



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

ELRC PETITION NO. E005 OF 2021

FERDINAND CHIRURE NYONGESA.....PETITIONER/APPLICANT

VERSUS

MASINDE MULIRO UNIVERSITY OF

SCIENCE & TECHNOLOGY1ST RESPONDENT

VICE CHANCELLOR MASINDE MULIRO UNIVERSITY

OF SCIENCE AND TECHNOLOGY2ND RESPONDENT

AND

MR. JOHN MUHEHE1ST INTERESTED PARTY

DR. JANET N. KASILLY.....2ND INTERESTED PARTY

DR. BERNADETTE SABUNI.....3RD INTERESTED PARTY

DR. ALEXANDER KHAEMBA4TH INTERESTED PARTY

DR. JOSEPH N. WAMOCHO.....5TH INTERESTED PARTY

DR. JUDAH NDIKU6TH INTERESTED PARTY

RULING

1. The Ruling is on the two applications heard together being Notice of Motion dated 29.9.2021 by the Petitioner and Notice of Motion dated 13th October, 2021 by the Respondents.
2. The Applicant/ Petitioner by Notice of Motion application dated 29th September 2021 under Article 159(1)(d) of the Constitution of Kenya 2010, sections 1,1A,1B,3,3A of the Civil Procedure Act , Order 51 Rule1 of the Civil Procedure Rules filed under certificate of urgency sought the following orders:-
 - a. That this application be certified as extremely urgent and be heard exparte in the first instance.
 - b. That an interim stay do issue restraining the 1st and 2nd Respondents from issuance of letters of appointment to the entire appointees on Senior Lecturer Grade 13, Associate Professor Grade 14 ad Professor Grade 15 pending inter parte hearing and determination of this application.
 - c. That conservatory orders do issue restraining the 1st and 2nd Respondents from issuance of letters of appointment to the entire appointees on Senior Lecturer Grade 13, Associate Professor Grade 14 ad Professor Grade 15 pending inter parte hearing and determination of the petition.

d. The costs of this application be provided for.

3. The Application states the grounds on which it is hinged and is supported by the affidavit of Ferdinard Chirure Nyongesa sworn on the 29th September 2021.

The Application was certified urgent and listed for hearing inter parties on the 29th September 2021. On 29th September 2021 the Respondent had not filed response and sought leave to file response. The court granted interim stay in terms of order 2 of the Notice of Motion.

4. The 1st and 2nd Respondents filed under certificate of urgency Application by way of Notice of Motion dated 13th October 2021 and sought the following orders:-

- a. That this application be certified urgent and service of the same be dispensed with in the first instance
- b. That leave be granted for the Attorney General to come on record for the 1st and 2nd Respondent.
- c. That this Honourable Court be pleased to review, vary and or set aside its orders made on the 13th October 2021
- d. That the status herein be defined and status quo on the 13th October 2021 be adopted.

5. The application was supported by affidavit of Prof. Solomon Shibairo sworn on the 13th October 2021. The court *ex parte* on the 14th October 2021 certified the application as urgent and granted orders 1 and 2. The Petitioner responded to this application by way affidavit of reply dated 19th October 2021. The 1st and 2nd Respondents filed replying affidavit sworn on 19th October 2021 by Prof. Solomon Shibairo the 2nd Respondent, to the notice of motion dated 29th September 2021 and to the Petition of same date.

6. The 1st, 2nd, 3rd and 4th interested parties filed affidavits in response to the Petition only.

7. The 5th Interested party filed response to the application and the petition by way of replying affidavit sworn on the 21st October 2021.

8. The 6th Interested party filed response to the application and the petition by way of replying affidavit sworn on the 21st October 2021.

9. The two applications were heard together inter partes on the 28th October 2021.

10. The Counsel for the parties being Wamalwa Simiyu for Petitioner, Tarus Senior State Counsel for the 1st and 2nd Respondents, Omenya a legal officer at the University, Kalisto holding brief for Lutta for the 2nd Interested party, Mabeya for the 1st, 3rd and 4th Interested parties, Shifwoka for the 5th and 6th interested parties submitting orally on the two applications.

The Applicant's submissions.

11. Wamalwa Simiyu for the Petitioner submitted on the notice of motion dated 29th September 2021 and rely on the ground therein and annexures. He submitted that the entire process was marred by discrimination and most of the appointees were not qualified. The Counsel referred to the replying affidavit of Prof. Shibairo sworn on the 19th October 2021 which annexed letters of appointment of the interested parties and pointed annexure 'SS2' and submitted that the appointee is the 1st interested party and does not hold qualifications for that position being a holder of a Masters degree in education.

