



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E015 OF 2020**

**IN THE MATTER OF PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW;**

**IN THE MATTER OF ARTICLES 2[1],3[1]10,19,20,21,22,27,28,35,41,43, 47,48,50,**

**94[5]159[1]162[2][a],232, AND 259 OF THE CONSTITUTION OF KENYA;**

**IN THE MATTER OF THE UNIVERSITIES ACT, 2012;**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT;**

**IN THE MATTER OF DISCRIMINATION [EMPLOYMENT**

**AND OCCUPATION] CONVENTION, 1958; AND,**

**IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY**

**OF THE PURPORTED RECRUITMENT OF CHIEF EXECUTIVE**

**OFFICER OF KENYA UNIVERSITIES AND COLLEGES**

**CENTRAL PLACEMENT SERVICE**

**REPUBLIC OF KENYA.....APPLICANT**

**VERSUS**

**KENYA UNVIVERSITIES AND COLLEGES CENTRAL PLACEMENT SERVICE.....RESPONDENT**

**ADRIAN KAMOTHO NJENGA.....EX PARTE**

**JUDGMENT**

**Application for Judicial Review and Response.**

1. The *ex parte* Applicant seeks an order of certiorari, to remove into this Court, and quash vacancy notice for the position of Chief Executive Officer of the Kenya Universities and Colleges Central Placement Service, closing on 8th December 2020.
2. Leave to apply for the order was granted on 10th December 2020.
3. The *ex parte* Applicant is a Kenyan Lawyer and Scholar.
4. The Respondent is a public body, established under Section 55 of the Universities Act No. 42 of 2012. Its functions include: co-ordination of the placement of Government sponsored Students to Universities and Colleges; dissemination on available programmes; collection and

retention of data relating to these Institutions; advise the Government; develop Career Guidance Programmes; and performance of any other functions under the Act.

5. The Application is based on the Statutory Statement and Verifying Affidavits sworn by the *ex parte* Applicant, received in Court on 9th December 2020.

6. It is opposed through the Replying Affidavit of Alice Mercy Wahome, sworn on 25th January 2021. At the that time, Wahome was the Acting Chief Executive Officer of the Respondent. She has since been appointed as the Substantive Chief Executive Officer.

7. The *ex parte* Applicant's position is that the vacancy notice was *ultra vires* the lawful powers bestowed upon the Respondent. The decision by the Respondent was arbitrary and aimed at closing out eligible and qualified Applicants.

8. The appointment of the Secretary and Staff Members of the Commission is governed by Section 58 of the Universities Act 2012. Section 9 and 12 of the Act apply *mutatis mutandis*, to the appointment of the Director/ CEO and Staff Members of the Respondent.

9. Accordingly, Section 11 of the Universities Act sets out the qualifications for appointment of the Chief Executive Officer of the Respondent as follows: -

**[1] A person shall be qualified for appointment as a Commission Secretary if the person-**

- a. holds a master's degree from a university recognized in Kenya; and,**
- b. has at least ten years' experience in the management of a University.**

**[2] In addition to the qualifications specified under subsection [1] a person shall meet the requirements of Chapter Six of the Constitution.**

10. The Applicant submits that the vacancy notice set its own qualifications, outside the above statutory provision. It required candidates to have minimum qualifications as follows: -

- a. Minimum of fifteen years' relevant work experience and at least ten years' distinguished career in a senior management position in a reputable institution, either in private or public sector;**
- b. Bachelor's Degree from a recognized institution;**
- c. Master's Degree in any of the following fields: education, business, social sciences or any other relevant and equivalent qualification from a recognized institution;**
- d. Professional qualification and membership to a relevant professional body, where applicable;**
- e. Must have undertaken leadership courses from recognized institutions; must fulfil the requirements of Chapter Six of the Constitution on leadership and integrity; and**
- f. Must have clearance from Kenya Revenue Authority, Ethics and Anti-Corruption Commission, Higher Education Loans Board, Credit Reference Bureau and Directorate of Criminal Investigations.**

11. No person or body, other than Parliament has the power to make provision having the force of the law in Kenya, under Article 94 [5] of the Constitution. The vacancy notice, contravened Article 1, 2, and 3 of the Discrimination [Employment and Occupation] Convention 1958, which forbids any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

12. The Applicant submits, the vacancy notice was opaque and lacking in transparency, stating that only shortlisted candidates would be contacted. The actual candidates and the criteria for shortlisting may never be known.

