



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 2 OF 2018

(FORMERLY NAIROBI ELRC JR MISC. APPL. NO. 24 OF 2018)

IN THE MATTER OF: ARTICLE 23 (3), 25, 27, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT CHAPTER 9 LAWS OF KENYA

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2013

AND

IN THE MATTER OF: THE UNIVERSITIES ACT

AND

IN THE MATTER OF: AN APPLICATION BY THE VICE CHANCELLOR OF EGERTON UNIVERSITY FOR THE JUDICIAL REVIEW ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI IN RESPECT TO UNLAWFUL AND UNPROCEDURAL SUSPENSION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

EGERTON UNIVERSITY COUNCIL.....RESPONDENT

EX PARTE.....PROF. ROSE MWONYA

RULING

1. The application before court is the one dated 26/11/2020. This application was filed under certificate of urgency and brought through a Notice of Motion filed under Section 39(1) & (3) of the Universities Act; Sections 3, 12(3), 13 and 20 of the Employment and Labour Relations Act; and Section 11 of the Fair Administrative Action Act. The applicant seeks the following orders;-

1. THAT this application be certified as urgent to be heard ex-parte and in the first instance, on priority basis;
2. THAT pending hearing and determination of this application, the Honourable Court be pleased to issue interim orders suspending the Respondent’s decision dated 13 November, 2020 that purports to send the ex parte applicant on leave with directions to hand over her role as Vice Chancellor to Prof. Isaac Kibwage, in its entirety;
3. THAT pending hearing and determination of this application, the Honourable court be pleased to issue orders suspending the respondent’s decision dated 13 November 2020 directing ex parte applicant to show cause, having been issued ultra vires and without jurisdiction;

4. THAT the Honourable Court be pleased to set aside and nullify the respondent's decisions in (2) and (3) above both dated 13 November 2020 for breaching the ex parte applicant's constitutional and statutory rights to fair administrative action.

5. THAT the Honourable Court be pleased to commit to civil jail the respondent's council members named below for deliberate contempt and infringement of the Judgment and decree of this court dated 15 May 2019 that expressly held that the University Council lacks disciplinary jurisdiction over the Vice Chancellor:

- i. Amb. Dr. Hukka Wario – Chair
- ii. Dr. Charity C. Nyaga
- iii. Dr. John Nyakawa Ondari
- iv. Mr. Joshua Nyagidi Otieno
- v. Ms. Esther Mukoa Wabuge
- vi. Mr. Julius Mutua
- vii. Dr. Wilson Kipruto Rono
- viii. Mr. James Muchiri Ndung'u

6. THAT the Honourable Court be pleased to issue further orders restoring the ex parte applicant the amenities attendant to her office as Vice Chancellor to enable her effectively discharge her statutory mandate as Vice Chancellor;

7. THAT the Honourable Court be pleased to issue orders restraining the respondent from further illegally interfering with the ex parte applicant's discharge of her statutory roles as Vice Chancellor of Egerton University until expiry of her fixed term 5-year contract on 16 January 2021, or until such time that the Cabinet Secretary Ministry of Education renders a decision on her application for a second five-year term, whichever is later.

8. THAT the Honourable court be pleased to issue such further orders befitting the circumstances of this case.

9. THAT the costs of this application be provided for.

2. The application is premised on the following grounds:

1. On 15 May 2019 this Honourable Court (Lady Justice M. Mbaru) delivered Judgment on merit in this case issuing orders of certiorari quashing the respondent's suspension letter dated 7 September 2018 issued to the ex parte applicant. The court in that judgment held that the respondent had no jurisdiction to purport to conduct disciplinary proceedings over the ex parte applicant on grounds that the proper appointing authority was the Cabinet Secretary to the Ministry of Education. The judgment effectively reinstated the ex parte applicant into her post as Vice Chancellor of Egerton University for the remainder of her term.

2. The respondent being aggrieved challenged the judgment in the Court of Appeal and filed Nakuru Civil Appeal No. 64 of 2019, alleging inter alia that the respondent council had jurisdiction, and further alleging that the several issues raised in the suspension letter should be examined on merit. This appeal is pending hearing.

3. The urgency in this application is that the respondent has now purported to act contemptuously and in reckless disobedience to the court judgment aforesaid by again sending the ex parte applicant on premature terminal leave vide a letter dated 13 November 2020 served on 15 November 2020, long before expiry of her fixed five-year term contract on 16th January 2021. The letter took effect on 20 November 2020 when an internal Memo was issued, and press releases were made that Egerton University had a new Vice Chancellor.

