



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E617 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

PROF. MICHAEL MADARA OGOT.....CLAIMANT

VERSUS

THE UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

The claimant herein is a Professor of Mechanical Engineering at the University of Nairobi, the Respondent. He was engaged by the Respondent as Professor in the Department of Mechanical Engineering in 2006. By letter dated 20th March 2018 the claimant was appointed as Acting Deputy Vice Chancellor, Research, Production and Extension. He served in that position until 9th July 2019 when he was appointed Deputy Vice Chancellor Research, Production and Extension substantively following a competitive process.

By letter dated 6th January 2020, the Claimant was further appointed as Acting Deputy Vice Chancellor, Finance, Planning and Development.

The Claimant's employment was terminated by letter dated 2nd October 2020. The letter of termination informed the claimant of his right of appeal within 14 days which right the claimant did not exercise on grounds that the right is illusory in view of the fact that the disciplinary hearing was by the Council, the highest decision making organ of the Respondent and his position had already been assigned to another person, albeit in acting capacity.

The grounds for termination were as set out in the letter of termination which is reproduced below –

“October 2, 2020

Prof. Madara M. Ogot, PhD

Deputy Vice Chancellor (Research, Production and Extension)

University of Nairobi

NAIROBI

Email: madaraogot@uonbi.ac.ke

Dear Prof. Ogot,

VERDICT OF DISCIPLINARY PROCEEDINGS

The Council of the University of Nairobi is obligated under Sections 18(8)(u) and 18(13) of the University of Nairobi Charter 2013 to ensure that the University complies with the constitution, other relevant laws, regulations and governance practices.

As you are aware, by notice dated 19th June 2020, the Council asked you to show cause why disciplinary action should not be taken against you, which you responded to by letter dated 25th June 2020. You were subsequently invited to appear before the Council for a

disciplinary hearing on 24th July 2020 when you appeared and made representation and oral presentation in further response to the notice to show cause.

The Council has considered your written response dated 25th June 2020 as well as the oral presentation which you made at the disciplinary hearing. Additionally, the Council has made reference to various provisions of the law inter alia the Constitution of Kenya, the Public Officers Ethics Act, the Employment Act, the University of Nairobi Statutes and the Public Service Commission Discipline Manual for the Public Service. Having considered the foregoing, the Council reached the undernoted findings:

i. That your actions and omissions constituted fundamental breach of your obligations as a Deputy Vice Chancellor of the University of Nairobi and the rule of law in contravention of the provisions of:

a) Articles 10(2)(c), 73 and 234(1)(e) & (f) of the Constitution of Kenya 2010

b) Sections 10(1) and 25 of the Public Officers Ethics Act, 2003

c) Sections 36, 38(3)(c) the Universities Act, 2012

d) Sections 12(3)(c), 22(8) and (10)(a) of the University of Nairobi Charter, 2013

e) Statute VA of the University of Nairobi Statutes

f) Sections 15 and 16 of your terms and conditions of employment.

g) That your contention that there was no substantive Vice Chancellor in office on January 17, 18 and 19 is misplaced and has no basis in law. On January 3, 2020, Council as the appointing authority informed you that the process of recruitment of the substantive Vice Chancellor had been successfully concluded. The Council takes notice that you were an active participant in the Vice Chancellor and the Deputy Vice Chancellor recruitment processes before it and therefore you are well aware and cannot feign ignorance of Council's power to appoint the Vice Chancellor whether in acting or substantive capacity. On this basis, your contention that the recruitment process was yet to be completed has no basis. This is further buttressed by:

a) The case of **Okiya Omtatah Okoiti v Cabinet Secretary, Ministry of Education, Science and Technology & another; Council of University of Nairobi & 7 others (Interested Parties) [2019] eKLR**, which judgement you are a beneficiary of.

b) Presidency Directives and Guidelines Ref: OP/CAB.9/IA Dated March 11, 2020 on the Management of State Corporations.

Consequently, you were found to have insubordinated the duly appointed Vice Chancellor.

iii) That as the Ag. Deputy Vice Chancellor Finance, Planning and Development, you had no mandate to issue the communique dated 18th January 2020. In issuing the communique, you acted without jurisdiction thereby failing to uphold the rule of law.

iv) Assuming that there was no Council in place as you contend, you failed to consult the Chancellor prior to issuing the memo of 18th January 2020. Additionally, you omitted, neglected and/or blatantly ignored to send a copy of the memo to the Chancellor who was to preside over the installation ceremony of the Vice Chancellor. You were fully aware that the installation ceremony of the Vice Chancellor of the University is an event presided over by the Chancellor. By not letting the Chancellor know of the cancellation of the installation ceremony, you acted in a manner intended to cause ridicule and embarrassment to the Chancellor which actions constitute acts of gross misconduct and thus grossly insubordinative of the Chancellor.

v) That the authority assigned to the holder of the office of a Deputy Vice Chancellor is a public trust, the holder of the office is under obligation to adhere to the rule of law and good order of a public institution. By failing to uphold the rule of law as exemplified hereinabove, you as a senior member of staff and supervisor of hundreds of other university employees undermined public confidence in the integrity of the aforesaid office.

vi) That the Council takes note of the gazette notices number 360 and 361 adduced in support of your contention that there was no council in place on January 17, 18 and 19 2020. As this matter is pending determination in court, the Council elected not to delve into the merits or lack thereof of this contention. On this basis, the charge of insubordination of the Council could not be sustained.

Pursuant to the findings as set out herein above, the Council noted that you ought to be summarily dismissed from employment in accordance with Section 44(3) & (4) of the Employment Act, 2007 and Clause 4.6 (d) of the Public Service Commission, Discipline Manual for the Public Service.

Further the Council concluded that your failure to uphold the rule of law and in insubordinating the Chancellor and Vice Chancellor has greatly undermined the confidence the Council has in you and your suitability to continue holding an administrative position as a Deputy Vice Chancellor.