13. The vacancy notice, contravened Articles 10 and 232 of the Constitution. It did not respect the values and principles relating to involvement of the People, accountability for administrative acts, transparency and affording equal opportunity to all persons. It offended Sections 36 and 37 of the Public Service Commission Act on prescribed qualifications in public office; discrimination and access to opportunities by the youth and disadvantaged persons; and disclosure of applicable remuneration.

14. In his Submissions, the Applicant takes issue with the Affidavit filed by Alice Wahome, who was eventually confirmed as the CEO of the Respondent, submitting that she was a contestant and referee in a race she eventually triumphed.

15. In that Affidavit, Wahome states that the Respondent commenced the process of recruiting its CEO in November 2020. The Incumbent's term was to lapse on 9th March 2021. Under Government Policy dated 23rd November 2010, the process of filling the position of a CEO in a public body, commences six months before the lapse of the outgoing CEO's contract.

16. The Respondent therefore issued vacancy notice in accordance with Section 58 of the Universities Act. It states: -

**“ The provisions relating to the appointment of the Secretary and Staff of the Commission as set out in Section 9 and 12 shall apply, mutatis mutandis to the appointment of the Director and Staff Members of the Placement Service. ”**

17. Section 9 of the Act provides that: -

**[1] “There shall be a Secretary of the Commission who shall be appointed by the Cabinet Secretary on the recommendation of the Commission following a competitive recruitment process, who shall serve for a period of five years, which term may be renewable once.”**

**[2].” The Secretary shall be the Chief Executive Officer of the Commission and shall be responsible for the day to day management of the affairs of the Commission.”**

18. Section 12 of the Universities Act states: -

**[1] “The Commission may employ such other Officers and Staff as it may deem necessary for the performance of its functions under this Act and any person employed under this Section shall be deemed to be a Public Officer, within the meaning of the Constitution.”**

**[2] “ All appointments under this Section shall take into account gender equity, ethnic and regional balance in accordance with the Constitution.”**

19. The Respondent holds that the Act grants discretion of the Respondent’s Board, in recruitment of the Respondent’s CEO. The Board is required to oversee a competitive recruitment process.

20. Section 58 does not envisage a situation where Section 11 of the same Act, applies in the recruitment of the CEO. If it is intended to apply, nothing would be easier than for Section 58 to state so.

21. Wahome explains that the vacancy notice was published on three newspapers with wide circulation, and on Respondent’s website, so as to reach as wide a population of interested members of the public as possible. Extracts of the advertisements from MyGov Newspaper of 17th November 2020, Standard Newspaper of 20th November 2020, and Daily Nation of 20th November 2020, are exhibited.

22. It was specifically stated in the notices above, that the Respondent is an equal opportunity employer and persons with disabilities, women and candidates from marginalized communities were encouraged to apply.

23. Subsequently, Seventy-Five candidates applied. Fourteen were shortlisted and interviews conducted. All this information was posted on the Respondent’s website.

24. Interviews were conducted, and the name of successful candidate forwarded to the Minister for appointment. None of the candidates complained about the process. There was no discrimination or lack of transparency. Distinction predicated upon academic qualifications cannot be deemed to be discriminatory. The Applicant has not demonstrated how the Articles of the Constitution above, were violated. The term of the Incumbent lapsed on 9th March 2021. It would be against public policy not to have the position filled. The Respondent has already put resources into the process and would be prejudiced in having the process reversed.

**Final Submissions:** -

25. It was agreed by the Parties, before the Court on 19th February 2021, that the Judicial Review Application, is considered and determined on the strength of the Pleadings, Affidavits, Documents and Submissions on record. Parties confirmed filing of the Final Submissions, at the last mention in Court, on 9th April 2021.