4. This impugned decision sending the ex parte applicant on terminal leave is a renewal of the onslaught by the respondent who is keen to continue the same grievances addressed and quashed by the said Judgment. Furthermore, the respondent's illegal actions amount to continued violation of the ex parte applicant's rights to due process and fair administrative action in these particular respects;

(a)The respondent's decision to send the ex parte applicant on premature terminal leave is illegal, unlawful and procedurally unfair because;

- i. The respondent in deciding to send the ex parte applicant on terminal leave acted in contempt of the aforesaid Judgment that settled the legal question that the council lacks jurisdiction over the Vice Chancellor the ex parte applicant herein, which jurisdiction resides with the Cabinet Secretary Ministry of Education. Therefore, the respondent acted ultra vires its powers by arrogating unto itself powers legally reserved to the cabinet secretary of the ministry of education as the only proper appointing authority competent to commence terminal leave procedures.

ii. The respondent by that decision acted in breach of the ex parte applicant's employment contract entitling her to serve out her fixed five year term ending 16 January 2021, which five-year term has not expired. The respondent therefore discriminated and acted with deliberate bias against her by forcing her out before her term ends.

iii. The respondent in deciding to take away the ex parte applicants statutory powers as vice chancellor, and hurriedly handing them over to one Prof. Isaac Kibwage ostensibly named as acting vice chancellor, violated the statutory procedure for appointment of Vice Chancellors set in section 39 (1) of the Universities Act. Again, the decision appointing prof. Isaac kibwage is unprocedural and ultra vires as only the Cabinet Secretary Ministry of Education is the competent authority to designate any Vice Chancellor whether in acting or substantive capacity.

iv. The respondent in that decision acted arbitrarily, unfairly, unreasonably and recklessly by ambushing the ex parte applicant with only a four (4) calendar days' notice within which it expected full comprehensive hand over reports for the entire university for all management and educational responsibilities handled by the ex parte applicant. The four days' timeline to complete handover of an entire University is mischievous and unreasonable, solely intended to frustrate the ex parte applicant.

v. Subsequent to the decision, as from 20 November 2020, the respondent had deliberately created an environment of great hostility to the vice chancellor and her office staff, and her official motor vehicle was withdrawn. These show that the respondent's actions are in fact actuated by malice and vendetta against the ex parte applicant.

vi. Again, the respondent has further denied access to the ex parte applicant to any official records, documentation and access to concerned officers thereby gravely crippling her ability to prepare any handing over reports rendering a full account for the entire University for a smooth transition to any successor, whether legitimately appointed or otherwise. It is clear that the respondent is keen to frustrate and kick out the ex parte applicant at all costs, in such a manner as to frustrate the transparent and open and accountable handover of Egerton University should the cabinet secretary so decide to appoint a successor.

(b)The respondent's decision of 13 November 2020 sending the ex parte applicant on terminal leave is also contradictory, irrational and unreasonable on grounds that;

i. As per her statutory appointment under section 39 (1) (a) read with section 39 (3) of the Universities Act and as per her employment contract, the ex parte applicant duly applied for a renewal of term as Vice Chancellor Egerton university for a further five years.

ii. In compliance with section 39 (1) (a) of the Universities Act, the respondents chairperson through the reasoned letter of 10/8/2020 unreservedly recommended to the Cabinet Secretary Ministry Of Education that the ex parte applicants service as Vice Chancellor be renewed for a second term, positively endorsing her performance track record.

iii. However, the respondent suddenly and maliciously turned around with deliberate intent to pre-empt any decision by the cabinet secretary on the pending application for renewal of term, and recklessly rushed its decision to instead force the ex parte applicant into terminal leave and replacing her with an acting Vice Chancellor without any justification.

iv. The respondent has not given any written notice or reasons for backtracking on its own earlier decision of 10/8/2020 unreservedly endorsing the ex parte applicant's application for a second term. The respondent has also not given any reason for its suspicious hurry to pre-empt the cabinet secretary's decision, nor has any decision – if any was made was communicated to the ex parte applicant on her application for second term as vice chancellor.

v. The respondent acted ultra vires by deliberately disregarding the final decision making power of the Cabinet Secretary, and instead frustrating the ex parte applicant by prematurely forcing her out even before a decision is made and communicated on her application for a second term, breaching sections 4 and 6 of the fair administrative action act.

vi. Therefore, the respondent's latest decision of 13 November 2020 now impugned is irrational and contradictory, tainted with bad faith, and is patently ultra vires.

