



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**PETITION NO. 6 OF 2020**

**IN THE MATTER OF ARTICLES 1, 2, 10, 22, 23, 27, 34, 35, 41, 47, 48, 50, 56, 73, 75, 156, 232 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 36(1)(d) OF THE UNIVERSITIES ACT, 2012**

**AND**

**IN THE MATTER OF THE ALLEGED UNCONSTITUTIONAL AND IRREGULAR APPOINTMENT OF THE MASINDE  
MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY UNIVERSITY COUNCIL CHAIRPERSON AND MEMBERS**

**AND**

**IN THE MATTER OF THE DETERMINATION THAT THE APPOINTMENT OF THE MASINDE MULIRO UNIVERSITY OF  
SCIENCE AND TECHNOLOGY UNIVERSITY COUNCIL CHAIRPERSON AND MEMBERS BY THE CABINET  
SECRETARY TO THE MINISTRY OF EDUCATION WAS NOT THROUGH AN OPEN PROCESS**

**BETWEEN**

**MOSES WANJALA LUKOYE..... PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JANE MUSANGI..... 3<sup>RD</sup> RESPONDENT**

**STEPHEN MUTORO..... 4<sup>TH</sup> RESPONDENT**

**CONNIE OKWISA MOGAKA.....5<sup>TH</sup> RESPONDENT**

**JOSHUA ONYANGO OGANGO.....6<sup>TH</sup> RESPONDENT**

**GAD GATHU KIRAGU..... 7<sup>TH</sup> RESPONDENT**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....INTERESTED PARTY**

**JUDGMENT**

1. Moses Wanjala Lukoye (the Petitioner) moved the Court on 4 August 2020 alleging that the appointment of the Chairperson and members of the Council of Masinde Muliro University of Science and Technology on 20 March 2020 by the Cabinet Secretary, Ministry of Education (the Cabinet Secretary) contravened the Constitution and was unlawful.

2. The Petitioner sought the following orders:

i. A declaration that the Respondents have contravened Article 10 of the Constitution in that the national values and principles of governance set out have not been observed and that the decisions regarding the appointments of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents require the participation and general approval of the public and people of Kenya.

ii. A declaration that the decision by the 1<sup>st</sup> Respondent under the legal counsel of the 2<sup>nd</sup> Respondent to gazette and consequently appoint the 3<sup>rd</sup> Respondent as the chairperson of Masinde Muliro University of Science and Technology University Council and the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents as members of the Masinde Muliro University of Science and Technology University Council violates the fundamental rights and freedoms as envisaged under Articles 27, 34, 35, 41, 47, 48, 50 and 56 of the Kenyan Constitution and is therefore null and void.

iii. An order of certiorari do issue quashing the gazette notice no 2365 whose import were to purport to gazette the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents as chairperson and members of Masinde Muliro University of Science and Technology Council, respectively.

iv. Conservatory orders in respect of the Interested Party until further or other orders of this Honourable Court are issued. Alternatively, the order of prohibition or injunction against the Respondents restraining them from undertaking or implementing any actions until safeguards and remedies in respect of the subject matter of the declaration above are put in place to the satisfaction of this Honourable Court.

v. A declaration that all the decisions and actions undertaken by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents as chairperson and members respectively of Masinde Muliro University of Science and Technology Council as from 10<sup>th</sup> March 200 are null and void.

vi. An order of mandamus compelling the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents as chairperson and members respectively of Masinde Muliro University of Science and Technology Council to furnish accounts of all allowances and monies handled by them as from 10<sup>th</sup> March 2020 to be paid back by the Respondents.

vii. An order of mandamus compelling the 1<sup>st</sup> Respondent to declare vacant the positions of chairperson and members of Masinde Muliro University of Science and Technology Council and duly advertise for the recruitment of the same to be done as per law prescribed.

viii. This Honourable Court do issue such further orders and give such direction as it may deem fit to meet the ends of justice and the protection of the constitutional rights of the Petitioner and the public at large in the context of the declarations made.

ix. The costs of the Petition be awarded to the Petitioner as against the Government of the Republic of Kenya and the other Respondents.

3. On the same day, the Petitioner filed a Motion under a certificate of urgency seeking several interim interdicts.

4. When the application was placed before the Court on 7 September 2020, it declined to certify it as urgent, and the Petitioner was directed to effect service. The Court also directed the parties to file and exchange affidavits and submissions ahead of Ruling on notice.

5. On 16 September 2020, one Jared Achimba Areba applied to be joined as an Interested Party to the Petition. The Court declined to certify the joinder application urgent and directed that it be served and that the Deputy Registrar fix a date for the giving of directions.

6. Upon service, G & A Advocates LLP filed a Notice of Appointment to act for the 3<sup>rd</sup> to 7<sup>th</sup> Respondents on 24 September 2020, while the Attorney General came on record for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 25 September 2020. The Cabinet Secretary also caused to be filed a replying affidavit sworn by the Director of University Education and Research on the same day.

7. The Petitioner filed his submissions on 2 October 2020, while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed joint submissions on 12 October 2020.

8. When the Petition was placed before the Court on 17 December 2020, it directed that both the Motion and Petition be heard together.

9. The Court also directed that responses and submissions be filed and exchanged within set timelines.

10. The 3<sup>rd</sup> to 7<sup>th</sup> Respondents and Interested Party's submissions were not on record by the set timelines.