12. The Counsel for the Petitioner in relation to the application by 1st and 2nd Respondent dated 13th October 2021, relied on the replying affidavit by the Petitioner sworn on the 19th October 2021 and filed same date. The Counsel submitted that on the 13th October 2021 the legal officer of the 1st Respondent appeared in court and did not tell the court that the appointment letters had been issued. That before that date the Respondent had been served with the Application hence aware the application was coming up for hearing. The Counsel submitted that the application dated 13th October 2021 by the Respondents should not be allowed and the court should proceed to allow the Petitioner's application of 29th September 2021.

The Respondent's case.

13. Tarus, Senior State Counsel, submitted on the application dated 13th October 2021 and relied on the affidavit of Prof. Shibairo sworn on the 13th October 2021 and filed in court on the 14th October 2021. The Counsel submitted that the reason they did not respond to the application dated 29th September 2021 is explained in the said affidavit by Prof. Shibairo. That the Respondents believe that the Petitioner/Applicant misled the court that the letters of appointment of the 1st to 6th Interested parties were about to be issued. That as explained in their affidavit and in the response of the interested parties letters of appointment were dated 23rd September 2021 and forwarded to the appointees latest 1st October 2021. That the Applicant/Petitioner filed application on the 29th September 2021 and served the Respondents and interested parties on the 2nd October 2021 and by that time all the appointment letters had been issued. Counsel submitted that the Application by the Petitioner is overtaken by events. That it is not juridical to issue orders restraining something that has already happened. To buttress this submission the State Counsel relied on the case of *Esso Kenya Ltd v Makwata Okiya Civil Appeal No. 69/1991(1992KLR)*

where he submits that the court held it was not judicious to issue orders stopping that which has already happened. The Court read the said authority and the holding therein by Masime JA as he then was, was that '*once the agreement was terminated the prayers in the temporary injunction application could not be granted as they assume the agreement is in place*'. That holding applies here for if the court finds that the appointment letters have been issued then the conservatory orders sought cannot issue.

14. Tarus further submitted that the orders sought by Petitioner/ Applicant are equitable and the doctrine of equity is *he who comes to equity must come with clean hands*. The Counsel submitted that the Applicant / Petitioner was aware that letters of appointment had been issued to the interested parties and never disclosed that fact to court. That the 1st to 6th interested parties are peers of the Applicant at the university hence he ought to have been aware of that fact. That the application is an abuse of court process for non- disclosure of material facts.

15. Lastly the Tarus submitted that for a party to benefit from conservatory orders he must demonstrate to court he has a prima facie case. The Counsel submitted that the Applicant/Petitioner has not made a prima facie case. That the Petitioner in his supporting affidavit admitted that he has not supervised 3 post graduate students to conclusion and that was a criteria for the promotion. That it would have been against public good and the law for the Respondents to promote the Petitioner/ Applicant if he did not meet the criteria.

16. On the claim by Petitioner that he was discriminated against under article 27 of the constitution, Tarus submitted that one must be in the same position with the other person to say that the other person was favoured and he was left out. The Counsel submitted that the argument that the 1st Interested party serving in same department with Petitioner who was promoted in a discriminatory manner is not valid as the 1st interested party is not an academician like the Petitioner but a technician as explained in paragraph 7 of the replying affidavit of Prof. Shibairo. That the Petitioner should not have compared himself to the 1st interested party. The Counsel asked the court to dismiss the Application by Petitioner and vacate the orders issued on the 13th October 2021.

Interested parties' submissions.

17. Mabeya Counsel for the 1st, 3rd and 4th interested parties. The Counsel submitted that they supported the application dated 13th October 2021 and opposed the application dated 29th September 2021. That all the interested parties have placed before court their qualifications and the criteria for their appointments and the Petitioner has not controverted their evidence. The 2nd issue submitted on was that the Petitioner applied for promotion to senior lecturer pursuant to internal advert by 1st Respondent dated 4th November 2020 and the applications closed on the 25th November 2020. That the Petitioner read the advert which among others was supervision of 3 post graduate students to completion and still went ahead to apply for promotion well knowing he did not meet the criteria. That the Petitioner/Applicant did not challenge the advert and acquiesced himself to the promotion process and proceeded to be interviewed on the 30th March 2021. That the appointment for these positions were done in May 2020 as set out in the affidavit of the Respondent. That the Petitioner places reliance on the Harmonized Criteria and Guidelines for Appointments and Promotions of Academic staff for universities in Kenya as set out by the Commission for University Education and that is in paragraph 8 and exhibit 'H' of the Petitioner's supporting affidavit. The Counsel submits that the said guidelines were declared unconstitutional by Radido J in Nairobi ELRC Petition No. 43 of 2019 in the matter of Universities Academic Staff Union v Machakos University and another. The Counsel submits that the court will grant conservatory orders if there is real danger the party will suffer real prejudice as a result of the violation or threatened violation of the constitution and relies on the *Center for Rights Education Awareness and 7 Others v Attorney General Petition No. 16/2011 (2011 eKLR)*.