The Council however did appreciate the need to temper justice with mercy given the far reaching economic, social and

psychological implications that attend the summary dismissal of an employee. As a consequence, thereto, the Council resolved not to dismiss you from employment but to terminate your appointment as the Deputy Vice Chancellor, Research, Innovation and Enterprise.

Accordingly, you are hereby relieved of all the duties and responsibilities of the Deputy Vice Chancellor, Research, Innovation and Enterprise and you shall revert to an academic position as Professor of Mechanical Engineering at the Department of Mechanical Engineering with effect from receipt of this letter. By a copy of this letter, you are also requested to hand over your office to the Vice Chancellor.

You reserve the right to appeal this verdict within fourteen (14) days receipt of this letter.

Yours sincerely,

SIGNED

Prof. Julia Ojiambo, PhD, CBS, EBS, MBS

Chairperson, Council of University of Nairobi”

The claimant was aggrieved by the termination of his appointment hence this suit.

Claimant's Case

Vide a statement of claim dated 6th October 2020, the claimant avers that the termination of his employment as Deputy Vice Chancellor, Research, Innovation and Enterprise was unfair and was actuated by malice. He seeks the following orders: -

a) A declaration that the termination of the claimant's employment as the Deputy Vice Chancellor Research Production and Extension is illegal, null and void.

b) An order of Mandatory Injunction be directed the Respondent to immediately reinstate the claimant as the Deputy Vice Chancellor Research Production and Extension without any loss of pay or benefits.

c) In the alternative to (a) and (b) above, the respondent be ordered to pay the claimant damages for the unexpired term of his contract that was to expire in or about July 2024 as particularized herein below: -

i) Salary – Kshs.359,236 pm (2020-2021), Kshs.370,615 pm (2021-2022), Kshs.383,103 pm (2022-2023) and Kshs.395,591 pm (2023-2024)

ii) Housing allowance – Kshs.120,000 pm

iii) Responsibility allowance – Kshs.80,000 pm

iv) Entertainment allowance – Kshs.40,000 pm

v) Car Allowance – Kshs.60,953 pm

vi) Telephone allowance – Kshs.10,000 pm

vii) Leave allowance – Kshs.25,000 pa

d) The Respondent issues a certificate of service to the Claimant

e) The Respondent bears the Costs of this Claim

Simultaneously with the statement of claim, the claimant filed a motion under certificate of urgency seeking the following orders: -

1. Spent.

2. Pending the hearing and determination of this application, there be a stay of the decision of the respondent contained in its letter dated 2nd October 2020 purporting to terminate the claimant's employment as the respondent's Deputy Vice Chancellor, Research, Innovation and Enterprise.

3. Pending the hearing and determination of this claim, there be a stay of the decision of the respondent contained in its letter dated 2nd October 2020 purporting to terminate the claimant's employment as the respondent's Deputy Vice Chancellor, Research, Innovation and Enterprise.

4. *Pending the hearing and determination of this application, an interim mandatory injunction be and is hereby issued compelling the respondent to reinstate the claimant to the position of Deputy Vice Chancellor, Research, Innovation and Enterprise.*
5. *Pending the hearing and determination of this claim, an interim mandatory injunction be and is hereby issued compelling the respondent to reinstate the claimant to the position of Deputy Vice Chancellor, Research, Innovation and Enterprise.*
6. *Pending the hearing and determination of this application, an interim injunction be and is hereby issued restraining the respondent, its employees, officers and or officials from advertising or recruiting for the position of Deputy Vice Chancellor, Research, Innovation and Enterprise.*
7. *Pending the hearing and determination of this claim, an interim injunction be and is hereby issued restraining the respondent, its employees, officers and or officials from recruiting for the position of Deputy Vice Chancellor, Research, Innovation and Enterprise.*
8. *This Court be pleased to make any such orders as it deems just in the circumstances.*
9. *The costs of this application be borne by the respondent.*

In the grounds and affidavit of the claimant in support of the motion, the claimant reiterates the averments in the statement of claim which are that he was appointed by the Respondent as the Deputy Vice Chancellor Research Production and Extension by letter dated 9th July 2019 on a 5 year contract. That through the letter dated 6th January 2020, the claimant was appointed by the respondent as the acting Deputy Vice Chancellor Finance, Planning and Development.

The claimant avers that through the Gazette Notice dated 17th January 2020, The Cabinet Secretary for Education revoked the appointment of the Chairperson of the University of Nairobi Council and the appointment of members of the University of Nairobi Council through Gazette Notice No. 360 and Gazette Notice No. 361 in the Kenya Gazette Vol. 102 No. 10.

That through a letter dated 17th January 2020, the Cabinet Secretary for Education revoked the appointment of the Vice Chancellor, Prof. Stephen Kiama. That through a letter dated 17th January 2020, the Cabinet Secretary for Education appointed Prof. Isaac Mbeche as the Acting Vice Chancellor.

That on 18th January 2020 a meeting of the University of Nairobi Executive Board was convened by the Acting Vice Chancellor, Prof. Isaac Mbeche, to deliberate on the decisions made by the Cabinet Secretary for Education. The University of Nairobi Executive Board (*"the Board"*) deliberated and agreed that it could not delve into the merits and demerits of the Cabinet Secretary's decision.

That the installation of the Vice Chancellor, Prof. Stephen Kiama, had been scheduled for 21st January 2020. Due to the revocation of his appointment and that of the Council, the Board concluded that the installation could not proceed. The Board consequently took the decision that all members of staff, stakeholders and students should be informed that the installation would not proceed.

That the Acting Vice Chancellor, Prof. Isaac Mbeche, instructed the claimant in his capacity as the Acting Deputy Vice Chancellor Finance, Planning and Development to draft a letter informing all members of staff, stakeholders and students that the installation would not proceed.

That acting on the instructions of the Acting Vice Chancellor, the claimant drafted the letter that was subsequently reviewed and approved for circulation by the Acting Vice Chancellor. Upon the approval, the claimant issued the memo dated 18th January 2020 to all staff and students of the respondent.

The claimant avers that the Chairperson of the University of Nairobi Council and the members of the University of Nairobi Council filed a suit in this court challenging the Gazette Notice No. 360 and Gazette Notice No. 361 in the Kenya Gazette Vol. 102 No. 10.

