



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION NO. 2 OF 2020

IN THE MATTER OF

ARTICLES 1, 2, 10, 22, 23, 27, 34, 35, 41, 43, 47, 48, 50, 56, 73, 75, 156, 232, 234, 236

AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

ALLEGED CONTRAVENTION OF ARTICLES 10, 27, 35, 41, 47 AND 232 OF

THE CONSTITUTION OF KENYA, 2010; SECTIONS 3(1)(f),(g)(j) & (k), 35(1)(a),(v) AND 36(1)(d) & (2) OF

THE UNIVERSITIES ACT, 2012; SECTION 5 OF THE EMPLOYMENT ACT, 2007, SECTIONS 34, 46, 63 AND 93 OF

THE PUBLIC COMMISSION ACT, 2017; STATUTE XII(1 AND 12) OF KIBABII UNIVERSITY 2020

AND

IN THE MATTER OF

THE ALLEGED UNCONSTITUTIONAL INTERVIEWING PROCESS OF THE POSITION OF DEPUTY

VICE-CHANCELLOR (ADMINISTRATION, FINANCE AND DEVELOPMENT) AT KIBABII UNIVERSITY

BY THE PUBLIC SERVICE COMMISSION

AND

IN THE MATTER OF

VIOLATION OF THE RULE OF NATURAL JUSTICE AND DISCRIMINATION AGAINST THE LONG

SERVING ACTING DEPUTY VICE-CHANCELLOR (ADMINISTRATION, FINANCE AND DEVELOPMENT)

AT KIBABII UNIVERSITY

AND

IN THE MATTER OF

THE DETERMINATION THAT KIBABII UNIVERSITY COUNCIL AND TOP MANAGEMENT

ARE UNCONSTITUTIONALLY CONSTITUTED

BETWEEN

BARASA KUNDU NYUKURIPETITIONER

V

PUBLIC SERVICE COMMISSION1st RESPONDENT

HON ATTORNEY GENERAL..... 2nd RESPONDENT

CABINET SECRETARY, MINISTRY OF

EDUCATION, SCIENCE & TECHNOLOGY..... 3rd RESPONDENT

And

KIBABI UNIVERSITY 1st INTERESTED PARTY

PROF DONALD SIAMBA, ACTING DEPUTY

VICE-CHANCELLOR (AFD), KIBABII

UNIVERSITY..... 2nd INTERESTED PARTY

JUDGMENT

1. Through a Petition dated 27 May 2020, Barasa Kundu Nyukuri (the Petitioner) alleged that the process of recruitment of the Deputy Vice-Chancellor (Administration, Finance and Development) for Kibabii University contravened section 5 of the Employment Act, 2007 as read with Article 232 of the Constitution. He also asserted that the University Council and top management were not lawfully constituted.
2. The Petitioner prayed for the following remedies:
 - (i) THAT the 2nd Interested Party be confirmed in the position of Deputy Vice-Chancellor Administration, Finance and Development, which position he has acted for over 12 months (over one year) under the public service career management and within the purview of the rule of natural justice.
 - (ii) THAT Kibabii University Council be re-constituted to address incompetency, conflict of interest and the gender rule of not more than 2/3 of the same gender and representation of Kenya's diverse communities in accordance with Article 27(8) of the Constitution of Kenya, 2010.
 - (iii) THAT the top four (4) management positions at Kibabii University be re-advertised to take care of the gender parity principle in the management of this prestigious institution in the region in accordance with the values and principles of public service enshrined in Article 232(f), (h) and (i) of the Constitution of Kenya, 2010.
 - (iv) THAT the cost of the application and Petition be provided for in the cause.
3. On the same day, the Petitioner filed a Motion under a certificate of urgency seeking orders staying the recruitment process.
4. When the Motion was placed before the Court on 2 June 2020, it directed that the Motion be served and that the parties file and exchange affidavits and submissions within set timelines.
5. The Honourable Attorney entered an appearance on behalf of the Respondents on 21 August 2020. The Chief Executive Officer of the Public Service Commission filed a replying affidavit in opposition to the Motion on the same day.
6. When the Petition was listed for directions on 17 December 2020, the Petitioner was absent despite the Deputy Registrar having notified him through an email to attend the session.
7. The Court rescheduled the giving of directions to 19 January 2021. The Deputy Registrar duly notified the Petitioner of the new date through an email, but there was no appearance by the Petitioner.
8. Since the Respondents were present, the Court directed that both the Motion and Petition be heard together.
9. The Court also directed the parties to file and exchange submissions within set timelines.
10. The Petitioner's submissions were not on record by 19 February 2021 as expected, and logically, the Respondents submissions, which should have been filed and served by 19 March 2021, were not on record (the Deputy Registrar had notified the Petitioner through an email on 19 January 2021 to file the submissions).

11. Even without the benefit of the parties submissions and considering the Petitioner's prayers, the Court understands the Issues for adjudication as examined hereunder.

Confirmation of Prof Donald Siamba as Deputy Vice-Chancellor, Administration, Finance and Development

12. The Petitioner felt that Prof Siamba should be confirmed into the office of the Deputy Vice-Chancellor because he had acted for over 12 months.

13. The question is whether the Court can extend and/or purport to confirm him in the position.

14. The Court does not think so for the following reasons.

15. It is the University Council that has the power to appoint a person to act in the office of Deputy Vice-Chancellor, and it is the Council that appointed Prof Siamba to act. The last acting appointment was to last until 30 May 2020. The University Council, a perpetual body, was not included as a party to the Petition.

16. In the Court's view, it was fatal for the Petitioner to omit to include Council as a party, being the appointing authority.

17. Further, the appointment of persons to act in the office of the Deputy Vice-Chancellor must be guided by some written instrument. The Petitioner did not file or produce such an instrument in Court.

18. By purporting to confirm Prof Siamba as Deputy Vice-Chancellor, the Court will be usurping a jurisdiction that does not belong to it.

Reconstitution of the University Council

19. The mandate of appointing members of a University Council is provided for in law. The appointments are made and gazetted after a recruitment process.

20. The Petitioner did not produce an official copy of the gazette notice with the names and particulars of the members of Council e contended were not lawfully in office.

21. What he filed as exhibit BKN 7 does not, in the view of the Court, meet the criteria of admissibility, as it does not even have the name or signature of the author.

22. The Court also notes that an order of reconstitution of the Council would have adversely affected the Council members without affording them an opportunity to be heard since they were not made parties to the litigation.

Re-advertisement of 4-top University management positions

23. The 4-top university Managers the Petitioner wanted their positions re-advertised were not made parties to the Petition. Making an order whose effect was to remove them from office without due process would not find favour with the dictates of natural justice.

24. Before concluding, the Court must observe that by failing to file and serve his submissions, the Petitioner not only failed to comply with court orders but must be taken as having failed to prosecute his case.

25. The Court further notes that there is nothing on record to show that the Interested Parties were served with the Motion and the Petition.

Conclusion and Orders

26. From the foregoing, the Court finds no merit in the Petition. It is dismissed with costs to the Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 14TH DAY OF APRIL 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Petitioner in person

For Respondents Callen Masaka, Senior State Counsel, Office of the Attorney General

Interested Parties no evidence they were served