18. The Counsel for the interested parties further submitted that the Applicant/Petitioner in the instant case has not exhausted internal dispute resolution mechanism of the employer and in his pleadings the Petitioner has stated he has appealed which appeal is due for consideration and in event that fails he can appeal further to the Chairman of the University Council and to buttress this submission relies on the decision of *Speaker of National Assembly v Hon. Njenga Karume (1992 KLR) at page 21*.

19. The Counsel further submits that the Petitioner/ Applicant applied for the position of senior lecturer yet he has not enlisted any of the persons appointed to the position of senior lecturer a demonstration of malice and bad faith. He asked the court to dismiss the application dated 29th September with costs.

20. Shifwoka for the 5th and 6th interested parties opposed the application dated 29th September 2021 and supported the application dated 13th October 2021. The Counsel raised issue of jurisdiction and stated that the court is ousted of jurisdiction on account of inclusion of the 2nd Respondent as he has no capacity to be sued. The court finds that argument to be without basis in the law. The jurisdiction of the court cannot be ousted because of the status of one party. That party can on application be struck out if the court finds the argument meritorious and the case proceeds against the other parties.

21. Shifwoka invoked the doctrine of exhaustion of remedies and relied on the case of *Masters Freighters v Kenya Bureau of Standards and Another (2019 eKLR)* at page 8 to extend that if a party comes to the constitutional court and has failed to exhaust available remedies the court cannot grant orders sought. That the appeal was not finalized at university level.

22. The Counsel further invoked the doctrine of estoppel and submitted that the applicant/ Petitioner is precluded from taking other position as other parties rely on his having acquiesced to the promotion process. The Petitioner having admitted to have not met the supervision requirement is estopped from making a case to be appointed. Counsel submits that supervision of students is not limited to the employer university.

23. Counsel submitted further that the prayers in the application are at variance with those in the petition. That in the petition the Applicant only seeks declaration not orders and relies on High Court Nairobi *Morrison and Another v Kenya Commercial Bank and Others 2003 EA Page 600* where court held that a party cannot ask for interim remedy not in the primary remedies if the interim order sought is permanent in nature.

24. Counsel submitted that the discrimination claim is not explained in relation to the 5th and 6th interested parties who have annexed their qualifications and were qualified to be appointed as professors and that the action is unfair and malicious as there were 35 professors appointed and only the 5th and 6th were selected to be sued.

25. Counsel submitted that there is no prima facie case and that there was no demonstration of irreparable damage to be suffered if interim orders not granted. That the Applicant/ Petitioner was in employment. That the Applicant/Petitioner had not demonstrated that the balance of convenience lies in his favour. Counsel asked court to dismiss the application dated 29th September 2021 with costs.

26. The Counsel for the 2nd interested party associated with the submissions by the Respondents and the other interested parties. He submitted that the 2nd interested party position was on religion of which the 2nd interested party is qualified and that the application had been overtaken by events as the 2nd interested party was issued with appointment letter dated 23rd September 2021 which was before the Petition was filed. He asked the court to dismiss the application with costs.

27. In rejoinder, Counsel for the Petitioner/ Applicant submitted that they served the parties on the 1st October 2021 and that the latest letter was dispatched on the 1st October 2021 and that there was no evidence besides the affidavit on the dispatch of appointment letters. The court notes that there is evidence of receipt of the letters by the interested parties in the acceptance clause. Counsel submitted that it is true the Petitioner did not comply with the requirements for the promotion and has explained why he did not comply. That the Petitioner has raised several breaches of his rights to which the Respondents have filed response. That the 1st interested party who has taken the position the Petitioner applied for his qualification is Masters not PHD. That the Harmonization document having been nullified by Court the Respondents had no authority to appoint the 1st interested party to that position as the document is the one that gave that authority to hold special circumstances. On exhaustion of internal mechanisms, the Counsel admits the Petitioner appealed and they submit under paragraph 8 of the supporting affidavit that it was ignored. That the Respondents have not shown the status of the appeal in their response.

Counsel submitted that in the prayers under the main petition they seek prayer No. B a declaration for action of appointments be declared null and void and prayer C of the Petition we seek for re-advertisement of the position of senior lecturer. That means there is a prima facie case. Counsel noted that if the parties have assumed office the application may not be relevant.