That by a notice to show cause dated 19th June 2020 and served upon the claimant on 19th June 2020, the respondent asked the claimant to show cause why disciplinary action should not be taken against him on account of alleged insubordination and failure to uphold the rule of law. It was alleged that the claimant had breached the law in issuing the memo dated 18th January 2020 to all staff and students of the respondent.

The claimant responded to the show cause through his letter dated 25th June 2020. Through the letter dated 17th July 2020, the respondent wrote to the claimant and invited the claimant to appear before the full Council for a disciplinary hearing on 24th July 2020.

That through his advocates on record, on 21st July 2020, the claimant wrote to the respondent and requested for various documents to enable him prepare adequately for the hearing. That the respondent wrote to the claimant's advocate on 22nd July 2020 and informed the claimant that the Council would rely on the information and documents already exchanged between the Council and the claimant.

That the disciplinary hearing proceeded on 24th July 2020. That through the letter dated 2nd October 2020, the respondent wrote to the claimant and informed the claimant that his employment as the Deputy Vice Chancellor, Research, Innovation and Enterprise had been terminated with immediate effect for, inter alia, insubordination to the Chancellor and Vice Chancellor of the respondent.

That through their email sent to the staff and students of the University on 5th October 2020, the respondent informed its staff and students that it had appointed Prof. Horace Ochanda as the Acting Deputy Vice Chancellor, Research Innovation and Enterprise with immediate

effect.

The claimant avers that though the letter dated 2nd October 2020 informed him that he had a right to appeal the verdict within 14 days, the purported right of appeal was illusory as: -

- a. The disciplinary hearing was conducted by the Council of the University.
- b. The Council of the University is the highest decision making organ of the respondent. There is no further body to which an appeal can be preferred.
- c. The respondent has already appointed Prof Ochanda as the Acting Deputy Vice Chancellor, Research Innovation and Enterprise, therefore the position the claimant occupied has already been filled.

The claimant avers that the termination of his employment as the Deputy Vice Chancellor, Research, Innovation and Enterprise was unfair, and was actuated by malice due to the following reasons:

- i. The claimant relied on the instructions from the Acting Vice Chancellor and the resolution of the University Executive Board to issue the memo dated 18th January 2020.
- ii. The Council of the respondent declined to provide the claimant with the Minutes and/or resolution of the University Executive Board for the meeting held on 18th January 2020, which minutes would demonstrate that the claimant had been instructed to issue the memo of 18th January 2020. These minutes/resolutions are documents that are in the sole custody of the Council of the respondent.
- iii. The memorandum dated 18th January 2020 that was the subject of the Notice to Show cause was also approved by the Acting Vice Chancellor before circulation.
- iv. The decision communicated in the memorandum dated 18th January 2020 was taken collectively by the University of Nairobi Executive Board and was merely communicated to the staff and students of the respondent pursuant to the decision of the said Board.
- v. The claimant, who was acting in the course of his duty, has been singled for victimization. This is in total disregard to the provisions of the Constitution of Kenya and the University of Nairobi statutes.
- vi. The disciplinary proceedings were flawed from the very beginning
- vii. as the claimant was being subjected to disciplinary proceedings for acting as per the instructions of the Acting Vice Chancellor and the resolution of the University Executive Board.
- viii. The grounds set out in the Notice to Show Cause dated 19th June 2020 are not valid or fair within the meaning of Section 45(2) of the Employment Act 2007.
- ix. In any event, the claimant was unable to prepare adequately for the disciplinary hearing without the minutes of the meeting of the University of Nairobi Executive Board held on 18th January 2020 that are in the sole possession of the University of Nairobi Council.

Respondent's Case

The Respondent filed a response to statement of claim dated 13th October 2020 and a replying affidavit of Prof. Julia A. Ojiambo, the Chairman of the Council of the Respondent also sworn on 13th October 2020 in which she acknowledges the appointment of the claimant as Deputy Vice Chancellor, Research, Production and Extension (DVC, RPE). She deposes that in addition to performing the duties and responsibilities of the office of DVC, RPE, the Claimant was mandated to perform the duties of the office of Deputy Vice Chancellor, Finance, Planning and Development in an acting capacity vide a letter of appointment dated 6th January 2020.

That the Deputy Vice Chancellor, Finance, Planning and Development (DVC, FPD) is the Head of the Respondent's Finance, Planning and Development division. Pursuant to the University of Nairobi Statute VA 2016, the DVC, FPD is in charge of:-

- (i) Designing, modelling and managing long term financial and physical plans*
- (ii) Optimal utilization and investments of the University's finances and assets*
- (iii) Annual budget planning, monitoring and management strategies*
- (iv) Provision of accurate and current financial information to support decision making"*

That by an Internal Memo dated 18th January 2020, the Claimant in his capacity as the Acting DVC, FPD informed the Respondent's students and members of staff of the University as follows;

"That the CS Education, Prof George Magoha has revoked the appointment of Prof. Stephen Kiama Gitahi as Vice Chancellor of the University of Nairobi and appointed Prof. Isaac Meroka Mbeche as Vice Chancellor in an acting capacity with effect from 17th January 2020 until the process of recruiting a substantive Vice Chancellor is completed. Prof. Kiama returns as the substantive Deputy Vice Chancellor, Human Resource and Administration. In addition, the installation ceremony for the Vice Chancellor that was planned to take place on Tuesday, 20th January 2020 has been cancelled.

Prof. Madara Ogot

Ag. Deputy Vice Chancellor, Finance, Planning and Development

And Professor of Mechanical Engineering"

That pursuant to the University of Nairobi Statutes, the DVC, FPD has no mandate to communicate the matters set out in the internal memo dated 18th January 2020 nor to cancel the Vice Chancellor's installation ceremony. As a consequence, by letter dated 19th June 2020, the Respondent's Council requested the Claimant to show cause why disciplinary action should not be taken against him.