(c)By the same token, the respondents chairperson also purported to issue to the ex parte applicant a show cause letter dated 13 November 2020 served on 16 November 2020 over the same issues earlier litigated and addressed in this court's judgment, and which same issues are the subject of the respondents own pending appeal in the court of appeal. This show cause letter is patently illegal and unfair on grounds that;

i. The respondents show cause letter offends the legal principles of res judicata and subjudice for purporting to reopen parallel administrative enquiries over issues already addressed by a reasoned judgment of this court; and which issues the respondent itself has escalated to the court of appeal in its pending appeal.

ii. The respondents show cause letter is contemptuous of this court's judgment that unequivocally held that the respondent council lacks jurisdiction to undertake any disciplinary proceedings against the vice chancellor the ex parte applicant therein.

iii. The respondents show cause letter is ultra-vires their statutory mandate for purporting to exercise disciplinary authority over the Vice Chancellor, which disciplinary authority is statutorily reserved in the cabinet secretary ministry of education.

iv. The respondents show cause letter is gravely unreasonable and contradictory in light of the respondents chairpersons own letter 10/8/2020 that patently justifies and explains the same issues while exonerating the ex parte applicant. The ex parte applicant legitimate expectation to rely on the said council letter of 10/8/2020 has been violated, and no reason is given for the U-turn and unreasonable and unjustifiable shifting of positions by the respondent.

v. The respondents show cause letter exposes the ex parte applicant to double jeopardy in so far as the respondent purports to ventilate parallel proceedings in both the Court of appeal at Nakuru, whilst at the same time pushing its vendetta in illegal disciplinary proceedings against her.

vi. The respondents show cause letter lacks justification and is arbitrary as no supporting documentation whatsoever was presented as evidence of the allegations therein, in breach of Article 50 of the constitution.

5. The ex parte applicant has experienced egregious violation of her rights to due process, rights to fair administrative action, right to be given a final decision on her application for a second term as Vice Chancellor in accordance with the law and her contract, and her right to serve out her fixed term 5 year contract up to its expiry on 16 January 2021.

6. Instead, the respondent is determined to hound her out of office without any regard whatsoever to the legality, rationality or procedural propriety of their actions. The actions of the respondent council are malicious, illegal, ultra vires, unreasonable, contradictory and contemptuous of this court's judgment hence this application.

7. This application therefore seeks orders staying the respondent's illegal decision dated 13 November 2020, and stay the illegal disciplinary proceedings instituted by the show cause letter also dated 13 November 2020. The application also seeks court orders for committal of the respondent council members to civil jail for contempt of the judgment and decree of this court dated 15 May 2019.

8. It is trite that contempt of court proceedings are inherently urgent, meant to secure the dignity of this Honourable court and to preserve the rule of law from reckless abuse the kind of which the respondent has repeatedly visited on the ex parte applicant in a vengeful scheme.

9. This application should therefore be urgently placed before the Duty Judge for hearing on priority basis, and urgent orders issued as prayed to preserve the ex parte applicants fair administrative action rights, and further to maintain the rule of law and dignity of this court, in the interest of justice.

3. This application is also supported by the supporting affidavit of the petitioner herein Prof Rose A. Mwaiya dated 26/11/2020 where she reiterates the sentiments in the application. She depones that she is the substantive vice chancellor of Egerton University having been appointed substantially following a competitive recruitment process pursuant to Section 39(1) (a) of the Universities Act by the Cabinet Secretary Ministry of Education for a 5 year term expiring on 16/1/2020 renewable on application pursuant to Section 39(3) of the Universities Act as per the Annexure PRM – 1.

4. She further depones that as per the Judgment of Mbaru Judge dated 15/5/2019 this court quashed the respondent's suspension letter dated 7/9/2018 issued to her. In the Judgment the court found that the respondents had no jurisdiction to purport to conduct disciplinary proceedings over her as the appointing authority was the Cabinet Secretary Ministry of Education. She avers that this Judgment effectively reinstated her as the Vice Chancellor of Egerton University for the remainder of her term.

5. She avers that the respondent filed an appeal against this Judgment and the appeal is still pending at the Court of Appeal.

