



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW NO. E015 OF 2021.

IN THE MATTER OF UNIVERSITIES ACT NO. 42 OF 2012

AND

IN THE MATTER OF KISII UNIVERSITY CHARTER AND STATUTES

AND

IN THE MATTER OF AN APPLICATION BY

WILLIAM ATEKA OGATO.....EX PARTE APPLICANT

VERSUS

KISII UNIVERSITY.....1ST RESPONDENT

KISII UNIVERSITY COUNCIL.....2ND RESPONDENT

PROF. FREDERICK O. WANYAMA.....3RD RESPONDENT

JUDGMENT.

1. This Judgment relates to Judicial Review Application dated 4th October, 2021, brought pursuant to the provisions of Order 53 Rule 1 of the Civil Procedure Rules, 2010.

2. The Applicant seeks:

i. An Oder of **CERTIORARI** to remove and bring into this court, for purposes of quashing, the 2nd Respondent's decision contained in the minutes of its 68th Full Council meeting held on 28th September, 2021 approving the renewal of contract of the 3rd Respondent as the Deputy Vice-Chancellor (Academic, Research and Student Affairs) (ARSA) of the 1st Respondent which expires on 30th November, 2021.

ii. Spent

iii. An Order of **PROHIBITION**, prohibiting the 3rd Respondent from assuming office as the Deputy Vice-Chancellor ((Academic, Research and Student Affairs) of the 1st Respondent pursuant to the decision made by the 2nd Respondent during its 68th Full Council Meeting held on 28th September, 2021.

iv. An Order compelling the 1st and 2nd Respondents to comply with the provisions of *Section 35(1)(a)(v) of the Universities Act* in the recruitment and appointment of the Deputy Vice-Chancellor (Academic, Research and Student Affairs) (ARSA)

v. An Oder for the costs of the proceedings.

3. The application is premised on the grounds set out on the face of the application and a supporting affidavit and a Further affidavit sworn by William Ateka Ogato, the Ex parte Applicant herein.

4. The crux of the application, is that the 2nd Respondent, in its 68th Full Council meeting, discussed and approved the renewal of the

contract of the 3rd Respondent.

5. The *Ex parte* Applicant states that Statute Law (Miscellaneous Amendments) Act No. 18 of 2018, and which commenced on 18th January, 2019, amended *Section 35 of the Universities Act* and the process of recruitment of Vice-Chancellors, Deputy Vice-Chancellors and Principals and Deputy Principals of Constituent Colleges and thereby removing from the ambit of the 2nd Respondent and placed in the hands of the Public Service Commission.

6. The *Ex parte* Applicant avers that the actions of the 2nd Respondent, offends the mandatory provisions of *Section 35 of the Universities Act*, which provides that the 2nd Respondent shall appoint a Deputy Vice-Chancellor in consultation with the Cabinet Secretary, after a competitive process conducted by the Public Service Commission.

7. The *Ex parte* Applicant further states that it is in the interest of justice that an order of Certiorari is granted to remove and bring into this court for purposes of quashing the 2nd Respondent's decision contained in the minutes of its 68th Full Council Meeting held on the 28th September, 2021, approving the renewal of contract of the 3rd Respondent.

8. The application is opposed vide an affidavit in response sworn by the 3rd Respondent herein on the 14th October, 2021.

9. The 3rd Respondent deposes that there exists a marked distinction between the procedure for appointment, which must be done through a competitive process as expressly provided under *Section 35(1)(a)(v) of the Universities Act* as read together with *Section 16(1) of the Kisii University Charter*, and the procedure for reappointment or renewal of contracts in respect of the position of Deputy Vice-Chancellor for which the law is silent.

10. The Respondent avers that *Section 16(1) of the Kisii University Charter* provides that **"Deputy Vice-Chancellors shall hold office for five years and shall be eligible for a further term of five years."**

11. The Respondent asserts that the applicability of Section 35(1)(a)(v) of the Universities Act has authoritatively been dealt with by the Court of Appeal in the case of *Wilfrida Arnodah Itolondo v Attorney General & 9 others [2020] eKLR*, where the court stated that such officers can only be subjected to re-evaluation by the University Council in tandem with the principles and values of good governance of public institutions.