That by letter dated 25th June 2020, the Claimant responded to the notice to show cause. By the aforesaid response, the Claimant stated inter alia that *"the communique was issued as a result of resolution of the University Executive Board and the direction of the Acting Vice Chancellor."* The Claimant stated that the resolution was made in a meeting of the University Executive Board held on 18th January 2020.

That the Council's Human Resource Committee considered and deliberated upon the contents of the Claimant's response and resolved that the aforesaid response did not satisfactorily address the issues raised in the notice to show cause. In addition, the Claimant did not provide evidence in support of the matters stated in his response. Consequently, the Committee recommended that the Claimant be invited to appear before the full Council for a disciplinary hearing.

That by letter dated 17th July 2020, the Claimant was invited for a disciplinary hearing scheduled to be held on 24th July 2020 via virtual platform. By the aforesaid letter, the Claimant was informed inter alia that he was *"at liberty to present his witnesses in support of his response"* and that he was *"entitled to attend the disciplinary hearing in the company of a fellow employee of his choice and preference."*

That by letter dated 21st July 2020, the Claimant's advocate demanded inter alia that the disciplinary process be set aside and that the Claimant be supplied with witness statements. The Council responded by letter dated 22nd July 2020 and stated that at the disciplinary hearing, the Council would rely on the information and documents exchanged between the Claimant and the Council.

The Respondent avers that the Claimant attended the disciplinary hearing on 24th July 2020 as scheduled. The Claimant made his representations before the Council. That at the disciplinary hearing, the Claimant did not seek an adjournment to enable him prepare any further response to the notice to show cause.

The Respondent avers that the Claimant was accorded an opportunity to be heard and was granted ample time to defend himself. The respondent avers that a fair hearing was accorded to the Claimant.

The Respondent avers that the Council considered the Claimant's written response as well as the Claimant's oral presentation at the hearing and reached the findings inter alia:-

- a. The Claimant's actions and omissions constituted fundamental breach of the Claimant's obligations as a Deputy Vice Chancellor of the University of Nairobi.
- b. The Claimant acted in insubordination to the Vice Chancellor. The Claimant applied for the position of the Respondent's Vice Chancellor and participated in the recruitment exercise conducted by the Public Service Commission. By letter dated 3rd January 2020, Council notified the Claimant that upon conclusion of the recruitment exercise of a substantive Vice Chancellor of the Respondent, the Claimant ranked position two (2) in order of merit. The Claimant was thus aware that the Respondent's Vice Chancellor had been competitively recruited.
- c. The Claimant as the Ag. DVC FPD had no mandate to issue the memo dated 18th January 2020. The Claimant acted without authority thereby failing to uphold the rule of law.
- d. By neglecting to send a copy of the memo of 18th January 2020 to the Chancellor who was to preside over the installation ceremony of the Vice Chancellor, the Claimant acted in a manner intended to cause ridicule and embarrassment to the Chancellor which actions constitute acts of gross misconduct and insubordination to the Chancellor.

The Respondent avers that the Council noted that the Claimant ought to be summarily dismissed from employment as the Respondent's Deputy Vice Chancellor, Research Production and Extension as per Clause 4.6 (d) of the Public Service Commission, Discipline Manual for the Public Service and Section 44(3) and (4) of the Employment Act, 2007. That notwithstanding, the Council resolved to temper justice with mercy given the fact that there is far reaching economic, social and psychological implications that come with the summary dismissal of an employee. That the Council thus resolved not to dismiss the Claimant from employment but to terminate the Claimant's employment as

Deputy Vice Chancellor, Research, Innovation and Enterprise.

The Respondent avers that the Claimant is to revert to an academic position as Professor of Mechanical Engineering at the Department of Mechanical Engineering in the College of Architecture and Engineering. That the aforesaid position was communicated to the Claimant by letter dated 2nd October 2020.

The Respondent avers that by failing to uphold the rule of law, the Claimant being a senior member of staff and supervisor of hundreds of other university employees undermined public confidence in the integrity of the aforesaid office. That consequently, the Claimant's actions and omissions greatly undermined the confidence of the Respondent Council in the Claimant and in the Claimant's suitability to continue holding an administrative position as a Deputy Vice Chancellor in view of the provisions of Articles 10 and 73 of the Constitution as well as the Public Officers Ethics Act.

The Respondent avers that the termination of the Claimant's employment as Deputy Vice Chancellor, Research, Innovation, Enterprise was lawful. That the aforesaid termination was neither unfair nor actuated by malice as alleged by the Claimant because:-

- a. The University Executive Board undertakes its functions through formally constituted meetings. Despite indicating that the Claimant relied on the resolution of an alleged meeting of the University Executive Board, the Claimant did not present the notice convening the meeting, the agenda of the meeting nor the minutes of the alleged University Executive Board meeting.
- b. As the Claimant alleges that the memo was issued pursuant to a resolution of a University Executive Board meeting, it was incumbent upon the Claimant to adduce evidence in support of his allegations. No evidence was adduced by the Claimant. Without such evidence, it would be unreasonable to expect the Respondent's Council to prove the negative being that the memo was issued pursuant to the alleged resolutions.
- c. The Respondent is not in possession of the minutes and resolutions of the alleged University Executive Board meeting of 18th January 2020
- d. The Claimant alleges that the memo was issued on behalf of the University Executive Board. However, the memo does not communicate that it was issued "*pursuant to the resolutions of the University Executive Board*" and "*on behalf of the University Executive Board*". It is not signed for and on behalf of the University Executive Board.
- e. No evidence was tendered in support of the Claimant's allegation that he acted at the instructions of the Acting Vice Chancellor to this effect. Indeed, the memo makes no reference to the resolutions of a University Executive Board meeting or instructions of the Acting Vice Chancellor.
- f. Pursuant to Clause 7 of the Respondent's Statute XIII as set out in the Almanac 2019-2020, the University Management Board may delegate any of its duties to the Chairman or the committee consisting of such members of the University Management Board, Hence, pursuant to the aforesaid Clause 7, communication of the resolutions made by the University Executive Board could only be have been made by Prof. Isaac Mbeche who is said to have been the Chairman of the alleged University Executive Board meeting.
- g. An acting Deputy Vice Chancellor, Finance, Planning and Development has no mandate to communicate the resolutions made at a meeting of the University Executive Board. Deputy Vice Chancellor, Finance, Planning and Development is neither the Secretary nor the Chairman of the University Executive Board.
- h. The Claimant contends that the Respondent singled him for victimization by taking disciplinary action against him. That is patently false. The Respondent has the legal mandate to undertake disciplinary proceedings against an employee who acts contrary to the terms and conditions of employment.
- i. The findings of the Respondent's Council as set out in the letter dated 2nd October 2020 constitute valid and fair reasons for the termination of the Claimant's appointment as Deputy Vice Chancellor.
- j. At the disciplinary hearing held on 24th July 2020, the Claimant did not seek an adjournment to enable him prepare any further response to the notice to show cause.