26. The Applicant relies on the following judicial authorities and highlighted principles: -

**§ *Wambua Maithya v. Pharmacy & Poisons Board; Pharmaceutical Society of Kenya & 2 Others [Interested Parties] [2019] e-KLR.* [In carrying out recruitment into public offices, the appointing authority is required to adhere to the twin principles of fair competition and merit]**

**§ *Resley v. The City Council of Nairobi [2006] 2 E.A. 311.* [ Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised...there is an obligation on the public authority to strictly comply with it, to render its decision valid].**

**§ *Githu Muigai & Another v. Law Society of Kenya & Another [2015] e-KLR.* [ Where a statute donates powers to an authority, the authority ought to ensure that the powers it exercises are within the four corners of the statute].**

**§ *Attorney-General & 2 Others v. Independent Policing Oversight Authority & Another [2015] e-KLR.* [Constitutional principles, postulates are not optional extras, but solemn commands that are binding on all. Their flouting whoever by, must attract the unequivocal rebuff of ours Courts. Courts must not be driven by extraneous consideration such as the amount of money expended in a flawed recruitment process.**

27. The *ex parte* Applicant submits that his Application is solid and uncontroverted and should be allowed with costs.

28. The Respondent adopts the following judicial authorities and key principles:

**§ Council of County Governors v. Attorney- General & Another, Nairobi Constitutional Petition No. 56 of 2017. [ In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Statutory construction should be a narrow pursuit, not at broader one].**

**§ Bernard Odero Okello & Another v. Cabinet Secretary for Industrialization, Trade and Enterprise Development & Another: Cyprian Mugambi Ngutari & 7 Others [Interested Parties] [2020] e-KLR [Discretion applies where the law is silent on an issue].**

**§ Council of Governors v. Salaries & Remuneration Commission [ 2018] e-KLR. [ Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that its amounts to discrimination and that discrimination is unfair].**

**§ Mussolini Kithome v. Attorney-General & Another, HC Nairobi, JR No. 144 of 2014 and Nelson Kinyua Wambutu v. County**

**Government of Nyeri & Another, Nyeri JR No. 17 of 2015. [The Court has discretion whether to grant relief at all, and if so, what form of relief. Among the factors to consider is whether grant of the remedy is unnecessary or futile, whether practical problems including administrative chaos and public inconvenience would ensue].**

29. The Respondent submits that the Application should be dismissed with costs.

30. The issues, as crafted by the Parties in different language, and understood by the Court are: -

**§ Whether the vacancy notice conformed to the law.**

**§ Whether it should be allowed to stand, or be quashed through an order of certiorari.**

**§ Costs.**

**The Court Finds:** -

31. The dispute herein rests on the interpretation given by the Parties to Section 58 of The Universities Act, No. 42 of 2012. The provision governs the appointment of among others, the CEO of the Respondent.

32. It is worded as follows: -

**“ The provisions relating to the appointment of the Secretary and the Staff Members of the Commission, as set out in Sections 9 and 12, shall apply mutatis mutandis, to the appointment of the Directors and Staff Members of the Placement Service.”**

33. What does Section 9 say?

**[1] “There shall be a Secretary to the Commission, who shall be appointed by the Cabinet Secretary on the recommendation of the Commission, following a competitive recruitment process, and who shall serve for a period of 5 years, which term may be renewable once.**

**[2] “ The Secretary shall be the Chief Executive Officer of the Commission and shall be responsible for the day to day management of the affairs of the Commissions.”**

34. And Section 12?

**[1] “The Commission may employ such other Officers and Staff, as it may deem necessary for the performance of its functions under this Act.”**

**[2] “All appointments under this Section shall take into account gender equity, ethnic and regional balance in accordance with the Constitution.”**

35. Section 58 does not refer to other provisions with respect to the appointment of the Respondent’s CEO.

36. It is not correct to read Section 11 into the appointment of the Respondent’s CEO. This provision is not mentioned under Section 58, and it cannot have been intended to apply to the appointment of the Respondent’s CEO. It is confined to the appointment of the Commission Secretary. If it was intended by Parliament to apply in the appointment of the Respondent’s CEO, why is it not included alongside Sections 9 and 12, in Section 58 of the Universities Act?

