on 12/6/2018 and as at the deadline for receiving applications for the position on 13/7/2018 only 24 persons submitted their applications.

42. That upon evaluation by a summary committee constituted by the Vice Chancellor on behalf of the respondents only one (1) applicant met the mandatory criteria set out in the advertisement.

43. That the respondent made a decision to re-advertise the position of Deputy Vice Chancellor – (Administration & Finance) and same was done on 3/8/2018 and 24 candidates again applied for the position.

44. A fresh summary committee was constituted by the Vice Chancellor in consultation with the Council to evaluate the fresh application. Twenty (20) of the candidates in the earlier advertisement had re-applied for the position.

45. That the criteria set out in the advertisement for the position of Deputy Vice Chancellor – (Administration & Finance) included applicants providing valid clearance certificates from Kenya Revenue Authority, Higher Education Board, Ethics and Anti-Corruption Commission Directorate of criminal investigations and Registered and recognized Credit Reference Bureau.

46. That only six (6) applicants out of the twenty four (24) candidates provided valid clearance documents from the aforesaid institution.

47. That all the applicants who did not provide valid documents required were not shortlisted for the final interview.

48. That one applicant was not shortlisted since had not been a Dean or a Director as per other requirements for the position of Deputy Vice Chancellor – (Administration & Finance) which interalia included being a holder of an earned PHD from a reputable university as well as a full professor or associate Professor of a recognized University and having at least ten (10) years academic and research experience with scholarly record and demonstrated by publications in internationally peer reviewed journals in their areas of specialization and supervision of masters and Doctoral students.

49. That only five (5) applicants out of the twenty four (24) who had applied for the position of Deputy Vice Chancellor – (Administration & Finance) met the requirements and therefore were shortlisted.

50. Faced with the uncontroverted facts, it is apparently clear that the Petitioner has failed to present any tangible evidence that the rights of the applicants not shortlisted for the position of Deputy Vice Chancellor – (Finance & Administration) were violated. Indeed the petition lacks any credible facts demonstrating in a precise manner how the rights of the candidates for the position of Deputy Vice Chancellor – (Administration & Finance) under Articles 27, 35, 41 and 47 of the Constitution, 2010 were violated in the absence of any statement of facts and/or supporting affidavit from any and/or all of the candidates not shortlisted for the position of Deputy Vice Chancellor – (Administration & Finance.)

51. It is inconceivable therefore from the petition how the rights of the petitioner, a member of the public who had not applied for the position of Deputy Vice Chancellor – (Administration & Finance) were violated and/or threatened by the respondent in the recruitment of the holder of the position of Deputy Vice Chancellor – (Administration & Finance.) Granted the Petitioner has *locus standi* to bring the petition on behalf of the public under Article 22(1) and 22(2) (b) of the Constitution of Kenya, 2010 which provides:-

“22(1) Every person has the right to institute Court proceedings claiming that a right or fundamental freedoms in the Bill of Rights has been denied, violated or infringed, or is threatened and 22(2) In addition to a person acting in their own interest Court proceedings under Clause (1) may be instituted by:-

(a) a person acting as a member of, or in the interest of, a group or class of persons.

and

(b) a person acting in the public interest.”

52. The Petitioner did not state in the Petition under what category, he had brought the petition but the Court finds this not to be a fatal omission it being clear that the Petitioner was a Kenyan Citizen and an academic Professor who had interest in matters Education at the University level.

53. Exclusion of candidates by way of shortlist based on a criteria already set out in an advertised position is a known, and acceptable method of recruitment. A candidate who applies for recruitment in a position advertised publicly and openly as in this case, submits themselves to the set out criteria outlined in the advertisement which criteria constitute, the job specification and job description and other

relevant requirements provided by the Constitution of Kenya under Chapter 6 and specific statute and in policy documents applicable to the specific position.

54. In this regard, the clearance certificate from the named institutions were stated by the respondent to be part of the requirements mandated under Chapter 6 of the Constitution.