Evidence

In order to expedite the conclusion of this suit, the parties agreed to forgo the hearing of the interlocutory application and to dispose of the claim by way of the affidavits, witness statements, pleadings on record and written submissions. The claimant filed the following documents:

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1. The Statement of Claim dated 6th October 2020 together with the verifying affidavit;
2. The list of witnesses and the witness statement dated 6th October 2020.
3. The notice of motion dated 6th October 2020, and the supporting affidavit to the application dated 6th October 2020 together with the exhibit MMO1 attached thereto;

4. The reply to the statement of response together with the supplementary bundle of documents dated 21st October 2020;

5. The supplementary list of witnesses as well as the sworn statements of evidence of Prof. Isaac Mbeche and the claimant, all sworn and filed on 22nd October 2020;

The Respondent on the other hand filed the following documents: -

1. Statement of Response dated 13th October 2020
2. two (2) witness statements
3. written submissions
4. list of authorities and
5. a case digest.

Determination

Having considered the pleadings, submissions and the authorities as filed by the parties, I find the issues for determination are the following:
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1. Whether the Respondent complied with fair procedure.
2. Whether there were valid reasons for the termination of the claimant's appointment as Deputy Vice Chancellor Research.
3. Whether the claimant is entitled to the orders sought in the statement of claim.

Fair Procedure

The claimant has acknowledged that he was first issued with a notice to show cause which he responded to. That he was thereafter invited for a disciplinary hearing which he attended. That he was given an opportunity to call witnesses and to be accompanied to the disciplinary hearing and that he was informed of his right of appeal.

I find the procedure was fair and in line with the law and the Respondent's Procedure.

Valid Reason

It is the claimant's case that there is no valid reason for the termination of his appointment as DVC, RPE.

It is the claimant's case that on 17th January 2020, the "Cabinet Secretary of Education Revoked the appointment of the Chairperson and Members of the University of Nairobi Council through Gazette Notices No. 360 and 361. That by letters of the same date the Cabinet Secretary revoked the appointment of Prof. Stephen Kiama as the Respondent's Vice Chancellor and appointed Prof. Isaac Mbeche as Acting Vice Chancellor. That on the same day the Ministry of Education issued a press statement informing the general public about the changes made by the Cabinet Secretary.

It is the Claimant's case, that the University Council is the highest decision making organ, in the University followed by the University of Nairobi Executive Board whose membership consists of the Vice Chancellor as Chairperson, the Deputy Vice Chancellors, Principals of Colleges with the University, Deputy principals and Finance Officer. Other members of senior management may be co-opted.

That in view of the revocation of appointment of the Chairperson and Member of the Nairobi University Council, the Executive Board was convened by the Acting Vice Chancellor Professor Mbeche to deliberate on the decisions taken by the Cabinet Secretary. That it is at the said meeting that a decision was made to issue a press release to all members of staff, stakeholders and students to be informed that the installation of Prof. Stephen Kiama would not proceed. That the Acting Vice Chancellor Prof. Mbeche instructed the claimant to draft a letter in the form of a Memorandum to be reviewed and approved by the Acting Vice Chancellor, which he proceeded to do as instructed. That the foregoing has been confirmed by Prof. Mbeche in his sworn statement of 22nd October 2020.

For the Respondent it is submitted that the claimant declined to avail Prof. Mbeche as a witness during his disciplinary hearing despite having been granted an opportunity to call a witness. That for this reasons Prof. Mbeche's evidence should not be admitted before this court. The Respondent relies on the decision in the case of **Peter Njuguna Chege v Timsales Limited [2020] eKLR** where the Court stated: -

"In the case of Kenya Union of Commercial, Food and Allied Workers v Menengai Oil Refineries Limited, Cause No. 476 of 2017 (Nakuru) the court held that;

...an employee who squanders the internal grievance handling

mechanisms provided for by the employer cannot claim to have been unfairly treated. Well advised to be accompanied by a fellow employee of his choice but opted to bring a third party, the grievant lost his chance to a hearing at the shop floor. He cannot then turn around and assert his right to a hearing.

*As aptly captured in **Jackson Butiya v Eastern Produce, Cause 335 of 2011** where the court held that;*

An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.

Equally in this case the claimant's retirement notice cannot issue to sanitise gross misconduct. To allow the retirement notice to stand would be to sanction misconduct and proceed to reward it.

The court finds the claimant authored his own termination of employment with the respondent. There is no violation of the constitution or any right under the Employment Act, 2007."

I find this case to be inapplicable as the claimant did not squander his chance to appear before the disciplinary committee. He attended the hearing.

The Respondent further submits that the evidence of Prof. Mbeche, even if admitted, is grossly insufficient to and does not aid the Claimant's case. This is because Prof. Mbeche did not produce the notice convening the meeting, the agenda of the meeting or the minutes thereof. That Clause 7 of the University of Nairobi Statute XIII further requires that a resolution can only be communicate by the Vice Chancellor. It is further submitted by the Respondent that the revocation of the appointment of the Vice Chancellor and cancellation of the installation ceremony created a crisis in the University and pursuant to Clause 5.7.3 of the Communication Policy, these were matters that could only be communicated by the Vice Chancellor.