37. The Court agrees entirely with the reasoning in **Council of County Governors v. The Attorney- General & Another, Nairobi H.C Constitutional Petition No. 56 of 2017**, that in the absence of legislative intention to the contrary, the language must ordinarily be taken as conclusive. Statutory construction should be a narrow pursuit, not a broader one.

38.The vacancy notice in the view of the Court, was in compliance with Sections 9, 12 and 58 of the Universities Act. Section 11 of the Act did not apply to the process under review. This provision should not be imposed upon the Respondent by the Court.

39.Contrary to the assertion by the Applicant that the process was not open and competitive, there is evidence that the vacancy notice was published in the Country's main Newspapers, The Standard and The Daily Nation. It was also placed on MyGov and in the Respondent's website. The vacancy notice reiterated that the Respondent is an equal opportunity Employer, and persons who are differently-abled, women and persons from marginalized communities were encouraged to apply.

40.No less than Seventy-Five candidates applied. Fourteen were shortlisted and interviewed, with the successful candidate appointed by the Cabinet Secretary, upon the recommendation of the Commission.

41.The Applicant has not established that there was discrimination. Of the Seventy-Five candidates, none has complained of discrimination. Who are the comparators in the discrimination alleged to have taken place in the recruitment process? The Applicant has not shown that the process was discriminatory. He bore the burden of proof, as held in ***Council of Governors V. Salaries & Remuneration Commission [2018] e-KLR***.

42.At page 7 of his Submissions, the Applicant argues that the Respondent restricted specialty fields, closing out persons who hold Master of Laws Degree. But does not the vacancy notice include Masters' Degree in Social Sciences? Is not Law a Social Science?

43.The Respondent is granted latitude in appointment of the CEO. It cannot be faulted, in setting the criteria for appointment of the CEO under the vacancy notice. The basic standards under Sections 9, 12 and 58 of the Universities Act were met. If those standards were lowered in the vacancy notice, there would be weighty grounds to challenge its legal validity.

44.In his Submissions, the Applicant introduces Mwongozo, the Code of Governance for State Corporations. Mwongozo has guidelines on appointment of Chief Executive Officer of a State Corporation. Mwongozo was not mentioned in the Pleadings and Affidavit of the Applicant. Mwongozo is an Executive Order, which cannot override the governing Legislation, Sections 9, 12 and 58 of the Universities Act. In any event, the standards in Mwongozo are basic standards. The law grants the Respondent discretion in improving on these standards.

45.The Court is satisfied that recruitment adhered to the twin principles enunciated in ***Wambua Maithya v. Poisons Board; Pharmaceutical Society of Kenya & 2 Others [Interested Party] [2019] e-KLR*** – competitiveness and merit. The Respondent acted within the four corners of its institutive law, the Universities Act, as required under ***Githu Muigai & Another v. The Law Society of Kenya & Another [2015] e-KLR***.

46.There was nothing wrong in Alice Mercy Wahome applying for the position of the CEO and being in the end, the successful candidate. She was the Acting CEO, and no doubt, familiar with the terrain. It was not against the law for her to file the Replying Affidavit to the Application. She was the Acting CEO, the custodian of all the records relating to the Application, and best placed to give evidence for the Respondent. The Applicant has not shown that Wahome was favoured by the Board on account of her acting role, or that she did not meet the set standards.

47.The vacancy notice has been acted upon, and in the view of the Court, acted upon in accordance with the relevant Statute and the Constitution of Kenya. The process has concluded and a CEO recruited, to fill the vacancy that was created, upon the expiry of the former CEO 's contract, on 9th March 2021. The current CEO has a contract which would be terminated without the benefit of hearing her, if the orders sought are allowed. There is no reason to issue an order of certiorari, as sought by the Applicant.

***IT IS ORDERED: -***

***a. The Application for an order of certiorari is declined.***

***b. No order on the costs.***

Dated, signed and released to the Parties, at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 23rd day of July 2021.

**James Rika**

**Judge**