55. In this regard Articles 73 (2) of the Constitution speaks to the manner of recruitment in Public office thus:-

“(2) The guiding principles of Leadership and Integrity include-

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair-election.

56. Under Article 80, Parliament is mandated to enact legislation which establishes procedure and mechanisms for the effective administration of Chapter 6 of the Constitution including Article 73(2) (a) cited above.

57. Attention has not been drawn to the Court nor is the Court aware of any statute that has prescribed the production by a candidate for the position of Deputy Vice Chancellor – (Administration & Finance) the Clearance Certificates from the institution named herein. However, it is apparent the said Clearance Certificates are only an aid to establish the integrity and suitability of a candidate as required under Article 73(2) (a) of the Constitution.

58. The question which arises is whether the production or otherwise of the said documents should be used to disqualify a candidate at the shortlisting stage and before the candidate has been given a hearing at all in the interview stage upon granting a candidate opportunity to explain failure to produce any such required Certificate and/or why the Certificate produced is not current.

59. This is a question of public interest that must be weighed upon carefully taking into account the circumstance of each case. Matters to be considered are the number of applicants for the position, the level and importance of the position to be filled in the eyes of the public; the relative ease and/or difficulty in obtaining the certificate required; the time frame given to the applicants from date of Advertisement to the closing date to allow acquisition of the required document, the importance of the document in assessing the integrity and suitability of the candidate; the need to provide opportunity to be heard to an applicant; the requirement to be fair and just in exercise of administrative authority and the requirement to observe fair labour practice in the recruitment of officers in public and state service.

60. This criteria is but a guide and is not exhaustive. The criteria derives from the letter and spirit of Articles 27, 41 and 47 of the Constitution to always accord a hearing to a person who stands to be disadvantaged by a decision of an officer in authority to accord fair Labour Practice to all in employment and those seeking employment and to afford expeditious, efficient, lawful and reasonable decision following a fair procedure to all who require service from Public and State officer.

61. Failure to observe these rights, if proved on a balance of probability is fatal to any decision made by a public or state office in recruitment process.

62. In the present case, the Petitioner having failed to include any evidence from the affected candidates has failed to prove denial, violation, infringement or any threat to the rights of the affected candidates and himself of the stated rights under Articles 27, 35, 41, and 47 of the Constitution of Kenya, 2010.

63. The petition therefore lacks merit and is dismissed.

63. It is the Court's considered opinion, and finding however that clearance Certificate from public and/or private agencies demanded by recruitment authorities pursuant to Article 73(2) (a) of the Constitution to establish personal integrity of a candidate as opposed to the academic and professional documents to establish competence of a candidate based on the job specification and description provided in the advertisement must await the interview stage of the recruitment to give a hearing; fair administrative action and fair Labour practice to an otherwise competent candidate (*emphasis mine*)

64. This is supported by the decision of Odunga J. in Trusted Society of Human rights Alliance & 3 Others –vs- Judicial Service Commission & Another [2016] eKLR; wherein the judge stated:-

**“I stress that the failure by the applicants to furnish reports from the various bodies enumerated cannot be the sole basis for not shortlisting them. My view is reinforced by the appreciation by all the parties to these proceedings that under Regulations 7 and 8 the Commission is empowered to undertake Reference checks and Backgrounds even after the shortlisting.**

65. This case is distinguishable however from the present one since the decision was based on specific interpretation of Regulation 4 of the First Schedule to the Judicial Service Commission's Act, on the requirements for applicants to the position of the Chief Justice, and judges of the superior courts. Furthermore, the decision was based on the specific facts of the case that had been adduced before it.

66. This being a Public Interest litigation, each party to bear their own costs of the suit.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of January, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and Judgment 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

**Omondi Abande & Co. Advocates for the Petitioner**

**Kitwa & Co. Advocates for the respondent.**

**Chrispo: Court clerk**