It is further the Respondent's submissions, that Prof. Mbeche did not indicate who the Secretary of the meeting was and whether he signed the minutes and ensured the minutes were sent to the Secretary of the Council in accordance with Clause 10 of Statute XIII.

It is submitted that the Council was not aware about such meeting until 25th June 2020 through the Claimant's response to the notice to show cause. That at the hearing the claimant stated there were no minutes for the meeting in either draft or final form and there was no written UEB meeting resolutions. That it is therefore unreasonable for the claimant to require the Council to produce the minutes of the said alleged meeting.

The Respondent submitted that though the Claimant contends that the alleged reason for termination of his employment as a Deputy Vice Chancellor was invalid and unfair as he acted on *"the resolution of the Board and Acting Vice Chancellor"* and that issuance of the memo of 18th January 2020 was *"legal and validly approved by the Board and the Acting Vice Chancellor on 18th January 2020"*, no evidence was availed before the Council in support of the alleged resolution and instructions.

It was the Respondent's submission that Section 63(2) of the Universities Act provides that **"a University Council shall expeditiously dispose of all matters before it and in any event, within six months"**. That the Claimant was heard on 24th July 2020 and a decision was communicated to the Claimant on 2nd October 2020. That the time taken by the Council is approximately 2 months.

The Respondent submitted that since the aforesaid period was within the six months stipulated in the Universities Act, the Claimant's contention that the termination of his appointment as Deputy Vice Chancellor was wrongful and unfair on the ground that the disciplinary proceedings took two (2) months to conclude is without merit.

The Respondent submitted that Section 43 of the Employment Act provides that **"the reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."**

The Respondent relied on the case of **Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 Others, [2019] eKLR**, where the Court of Appeal stated;

"The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that it "genuinely believed to exist "causing it to terminate the employee's services..."

The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own 'reasonable grounds' for those of the employer..."

The notice to show cause letter issued to the claimant dated 19th June 2020 accused him of the following –

"June 19, 2020

Prof. Madara M. Ogot, PhD

Deputy Vice Chancellor (Research, Production and Extension)

University of Nairobi

NAIROBI

Email: madaraogot@uonbi.ac.ke

Dear Prof. Ogot,

NOTICE TO SHOW CAUSE WHY DISCIPLINARY ACTION SHOULD NOT BE TAKEN AGAINST YOU ON ACCOUNT OF INSUBORDINATION AND FAILURE TO UPHOLD THE RULE OF LAW PROCEEDINGS

The above and your email and internal memo communication to all staff, students and stakeholders of the University dated January 18, 2020 refers.

As you are well aware, the Council of the University of Nairobi is established and its functions spelt out both in the Universities Act 2012 and the University of Nairobi Charter 2013. The key statutory functions of the Council are inter alia employing staff, appointing Vice Chancellor, Deputy Vice Chancellor(s) and Principal(s) of Constituent Colleges, determining method of recruitment, appointment and promotion of all the staff of the University and disciplining staff. In undertaking the above functions, the Council is also mandated to ensure that the University complies with the constitution, all relevant laws, regulations, governance practices, accounting and auditing standards.

On January 18, 2020 at 2:02:40 pm, you acted contrary to the clear provisions set out in the Universities Act and the Charter, by insubordination of the Council of the University of Nairobi and also failing to uphold the rule of law by:

a. Purportedly acting on unlawful and illegal orders from the Cabinet Secretary Ministry of Education, thereby undermining the establishment and authority of the Council as established by law

b. Issuing a communique to all staff, students and stakeholders of the University to wit:

i. that the Cabinet Secretary Ministry of Education had purportedly revoked the appointment of the duly and lawfully appointed Vice Chancellor of the University of Nairobi;

ii. that the Cabinet Secretary Ministry of Education had purportedly appointed one Prof. Isaac Meroka Mbeche as the Vice Chancellor of the University of Nairobi in an acting capacity with effect from January 17, 2020 until the process of recruiting a substantive Vice Chancellor is purportedly complete;

iii. Hi. that the Cabinet Secretary Ministry of Education had purportedly appointed the lawfully appointed Vice Chancellor Prof. Stephen Kiama to the vacant position of Deputy Vice Chancellor (Human Resource and Administration);

c. without lawful cause and/or authority whatsoever, cancelling the installation ceremony for the duly and lawfully appointed Vice Chancellor of the University of Nairobi scheduled for January 20, 2020 and thereby occasioning monumental ridicule and embarrassment to (i) the University, (ii) the Council, (iii) the Vice Chancellor and (iv) the Chancellor as the installing officer in the eyes of right standing citizens, invited guests and university stakeholders.

The above actions were undertaken on the basis of powers and functions that are neither vested in you nor the Cabinet Secretary. Further, these actions were in violation of the Universities Act provisions on the process of recruitment and appointment of the Vice Chancellor and injurious to the character of Council, your employer.

The above illegal and unlawful actions were solely attributed to yourself, and:

1. were contrary to national values and principles of governance and values and principles of Public Service under Articles 10(2) and 232 of the constitution 2010 as read together with part II section 5(6) of Code of Conduct and Ethics for Public Universities (Revised 2009)

2. undermined the establishment and authority of the Council under sections 35(1), 38, 39, 40 and 65 of the Universities Act 2012 (as amended) as read together with sections 14, 18, 22 and 23 of the University of Nairobi Charter, 2013 as read together with part II section 5(6) of the Code of Conduct and Ethics for Public Universities (Revised 2009)

3. contravened the terms and conditions of service that you signed with the Council, your employer

In view of the above, you are hereby issued with Notice to Show Cause, why disciplinary action should not be taken against you on account of a. insubordination of:

i. Council as stated above

ii. Chancellor as stated above and,

b. failure to uphold the rule of law in the course of discharging your duties as a staff of the University, a public institution.

Your response to the show cause notice to be received by the Council no later than seven (7) days from the date of this letter.