6. The applicant contends that the respondent is now purporting to act in reckless disobedience of the court's judgment by sending her on a premature terminal leave vide a letter dated 13th November, 2020 and served on her on leave in a renewed onslaught by the respondent against her and a violation of her rights to due process and fair administrative action. She also avers that decision is in contempt of this court Judgment of 15/5/2019.

7. The applicant further avers that in compliance with Section 39(1) (a) of the Universities Act the respondent's chairman through a letter of 10/8/2020 unverifiedly recommended to the cabinet secretary Minister of Education that her services as Vice Chancellor be renewed for a second term positively endorsing her performance track record.

8. She avers that the terminal leave being imposed upon her is therefore geared to pre-empt any decision of the Cabinet Secretary on the pending application for renewal of term.

9. The applicant also depones that the respondent's chairperson has also purported to issue her with a show cause letter (Appendix PRM 7) over issues earlier litigated upon and addressed in the court's Judgment and which issues are also the subject of the respondents over pending Appeal in Court of Appeal.

10. She therefore seeks stay of the respondent's illegal decision dated 13/11/2020 and stay of illegal disciplinary proceedings instituted by the show cause letter also dated 13/11/2020.

11. The applicant also seeks to have the respondent's council members committed to civil jail for contempt of the Judgment and decree of this court dated 15/5/2019.
12. In response to this application the respondents filed Grounds of Opposition dated 4/12/2020, a notice of motion application 4/12/2020 and supporting affidavit deposed by Esther Mukoa. They also raised a Preliminary objection dated 4/12/2020.
13. In the Notice of Motion application, the respondents sought to have the notice of motion dated 26/11/2020 struck out. The Replying Affidavit was signed by Esther Mukoa Wabuge who is a member of the council for Egerton University. She deposed that she had authority to swear the affidavit on behalf of the council.
14. She has deposed further that the petitioner applicant attained her retirement age as a staff of Egerton University on 20th June 2020 is not eligible for consideration for appointment as a Vice Chancellor when her contract ends.
15. She deposes that the respondent is the organ mandated to recommend the renewal or otherwise of the Vice Chancellor and has not made any such recommendation of the applicants contract as Vice Chancellor as she is not eligible and qualified based on the annual performance evaluation and her eligibility having passed her retirement age of 70 years in June 2020.
16. The deponent further avers that the Cabinet Secretary Minister of Education has given express instructions to the respondent to take action on the recommendation of the report titled "**Management Audit Report on the affairs of Egerton University**" by the Inspectorate of State Corporations dated March 2020 and forwarded with instruction in the letter to the Cabinet Secretary dated 10th November 2020.
17. She avers that the decision to send the ex parte applicant on terminal leave and the show cause letter are a consequence of the mandate of the respondent and carrying out of the Cabinet Secretary Minister of Education direction to the respondent by the letter dated 10th November 2020 and the orderly transition in the office of the Vice Chancellor in view of the imminent expiry of the Exparte Applicants' contract of service on 12th January, 2021.
18. She further avers that the Code of Regulation for Government Employees Revised Edition 2006 that applies to Public Universities mandatorily requires an employee to take terminal leave prior to retirement and all other outstanding leave and that the exparte applicant was less than 2 months to her retirement and was lawfully required to take her pending leave on 13th November, 2020.
19. The deponent refers to the applicant's application letter (App EMW2) and states that prior to her appointment the applicant was a pensionable staff of respondent as per EMW3. She avers that the applicant was also due to retire on 20th June, 2020 and had been given a retirement notice on 25/7/2019 (EMW 4). She avers that the applicant does not qualify for re-appointment for a second term as a Vice Chancellor having reached her retirement age.
20. The deponent further avers that all annual performance evaluation reports as statutory carried out by the respondent does not bespeak of her meeting the threshold for consideration for re-appointment complied with the damning report of the Inspectorate of State Corporations dated March 2020 (Appendix EWS).
21. The deponent further deposes that the applicants appointing authority the Cabinet Secretary Minister of Education had already forwarded the report to the respondent and advised that action be taken as per the recommendations therein and revert within one month of 10th November, 2021 (Appendix EMW6).
22. The deponent aware that the respondent took action against the applicant and sent her on annual leave and also issued her with a show cause letter as a consequence of carrying out the Cabinet Secretary's direction on his letter of 10th November, 2020.
23. She avers that on 13th November, 2020 the council held a meeting and made a resolution for the ex parte applicant to take any pending leave before expiration of her term of contract on 12th January, 2021. This resolution was conveyed to the applicant vide a letter dated 13th November 2020 (EMW 7). They aver that the request to proceed on leave was premised on Clause 11 of the contract signed by the applicant and the respondent and the direction of the Cabinet Secretary.
24. They aver that the decision of the Council was not illegal, and unlawful as the council invoked the contract between the applicant and the respondent.
25. The respondent further aver that they issued the applicant with a show cause letter due to directions given by the Cabinet Secretary. The applicant responded to the show cause letter. The respondent also filed a Preliminary Objection stating that the court has no jurisdiction to handle the application having rendered a final Judgment in this matter and thus became *fuctus officio*. The respondent aver that the Notice of Motion of 26/11/2020 seeks to have the court sit on its own appeal.
26. They aver that the notice of motion is not a review of the court's Judgment of 15/5/2019 nor a stay pending appeal nor an application for execution of the court's Judgment and is therefore the court has no jurisdiction to handle it.
27. The applicants in response to the Preliminary Objection raised by the respondent filed therein a reply to the Preliminary Objection indicating that the issues raised therein were subjudice pending for determination at the Court of Appeal in CA No. Nyeri 221/2019 (Formerly CA No.64 of 2019).
28. I have examined the averments of the parties herein and the issues for this court's determination are as follows;

