



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 206 OF 2019

IN THE MATTER OF: ARTICLES 3(1), 22, 23, 48, 50(1), 162(2)(A), 165(5), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 24, 27, 41(1), 47, 73, 75, 77(3), 129, 153(4)(A), 232 AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PRIMACY OF SECTION 35(1)(A) OF THE UNIVERSITIES ACT 2012

AND

IN THE MATTER OF: THE FAILURE BY THE PUBLIC SERVICE COMMISSION TO INSTITUTE AN INDEPENDENT PROCESS FOR RECRUITING THE VICE CHANCELLOR OF MASINDE MULIRO UNIVERSITY OF SCIENCE TECHNOLOGY AS REQUIRED BY SECTION 35(1)(A)(IV) OF THE UNIVERSITIES ACT, 2012

AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE ONGOING PROCESS OF RECRUITING AND APPOINTING THE NEW VICE CHANCELLOR FOR MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY IN DEFIANCE OF SECTION 35(1)(A)(V) OF THE UNIVERSITIES ACT, 2012

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

V

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION,

SCIENCE & TECHNOLOGY.....2ND RESPONDENT

HON ATTORNEY GENERAL.....3RD RESPONDENT

COUNCIL, MASINDE MULIRO UNIVERSITY

OF SCIENCE & TECHNOLOGY.....4TH RESPONDENT

RULING

1. The Court delivered Judgment on 16 October 2020.
2. In the Judgment, the Court ordered
 - (a) THAT a declaration do and is hereby issued that section 35(1)(a)(v) of the Universities Act supersedes the provisions of section 39(1)(a) of the Act in respect to the recruitment of public universities Vice-Chancellors and Deputy Vice-Chancellors and Principals and Deputy Principals of Constituent Colleges.
 - (b) THAT the co-option and participation of University Council members by the Public Service Commission in the recruitment process under section 35(1)(a)(v) of the Universities Act is not illegal and/or fatal to the recruitment process.
3. The Petitioner was aggrieved and he filed a Notice of Appeal on 27 October 2020.
4. On 30 October 2020, Eliud Ambani (applicant) moved the Court under a certificate of urgency seeking orders
 1. ...
 2. ...
 3. The judgment delivered on 16th October 2020 be reviewed and/or set aside in part to the extent that the Honourable Court held that the co-option and participation of the University Council members by the Public Service Commission in the recruitment process under section 35(1)(a)(v) of the Universities Act is not illegal and/or fatal to the recruitment process.

In the alternative to (3) above

4. The Honourable Court do hold that the co-option and participation of the University Council members by the Public Service Commission in the recruitment process under section 35(1)(a)(v) of the Universities Act is only allowable to the extent that such members are drawn from Universities separate from the one that forms the subject of recruitment.
5. The Court do grant any other order it deems just and appropriate in the circumstances.
6. The costs of this application be provided for.
5. The 4th Respondent filed Grounds of Opposition to the Motion on 6 November 2020 while the 1st to 3rd Respondents filed their Grounds of Opposition on 25 November 2020.
6. The Court gave directions on 9 December 2020 as a consequence of which the following were filed
 - (a) Applicant's further affidavit on 9 December 2020.
 - (b) Applicant's submissions on 19 December 2020.
 - (c) 1st to 3rd Respondents submissions on 26 December 2020.
7. The Court has considered the Motion, affidavits and submissions on record including the case law.

Locus of the applicant: A stranger.

8. The Respondents took an objection to the competence of the application on the ground that legally, the applicant was a stranger to the proceedings as he had not participated therein up to the time of delivery of judgment.
9. However, these Respondents did not advance the objection in their submissions.
10. The applicant was not a party to the proceedings which culminated in the judgment sought to be reviewed.
11. Nevertheless, there is case law which suggests that even a person who was not a party to the proceedings may apply for a review after judgment (see *Tang Gas Distributors Ltd v Said & Ors* (2014) EA 448, *J M K v M W M & Ar* (2015) eKLR and *Accredo Ag & 3 Ors v Steffano Uccelli & Ar* (2017) eKLR).
12. The Court finds the objection without merit.

Review jurisdiction

13. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 outline the grounds upon which the Court may review a decree or order.

14. The grounds are the discovery of new and important matter or evidence which was not available and could not be produced at the material time, even with the exercise of due diligence; mistake or error apparent on the face of the record; if judgment requires clarification and for any sufficient reason.

15. The applicant herein did not explicitly set out which ground he was relying on but appears to have been the grounds of clarification and/or sufficient cause.

16. The primary ground advanced by the applicant in seeking review was that there was a conflict between the orders issued by the Court.

17. In *Francis Origo & Ar v. Jacob Kumali Mungala* (2005) eKLR, the Court of Appeal stated an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal.

18. In *National Bank of Kenya Ltd vs Ndungu Njau* (1996) KLR 469, the Court of Appeal stated

In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion, the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.

19. In the present case, the applicant complains of inconsistent findings by the Court as sufficient ground for review. He has made elaborate arguments to support the contention.

20. The review sought by the applicant would in the view of the Court, alter the substance of the judgment completely.

21. Such alteration puts the Court at the risk of considering the merits of the suit after it had made final determinations.

22. In the view of this Court, the elaborate contentions by the applicant should be addressed within the appellate jurisdiction, rather than under the guise of review because the net effect of allowing the motion would be the Court sitting on appeal over its final decision.

23. It is also noteworthy that the Petitioner, an indefatigable constitutional defender had already filed a Notice of Appeal against the judgment.

24. Under section 80 of the Civil Procedure Act, the review jurisdiction ought not to be invoked in such circumstances to enable the appellate process to proceed to its logical conclusion.

25. This Court is also aware that the High Court declared as unconstitutional the amendments effected to the Universities Act by the **Statute Law (Miscellaneous Amendment) 2018** in *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & Ar; Attorney General & 7 Ors (Interested Parties)* (2020) eKLR and that declaration may impact the present application.

Conclusion and Orders

26. For the above reasons, the Court declines to review the judgment. The Motion dated 27 October 2020 is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 18th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For applicant Munyao Muthama & Kashindi Advocates

Petitioner in person

For 1st – 3rd Respondents Ms. Oyugi, Senior Litigation Counsel, Office of the Attorney General

For 4th Respondent G & A Advocates LLP

Court Assistant Chrispo Aura