Yours sincerely,

SIGNED

Prof. Julia Ojiambo, PhD, CBS, EBS, MBS

Chairperson

Council of University of Nairobi”

It was a fact that there was no Vice Chancellor or University of Nairobi Council on 18th January 2020 following the revocation of the appointment of the Chairperson, the Members of the Council and that of the Vice Chancellor by the Cabinet Secretary, Education. The installation of the Vice Chancellor whose appointment was revoked had been scheduled for 20th January 2020, just two days from the date of the Internal Memo.

The impugned memo dated 18th January 2020 stated as follows: -

FROM: Deputy Vice Chancellor (FPDJ)

TO: AU Staff and Students

RE: APPOINTMENT OF ACTING VICE CHANCELLOR

This is to inform the University Community that the CS Education, Prof. George Magoha has revoked the appointment of Prof. Stephen Gitahi Kiama as Vice Chancellor of the University of Nairobi and appointed Prof. Isaac Meroka Mbeche as Vice Chancellor in acting capacity with effect from 17th January, 2020 until the process of recruiting a substantive Vice Chancellor is completed. Prof. Kiama returns as the substantive Deputy Vice Chancellor, Human Resource and Administration. In addition, the installation ceremony for the Vice Chancellor that was planned to take place on Tuesday 20th January, 2020 has been cancelled.

SIGNED

Prof. Madara Ogot”

It is clear that what was communicated was factual. It was the responsibility of the University administration to communicate the changes that had occurred in the leadership of the Respondent following the actions taken by the Cabinet Secretary, Education. Had the circular not been sent out, there would have been confusion over the installation of the Vice Chancellor.

The University of Nairobi Statute XIII provides for the responsibility and meetings of the University Executive Board as follows: -

STATUTE XIII

UNIVERSITY EXECUTIVE BOARD

1. There shall be a University Management Board whose membership shall be:

- i. The Vice Chancellor – Chairman;
- ii. The Deputy Vice Chancellor (Academic Affairs);
- iii. The Deputy Vice Chancellor (Human Resource and Administration);
- iv. The Deputy Vice Chancellor (Student Affairs);
- v. The Deputy Vice Chancellor (Research, Production and Extension
- vi. The Principals of Colleges;
- vii. The Deputy Principals of Colleges;

viii. *Managing Director, University of Nairobi Holding Company; and*

ix. *Administration Registrar-Secretary*

2. *The University Management Board shall be responsible for:*

i. *The co-ordination of University and College development plans;*

ii. *The efficient management of University resources, both human and material. Making proposals to the Council and the Senate on policies that have a University-wide 226 application; and*

iii. *Any other matters related to the management of the University and the Colleges.*

[Emphasis added]

From the forgoing, the committee is not prohibited from holding a meeting where there is a crisis. Further, I do not think it was necessary to hold a formal meeting to authorise the Acting Vice Chancellor to communicate to the public a serious, factual and urgent issue like the sudden change of management and the postponement of installation of the Vice Chancellor, the revocation having been gazetted on 17th February 2020. I also do not find it practical to expect a communication of the nature that the claimant is accused of to be done through a resolution as there was really nothing to pass a resolution on, the issue under discussion having been published in the Kenya Gazette and having been the subject of a press release by the Office of the Cabinet Secretary, Education. This was mere consultation on how to handle the situation that had been brought about by the actions of the Cabinet Secretary.

On the allegations that Prof. Mbeche was not called as a witness

before the disciplinary committee and that his evidence should not be admitted before this court, the Respondent did not give away legal basis for the same. This court is not limited to considering only the evidence that was adduced before an internal disciplinary committee but all relevant evidence placed before the court. In any event, in all his defences to the show cause letter and even at the hearing the claimant repeatedly stated that he was instructed by Prof. Mbeche who was the Acting Vice Chancellor to draft and issue the Internal Memo after his approval. This was therefore evidence that was available before the disciplinary committee and subject to consideration by this court.

On the question that the Claimant acted on unlawful and illegal orders from the Cabinet Secretary, my view is that a Gazette Notice is not illegal unless and until it is declared illegal by a court, which in this case was never done as the parties reached a settlement on the matter long after the impugned communication, following which the suit was marked as settled and the Gazette Notice withdrawn. Indeed, Section 69 of the Interpretation and General Provisions Act (Cap 1 of the Laws of Kenya) provide that: -

69. Gazette, etc., to be prima facie evidence

The production of a copy of the Gazette containing a written law or a notice, or of a copy of a written law or a notice, purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.

There was thus no unlawful or illegal order of the Cabinet Secretary, but a valid gazette notice published in the Kenya Gazette for public notification of the revocation of appointment of the Chair and Members of the University of Nairobi Council and the Vice Chancellor.

At the time of writing the impugned internal memo, the claimant was Acting Deputy Vice Chancellor, Finance, Planning and Development. According to the University Statute, one of his duties was that he: -

“shall have such other duties as may be assigned or delegated to him by the Vice Chancellor in accordance with the Statute III.”

No issue has been raised by the Respondent over the power of the Acting Vice Chancellor Prof. Mbeche to assign the duty of issuing the impugned internal memo as the claimant did. In fact, Prof. Mbeche has very expressly, in his sworn affidavit, confirmed what the claimant had been telling the Respondent all along, that he is the one who instructed the Claimant to issue the circular. In his sworn affidavit at paragraphs 4 to 13, he states: -

4. *On 17th January 2020, the Cabinet Secretary for Education revoked the appointment of the Chairperson of the University of Nairobi Council and the appointment of members of the University of Nairobi Council. The notices were published in Gazette Notice No. 360 and Gazette Notice No. 361 in the Kenya Gazette Vol. 102 No. 10 dated 17th January 2020.*

5. *The Cabinet Secretary for Education also revoked the appointment of the Vice Chancellor, Prof. Stephen Kiama, and appointed me as the Acting Vice Chancellor by letters of the same date.*

6. *On 18th January 2020, I convened a meeting of the University of Nairobi Executive Board (The Board”) in my capacity as Acting Vice Chancellor, to deliberate on the decisions made by the Cabinet Secretary for Education.*

7. *As at 18th January 2020, the University Executive Board meetings was made up of the following, in accordance with clause 20 (1) of the University of Nairobi Charter:*