Determination

28. The court has considered the submissions by the parties on the two applications. It was established that the Applicant did not meet the threshold for the position of senior lecturer among others he did not supervise 3 post graduate students to conclusion. On prima facie basis he was not qualified for the position. This fact the Applicant /Petitioner admits in his affidavit of support and in the petition. The allegation of discrimination has not been established on prima facie basis. The Applicant admits in paragraph 8 of his affidavit in support to the application that he has appealed and but states in vain. He does not disclose the status of the appeal. The Petitioner is still in employment. Evidence was placed before the court that all the interested parties having been issued with the appointment letters. The Petitioner states that the parties received the court order of 13th October 2021 without protest on 1st October 2021. That the 1st Respondent's legal officer in court on 28th September 2021 did not inform the court the letters of appointment had been issued. The court finds that this is not a basis to establish the letters of appointment had been issued latest one on 1st November 2021 as the legal officer may not have been privy to that information. Letters of appointment are to the employee personally. The court notes that out of the 6 interested parties sued only the 1st interested party was appointed to similar grade (GRADE XIII) of which the Petitioner was interviewed. The 1st Interested party placed evidence of his qualifications and his appointment letter dated 8th June 2021 and accepted by him on the 21st June 2021. The Court finds that the 1st interested party is technician hence his requirements are different from those of the Applicant who is an academician. The 2nd Respondent in his affidavit produced appointment of Dr. Evans Ouma Raballah appointed to the Senior Lecturer Grade III via letter of 31st May 2021 and accepted on the 22nd June 2021. The Applicant did not disclose this appointment to the court. The Court in the circumstances of the letters of promotion having been issued to all the interested parties and other employees not before court finds that the application dated 29th September 2021 is overtaken by events. The court will not act in vain. On the other hand the Petitioner's appeal is still pending before the university internal appeal mechanisms. Counsel for interested parties further submits that the Applicant has not exhausted internal dispute resolution mechanism and in his pleadings the Petitioner has stated he has appealed which appeal is due for consideration and in the event that fails he can appeal further to the Chairman of the University Council. To buttress this submission Counsel for interested parties relies on the decision of *Speaker of National Assembly v Hon. Njenga Karume (1992 KLR) at page 21*. The court agrees with this submission and finds that the Petitioner has not exhausted the internal remedies and further has not demonstrated the reason why he has decided to come to court when the appeal is pending. The submission by Counsel for Applicant/Petitioner that the appeal was ignored is not supported by evidence. The court in declining to grant the orders sought in application dated 29th September 2021 is further guided by the Supreme Court decision in the matter of *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others Application No. 5 of 2014 (2014)eKLR* in which the court held as follows:-

‘ (86)conservatory orders ‘bears a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not like interlocutory injunctions, linked to the private-party issues as the prospects of irreparable harm occurring during the pendency of the case or a high probability of success in the applicant’s case for stay. Conservatory orders, consequently should be granted on inherent merit of a case bearing in mind the public interest, constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.’

29. Consequently the court finds that there is no inherent merit in the application by the Petitioner for grant of the sought conservatory orders. The letters of Promotion appointments having been accepted by all the interested parties the court finds that the conservatory orders sought have been overtaken by events. Further, there is no evidence of prejudice that can be suffered by the Applicant/Petitioner if the conservatory orders are not issued. That it is not in public interest for the court to interfere with internal mechanisms of the 1st Respondent prematurely. The Applicant should first exhaust the internal appeal mechanisms which he admits he has invoked by filing appeal against the

rejection letter.

30. Accordingly the Application by the Petitioner by way of Notice Motion dated 29th September 2021 lacks merit and is dismissed with costs in the cause.

31. Accordingly, the Application by the Respondents by way of Notice Motion dated 13th October 2021 is allowed to extend of granting order (c) and (d) being that the court has vacated its orders of 13th October 2021 and that the status of the parties prior to 13th October 2021 is adopted. Costs in the cause.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF NOVEMBER 2021 AT BUNGOMA.

J.W KELI

JUDGE

IN THE PRESENCE

COURT ASSISTANT – BRENDA

FOR CLAIMANT/ APPLICANT: KAPTEN HOLDING BRIEF FOR WAMALWA.

FOR RESPONDENT: TARUS FOR 1ST AND 2ND RESPONDENT AND HOLDING BRIEF FOR SHIFWOKA FOR 5TH & 6 INTERESTED PARTIES.

M/S MABEYA FOR 1ST TO 4TH INTERESTED PARTIES.