11. The Court has considered the Motion, Petition, affidavits and submissions on record.

## **Background**

12. The term of members of the Council of Masinde Muliro University of Science and Technology was to expire on 9 March 2020. On 25 February 2020, the Ministry of Education advertised the vacancies and the deadline for receipt of applications were given as 17 March 2020.

13. On 20 March 2020, the Cabinet Secretary gazetted the 3<sup>rd</sup> to 7<sup>th</sup> Respondents as Chair and Council members.

14. Nevertheless, the Ministry of Education published the names of shortlisted applicants on 24 March 2020.

#### **Petitioner's assertions**

15. The Petitioner challenged the lawfulness of the appointments on the grounds that the process was not open or competitive as required by law; the 3<sup>rd</sup> to 7<sup>th</sup> Respondents were not in the shortlist of applicants and that the 3<sup>rd</sup> to 7<sup>th</sup> Respondents appointment(s) were gazetted before the publication of shortlisted applicants.

#### **Cabinet Secretary and Attorney Generals contentions**

16. The Cabinet Secretary and the Attorney General supported the lawfulness of the appointments on the grounds that the COVID19 public health pandemic had interfered with the recruitment process, and therefore face to face interviews could not be conducted.

17. In the circumstances, the Respondents contended that they resorted to a database of those who had either served as members of University Councils and were eligible for re-appointment and therefore, there was no need to conduct competitive recruitment.

18. To firm up the submission, the Respondents cited the case of *R v Cabinet Secretary for Education, Science & Technology & 3 Ors* (2014) eKLR where the High Court had held that there was no need for a competitive process where a person was eligible for re-appointment to a public office.

19. The Respondents also supported their decision on the ground that it was necessary to avoid a vacuum in the Council (to allow university operations to continue uninterrupted).

20. The Respondents also challenged the competency of the Petition on the ground that it did not meet the threshold set in *Anarita Karimi Njeru v Attorney General* (1979) eKLR.

21. The Court has considered the Motion, Petition, affidavits and submissions and come to the view that the Petition should succeed for the reasons given hereunder.

#### **Competency of the Petition**

22. One, the Respondents urged the Court to reject the Petition on the ground that it did not set out the provisions of the Constitution contravened.

23. The Petition was filed by a layperson with no disclosed legal education or training. Article 22(3)(b) of the Constitution envisages a party approaching the Court through informal documentation.

24. Under Part C of the Petition, the Petitioner outlined the provisions of the Constitution he alleged were contravened and these included Article 10 on national values and principles, governance, integrity, transparency and accountability.

25. Although alleging incompetency, the Respondents did not suggest that they were prejudiced by the inelegant drafting by the Petitioner. Indeed the replying affidavit sworn on behalf of the Cabinet Secretary show that these Respondents knew and understood the case they were expected to meet.

#### **Merits of the Petition**

26. Two, the advertisement declaring vacancies for chairpersons and members of university councils directed interested applicants to indicate the position applied for.

27. The deadline for the applications was 17 March 2020, and the names of the shortlisted candidates were published on 24 March 2020.

28. In paragraph 7 of the replying affidavit filed on behalf of the Cabinet Secretary, it was admitted that interviews were conducted virtually.

29. Apart from admitting that interviews of the interested and shortlisted applicants were conducted virtually, the Respondents did not explain what became of the interviews.

30. By not releasing the results of the interviews, the Respondents were in contravention of the values and principles of transparency and accountability which imbue the public service.

31. Three, the 3<sup>rd</sup> Respondent had never applied for nor served as a Chair or member of the Council of Masinde Muliro University of Science and Technology and, therefore, could not be *re-appointed* to chair the Council.

32. The Cabinet Secretary could only *re-appoint* her to chair the University Council she had been appointed to Chair. A *re-appointment*, therefore, could only apply if it was to the same public institution.

33. Four, it was not open to the Cabinet Secretary to revert to the Ministry's database and purport to appoint persons therein as members of Council as such a course of action made meaningless and a mockery the very reason why the positions had been advertised only weeks before.

34. The explanation that the decision was based on the COVID19 public health pandemic cannot hold any water as interviews were conducted virtually.

35. Five, there was no statutory or other legal foundation given by the Respondents for appointing persons who had not applied and/or been shortlisted and interviewed for the position of council member of the Masinde Muliro University of Science and Technology.

36. Six, there is no statutory foundation to support the appointment of Council members from a database.

37. The Constitution 2010 was meant to address particular governance issues, including appointments to public offices.

38. The actions of the Cabinet Secretary herein show an attempt to claw back on the values and principles which should guide such appointments.38.

### **Conclusion and Orders**

39. From the foregoing, the Court finds and orders:

i. A declaration be and is hereby issued that the decision by the 1<sup>st</sup> Respondent to gazette and consequently appoint the 3<sup>rd</sup> Respondent as the chairperson of Masinde Muliro University of Science and Technology University Council and the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Respondents as members of the Masinde Muliro University of Science and Technology University Council contravened the national values and principles as envisaged under Articles 10 and 232 of the Constitution and is therefore null and void.

ii. An order of certiorari be and is hereby issued to quash Gazette Notice No. 2365, whose import were to purport to gazette the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents as chairperson and members of Masinde Muliro University of Science and Technology Council, respectively.

40. The Petition was in the public interest. Each party to bear their own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 7<sup>TH</sup> DAY OF APRIL 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Petitioner in person

For 1<sup>st</sup> and 2<sup>nd</sup> Respondents Office of the Hon Attorney General

For 3<sup>rd</sup> to 7<sup>th</sup> Respondents G & Advocates LLP

Interested Party did not participate

Court Assistant Chrispo Aura