- a. I was present as the Chair;
 - b. The Claimant as the DVC Research Innovation Enterprise and Ag. DVC Finance Planning & Development;
 - c. Four (4) College Principals out of a total of 6,
 - d. Three (3) Deputy Principals;
 - e. The Director Graduate School and her two deputies;
 - f. The Director ODeI College Campus and his deputy.
8. The Board deliberated and agreed that it could not delve into the merits and demerits of the Cabinet Secretary's decision.
9. The installation of the Vice – Chancellor, Prof. Stephen Kiama, had been scheduled for 21st January 2020. Due to the revocation of his appointment and that of the University of Nairobi Council, the Board concluded that the installation could not proceed. The Board consequently took the decision that all members of staff, stakeholders and students and students that the installation would not proceed.
10. I instructed the claimant in his capacity as the Acting Deputy Vice – Chancellor Finance, Planning & Development to draft a memo informing all members of staff, stakeholders and students that the installation of Prof. Stephen Kiama scheduled for 20th January 2020 as Vice Chancellor of the University of Nairobi would not proceed.
11. Acting on my instructions, the claimant drafted the memo that I subsequently reviewed and approved for circulation. Upon approval, the claimant issued the memo dated 18th January 2020 to all staff and students of the respondent.
12. I have seen the letter of dismissal as well as the show cause issued against the Claimant herein. The allegation that he authored the memo without authority and that he cancelled the installation ceremony for the new Vice chancellor are not true for reasons that:
- a. On 17th January 2020, the Cabinet Secretary had revoked the appointment of the Vice Chancellor and appointed me as the acting Vice Chancellor. The installation process could not therefore proceed as scheduled;
 - b. As at 18th January 2020, there were only 4 Deputy Vice Chancellors in the University of Nairobi out of whom the Claimant was best suited to issue the memo in his capacity as the Acting Deputy Vice Chancellor Finance and Planning. He is the only DVC who attended the Board meeting and therefore the only other senior employee of the respondent other than myself who could communicate the resolution of the Board.
 - c. As at 17th January 2020, I was the substantive Deputy Vice Chancellor Finance. Development & Planning. I was however on leave and the claimant had been appointed as Acting Deputy Chancellor Finance & Planning. Having been appointed acting Vice Chancellor, I could not author the memorandum on 18th January 2020;
 - d. Prof. Kiama was the Deputy Vice Chancellor Human Resource & Administration. Upon his appointment as Vice Chancellor he held on to the position as he awaited his installation. Ordinarily, he was the one who would have authored the memorandum that is the subject of this case. When his appointment was cancelled on 17th January 2020, he could not author a memo against his own appointment.
 - e. Under the University of Nairobi Charter (Clause 20) the Claimant had power to discharge the duties I assigned him to do. This was also in line with Clause 1 of his contract of employment.
13. I have not been contacted by any member of staff at the University of Nairobi or any officer to provide any information on the matter.”

On the charges of insubordination of the Council, there was no council in existence at the time of issuance of the impugned Internal Memo, and the claimant could not have unsubordinated a non-existent entity.

The foregoing is sufficient to absolve the claimant of any and all allegations of wrongdoing by the issuance of the Internal Memo. It is unfortunate that even though the claimant all along stated that he was acting under instructions of the then Acting Vice Chancellor, the Respondent did not as much as write a letter to the Acting Vice Chancellor, who was its employee, and available if required, to confirm if what the claimant had stated about him was true. This in my view confirms the claimant's averments that he was singled out for victimisation for merely acting on instructions of his immediate supervisor and a resolution of the University Executive Board. In fact, upon the claimant informing the Respondent that he was acting under instructions of the Acting Vice Chancellor, all blame should have been shifted to the said Acting Vice Chancellor.

It is my finding that the Claimant acted on authority of his immediate Supervisor and the University Board to issue the impugned internal memo dated 18th January 2020, that the contents of the said circular were factual and that all accusations against him in respect of minutes of the Board, insubordination of the Vice Chancellor or any other liability arising from the impugned Internal memo were levelled against the

wrong person.

I find no breach by the Claimant of Articles 10(2)(c), 73 and 234(1)(e) and (f) of the Constitution, Sections 10(1) and 25 of the Public Officers Ethics Act, Sections 36, 38(3)(c) of the Universities Act, Sections 12(3)(c), 22(8) and 10(a) of the University of Nairobi Charter, 2013, Statute VA of the University of Nairobi Statutes and Sections 15 and 16 of his terms and conditions of employment, or any other law contrary to the averments in the letter of dismissal.

I also find that the claimant had mandate of the Acting Deputy Vice Chancellor and the University Executive Board to issue the Internal Memo contrary to the averments in the letter of dismissal.

It is also a fact that there was no substantive Vice Chancellor, the Vice Chancellor's appointment having been revoked by Gazette Notice. Prof. Mbeche was the Acting Chancellor. I therefore find that the termination of the appointment of the claimant was unfair and that he was maliciously singled out for punishment for no valid reason. The fact that the Respondent made reference to the claimant's application for the position of Vice Chancellor where he was ranked as No. 2 and the fact that the Chairperson, Members of the Council and Vice Chancellor, who were the subject of the impugned Internal Memo were part of the disciplinary committee means that, the disciplinary process was motivated by their displeasure over their removal and the Claimant's communication of the same to the staff and therefore malicious. I find that there was absolutely no reason to dismiss/remove the claimant from his position as Deputy Vice Chancellor, Research, Production and Extension or even to subject him to disciplinary action.

Remedies

The claimant prayed for a declaration that the termination of his employment as Deputy Vice Chancellor, Research, Production and Extension is illegal, null and void. **Having found that there was no reason at all for the termination, I do declare the termination to be unlawful and unfair.**

I do order the immediate reinstatement of the claimant to the position of Deputy Vice Chancellor Research Production and Extension without any loss of pay or benefits.

The order for reinstatement is made based on the fact that the position is still vacant and the claimant's performance in that position has not been questioned in these proceedings.

The respondent shall bear the claimant's costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MARCH 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE