



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO.E100 OF 2020**

**DR. ANDREW MOKAYA MAUBI.....PETITIONER**

**VERSUS**

**MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF EDUCATION....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**PROF. BOSIRE MONARI MWEBI.....INTERESTED PARTY**

**RULING**

The ruling herein relates to the petitioner's application dated 14<sup>th</sup> December, 2020 and made under the provisions of Articles 48 and 159 of the Constitution, 2010 and section 12, 20 and 29 of the Employment and Labour Relations Court Act and Rule 17 and 17 of the rules thereto and seeking for orders that;

1. Spent.

2. Spent.

3. *The court be pleased to issue a conservatory order prohibiting and or restraining the respondents their representatives, employees, servants and or agents from removing the petitioner/applicant from the position of chairperson*

*of the council of the 1<sup>st</sup> respondent pending hearing and determination of the petition.*

4. Spent.

5. *The court be pleased to issue a conservatory order staying the directions and or import of Gazette Notice No.10184 of 2020 revoking the appointment of the petitioner/applicant as chairperson of the 1<sup>st</sup> respondent and appointing the Interested Party as the chairperson of the 1<sup>st</sup> respondent until hearing and determination of the petition.*

6. *Costs of the instant application*

7. *Any other further orders and or relief the court deems just and equitable to issue in the circumstances.*

The application is supported by the petitioner's affidavit and on the grounds that on 23<sup>rd</sup> July, 2019 the 2<sup>nd</sup> respondent through an advertisement made calls for the application for the position of council members for universities and for position of chairpersons of the various councils. The call required that the applicants to provide various clearances from different government entities including the higher education loans board, the credit rating bureau, good conduct, and ethics and anticorruption. He applied for all these certificate clearances to his application and resume.

In July, 2019 the petitioner applied for the position of council member and or chairperson of the university councils and on 8<sup>th</sup> October, 2019 he was shortlisted for an interview by the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent's vice chancellor Prof. Romanus Otieno in a letter dated 10<sup>th</sup> March, 2020 offered him the position which the petitioner accepted.

The appointment was in compliance with section 36(1)(a) of the Universities Act and on 20<sup>th</sup> March, 2020 the 2<sup>nd</sup> respondent through Gazette Notice 2375 announced the appointment of the petitioner as chairperson of the council of the 1<sup>st</sup> respondent for a period of 3 years from the date of notification and publication.

In his supporting affidavit, the petitioner avers that upon appointment as chairperson of the 1<sup>st</sup> respondent council he was to be paid Ksh.80,000 gross pay each month, a sitting allowance of Ksh.20,000 per sitting at a minimum of 6 sittings per year, mileage allowance at a maximum of Ksh.35,000 per trip to attend council sittings.

The petitioner also avers that on 23<sup>rd</sup> October, 2020 he completed induction organised by the State Corporations Advisory Committee at Kenya School of Government and which induction was approved by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

On 20<sup>th</sup> April, 2020 the 1<sup>st</sup> respondent updated its website and introduced the petitioner as the chairperson of its council.

On 20<sup>th</sup> December, 2020 without notice or justification, the 2<sup>nd</sup> respondent through gazette Notice No.10184 revoked the petitioner's appointment as chairperson of the council of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent then appointed the interested party as the chairperson of the 1<sup>st</sup> respondent council.

The revocation of the appointment as chairperson of 1<sup>st</sup> respondent council and the actions of the 2<sup>nd</sup> respondent is an infringement of the petitioner's right to human dignity. The revocation of the appointment as chairperson was without a hearing and or being offered a chance to be heard contrary to fair administrative action. The inexistence of any procedures for restitution and protection of the right to fair hearing by the respondents is an infringement of the petitioner's rights. This was done after the petitioner had undergone induction training and had already received payment and undertaken various travels and made decisions in favour of and the 1<sup>st</sup> respondent and hence an infringement to his fair labour practices.

There is no evidence of wrongdoing to justify the actions taken by the respondents against the petitioner of revoking appointment as chairperson to the council. The orders sought should be issued to protect his rights pending the hearing of the petition.

The 3<sup>rd</sup> respondent entered appearance for self and 2<sup>nd</sup> respondent.

In reply, the only the 2<sup>nd</sup> respondent filed the **Replying Affidavit of Prof. George Magoha** and who avers that he is the Cabinet Secretary for Education and the 2<sup>nd</sup> respondent. As the Cabinet Secretary he is mandated under section 36 of the Universities Act to appoint chairpersons and members of public universities through an open process. When the terms of councils for some public universities who had been appointed vide Gazette Notice No.2347 of 2017 expired, applications were invited and upon the recruitment process, new members were appointed through Gazette Notice No.55 of 20<sup>th</sup> March, 2020 to serve for 3 years and the petitioner was appointed as chairperson of the 1<sup>st</sup> respondent.

Prof. Magoha also avers in reply that he received letter dated 26<sup>th</sup> November, 2020 from the Ethics and Anti-Corruption Commission (EACC) informing him that the petitioner is not fit to hold public office as it had been reported that he had masterminded and defrauded Vision Institute of Professionals Ksh.34 million which is subject of **Nairobi Chief Magistrates Court Criminal Case No.466 of 2019**. The EACC also reported that the petitioner was under investigations under the Banking Fraud Unit for separate complaints.

The 2<sup>nd</sup> respondent also avers that upon receipt of the letter from EACC his office verified the allegations and confirmed that indeed the petitioner is facing criminal charges where Vision Institute of Professionals mad complaints that the petitioner defrauded the institute. He then proceeded to revoke the petitioner's appointment vide Gazette Notice No.10184 of 4<sup>th</sup> December, 2020 and wrote a letter to the EACC on the same.

Prof. Magoha also avers that his decision to revoke the petitioner's appointment was undertaken after a proper inquiry which confirmed the petitioner has too many unresolved questions concerning his integrity. In compliance with the constitution and the doctrine of legality, he reached the rational conclusion that the petitioner is not fit to hold office of chairperson with the 1<sup>st</sup> respondent university.

As the chairperson, the petitioner was expected to ensure prudent financial management, demonstrate and uphold high level of integrity and ethical conduct. The unresolved issues concerning his financial probity made him unfit to hold public office. The application made and orders sought are misconceived and any conservatory orders made may be prejudicial to the 1<sup>st</sup> respondent smooth operations and thus should be dismissed with costs.

The petitioner filed his Supplementary Affidavit and avers that the 2<sup>nd</sup> respondent is guided by statutory, regulatory and policies on the procedures for appointing employees and which involves vetting procedures and should have been informed of nay matter before appointment. The allegations in **Criminal Case No.466 of 2019** has not issued any ruling, judgement or order or found the petitioner guilty and the law with regard to the discipline of employees faced with charges in court is settled. The 2<sup>nd</sup> respondent should have suspended him before proceeding to revoke his appointment and hence has infringed on his rights.

The petitioner also avers that he has not been summoned by the EACC on any other charge save for the criminal case pending. Article 47 of

the constitution underpins the importance of fair and just process before a decision that is detrimental can be reached. The 2<sup>nd</sup> respondent has neglected to follow articles 25, 50 and 47 of the constitution to accord him a fair disciplinary process, a hearing and without evidence and will be greatly prejudiced if the orders sought are not granted as prayed.

Only the petitioner filed written submissions.

The petitioner submitted that his application has met the threshold for the grant of conservatory orders as held in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** that;

*“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. 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 causes.*

That in the case of **Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR** the court held that when seeking for a conservatory order a party must satisfy that his rights are under threat of violation; are being violated or will be violated and that such violations are likely to continue if the orders sought are not granted. In the case of **Okiya Omtatah Okoiti v Cabinet Secretary for Information, Communication and Technology & 2 others [2019] eKLR** the court held that an applicant seeking conservatory orders must satisfy that he has a prima facie case with a likelihood of success and shall suffer prejudice if the orders are not granted.

The petitioner submitted that he applied for the position of chair of the 1<sup>st</sup> respondent and underwent a rigorous interview process with the 2<sup>nd</sup> respondent and was found fit to serve but the 2<sup>nd</sup> respondent arbitrarily acted on information provided by another government agency even after carrying out a rigorous vetting of the petitioner. This is in violation of his rights to a fair hearing and fair administrative process. The revocation of the appointment was devoid of the due process as the petitioner was not allowed to defend himself. There is a prima facie case and the orders sought justified.

Determination

The petitioner is seeking for conservatory orders to restrain the respondents from removing him from the position of chairperson of the 1<sup>st</sup> respondent council and further a conservatory order staying the directions and import of Gazette Notice No.10184 revoking his appointment and the appointment of the interested party as chairperson, council of the 1<sup>st</sup> respondent.

As correctly submitted, the court will only grant a conservatory order within the framework of Article 23 of the Constitution, 2010. At this stage, the court is not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as held in **Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR**.

In this case, the petitioner was appointed chairperson of the 1<sup>st</sup> respondent council for a term of 3 years vide Gazette Notice No.2375 of 20<sup>th</sup> March, 2020. Such appointment is non-executive and for the given duties outlined under the letter of appointment dated 10<sup>th</sup> March, 2020.

The appointment of the petitioner has since been revoked vide Gazette Notice No.10184 of 2<sup>nd</sup> December, 2020 and the interested party has since been appointed for the position of chairperson, 1<sup>st</sup> respondent council.

To grant a conservatory order in the nature sought by the petitioner would be to restore the him back to the position of chairperson, 1<sup>st</sup> respondent council and by staying the directions of Gazette Notice No.10184 effectively revert the parties back to the position subsisting before the 2<sup>nd</sup> of December, 2020.

In employment and labour relations and unlike any other relationship, such would be to direct reinstatement and specific performance. such is regulated in law under section 12 of the Employment and Labour relations Act, 2011 read together with section 49(4) of the Employment Act, 2007 and Rule 17 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

In this regard, as the petitioner submitted, the case of import and scope of a conservatory order was highlighted by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, the import and scope of a conservatory order requires that;

**... Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay.**

**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 causes.”**

As noted above, the petitioner’s appointment as chairperson, 1<sup>st</sup> respondent council was done by the 2<sup>nd</sup> respondent pursuant to the

provisions of section 36(1) (a) of the Universities Act, 2012. The revocation of appointment was by the appointing authority, the 2<sup>nd</sup> respondent. Such position has been allocated to the interested party.

Without going into the gist of the petition, to issue the orders sought at this instance would be contrary to the principles for the grant of conservatory orders and result in conflation of issues instead of facilitating the ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court as addressed by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, cited above.

In the penultimate, the petitioner final orders sought are with regard to the protection of his rights under the constitution and for orders of mandamus compelling the respondents to reinstate him to the position of chairperson of the council of the 1<sup>st</sup> respondent. In the alternative, the petitioner is seeking for compensation in salary and benefits accruing to the position held for 3 years. In this regard, in the case of

**Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR** the court held that;

*... an applicant [seeking] for conservatory order under Article 23(2) (c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a prima facie basis that his or her right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened.*

Further, the context given being employer and employee relationship, such put into account, it is imperative that the court should hear the main petition on the merits.

Having moved the court immediately upon the revocation of his appointment, the petitioner shall be heard on priority basis and upon reading of the ruling herein, hearing directions shall be issued.

**Accordingly, the application dated 14<sup>th</sup> December, 2020 shall not issue as prayed; the petitioner shall be heard on the main petition and on priority basis; hearing direction shall issue instantly. Costs shall abide the petition.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: .....

..... and .....