1) Whether this court has jurisdiction to handle this application.

2) If yes, whether the orders granted by this court on 26/11/2020 can be captured.

3) Whether the respondent's council is guilty of contempt of this court's Judgment and orders of 15/5/2019.

29. On issue of jurisdiction, the respondents have submitted that this court rendered a final Judgment in the matter on 15/5/2019 quashing a letter addressed to the applicant. They stated that the orders granted by court in the said Judgment have not been breached in any way. They therefore aver that what is raised in the application is a new matter and cannot relate to the Judgment of the court. The respondents therefore submit that the court is *fuctus officio*.

30. In the Judgment of this court of 15/5/2019 (Mbaru J), the learned Judge issued orders of certiorari quashing the respondent's suspension letter dated 7/9/2018 issued to the ex parte applicant for being unlawful, illegal and procedurally irregular.

31. In the same Judgment, the Hon. Judge ordered the applicant reinstated to her position as the substantive Vice Chancellor of Egerton University.

32. The court also prohibited the respondents by itself, its governance organs howsoever from suspending, terminating or in any other manner interrupting the ex parte applicant's employment during her tenure as the Vice Chancellor of Egerton University.

33. In this court's view these orders should be read together with the letter appointing the applicant as Vice Chancellor which letter indicated that;

“The Vice Chancellor Terms and Conditions of service shall be as provided for in the contract document issued by the council of Egerton University. You shall report and be answerable to the council on all matters related to the office of the Vice Chancellor of Egerton University..”

34. In line with the above letter, the council of Egerton University issued the applicant with an appointment letter detailing the terms and conditions of service and which the applicant signed and accepted on 13/1/2016.

35. My reading of this appointment letter and terms and conditions of service and the Judgment of the court showed that the respondent could not interfere with the applicant's work but she was still answerable to the council in the performance of her duties. The respondents were barred from interfering with the applicant's employment during her tenure as Vice Chancellor but the checks and balances required of her duties by the Council still remained.

36. The court on 15/5/2019 finalized issue of applicant's termination and suspension and which are not issues raised herein.

37. The new matter in the current application relate to her being disciplined and being asked to proceed on her terminal leave. These 2 issues are operation duties by the council and which are actually new issues to be addressed in a fresh suit on whether there are valid reasons for the discipline and also for the leave.

38. This court having considered the issues raised on the main application and the court having rendered a final Judgment; it would be an abuse of jurisdiction for this court to seek to reopen this matter on entirely different issues and render fresh directions.

39. It is true as submitted by the respondents that this court is *fuctus officio* and cannot reopen this case to handle fresh and new matters not flowing from the court's Judgment.

40. In view of this finding, I do not wish to go further than this and handle other issues I would have considered. I therefore find the application before me is not merited. I dismiss the applicant's application accordingly. There will be no order of costs.

DATED and DELIVERED in open court this 14th day of JANUARY, 2021.

Hon Lady Justice Hellen Wasilwa

Judge

In the presence of:-

Evan Ochieng for Ex-parte applicant – present

No appearance for respondents