12. It is the Respondent's assertion that vide an opinion to the Ministry of Education, State Department for university Education and Research, the Attorney General, advised on the involvement of the Public Service Commission in the re-appointment/renewal of contract of Deputy Vice-Chancellors and others, wherein, the Hon. Attorney General, clarified that the aspect of competitive recruitment does not arise in the context of re-appointments.

13. The Respondent states that he did reapply for renewal of his contract 6 months to its expiry as required under the 2nd Respondent's University Charter. He further states that his application was discussed by the Council on the 12th July, 2021 where upon, he was invited to appear before the Council to respond to questions. He states that he did appear before the Council on 9th August, 2021, culminating in his re-appointment in the 68th Full Council Meeting of the 2nd Respondent.

14. The Respondent avers that this court lacks jurisdiction to entertain the matter as the Applicant is not faulting the re-evaluation process conducted by the 2nd Respondent which process would have been within the purview of judicial review.

15. The Respondent states that the re-evaluation by the 2nd Respondent prior to the re-appointment, was open and that he addressed all the issues raised by stakeholders in relation to his suitability for renewal of contract.

16. It is the Respondent's prayer that the application be dismissed with costs for being bad in law and offends basic legal principles.

17. The application was heard interparties on 18th October, 2021.

18. The Applicant reiterated the grounds in support of his application and the 3rd Respondent also reiterated his reply to the application.

Determination

19. I have considered the pleadings in the matter, together with the oral submissions by the Counsels for the parties during the hearing interparties. The issues for this court to determine are two:

- i. Whether the prayers herein fall within the purview of judicial review
- ii. Whether the renewal/re-appointment of the 3rd Respondent was made within the law.

Whether the prayers herein fall within the purview of judicial review

20. To determine this issue, the court need to answer the question on the rationale for judicial review proceedings. This question was clearly answered in the case of *Municipal Council of Mombasa vs. R. Epuffic & Umoja Consultants Limited Civil Appeal No. 185 of 2001* where

the court held that:

“Judicial review is concerned with the decision-making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters... the court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.”

21. The Applicant herein is seeking orders of **CERTIORARI** to remove and bring into this court, for purposes of quashing, the 2nd Respondent’s decision contained in the minutes of its 68th Full Council meeting held on 28th September, 2021 approving the renewal of contract of the 3rd Respondent and **PROHIBITION**, prohibiting the 3rd Respondent from assuming office.

22. The orders sought herein, question the jurisdiction of the decision maker; whether the 2nd Respondent usurped the authority of the Public Service Commission in making the impugned decision. For this reason, the court returns that the orders that the Applicant seeks, are orders that fall within the purview of judicial review.

23. I find and hold that the court has jurisdiction and the application herein is properly before this court.

Whether the renewal/re-appointment of the 3rd Respondent was made within the law

24. Section 35(1)(a)(v) of the Universities Act (as amended in 2018) provides as follows:

“35-Governing organs of a university

(1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent-

(a) a Council, which shall-

(i),

(ii)

(iii)

(iv)

(v) in the case of public universities, appoint Vice-Chancellor, Deputy Vice-Chancellors and Principals and Deputy Principals of Constituent Colleges, in consultation with the Cabinet Secretary, after a competitive process conducted by the Public Service Commission.”

25. The Counsel for the Applicant submitted that the 2nd Respondent in reappointing the 3rd Respondent, was usurping the powers of the Public Service Commission. He sought to rely on the decision of Justice Radido in the case ***Okiya Omtatah Okoiti v Public Service Commission & 3 others [2020] eKLR***, where the court held that Section 35(1)(a)(v) of the Universities Act supersedes Section 39 in respect of the appointment of Vice-Chancellors, Deputy Vice-Chancellors and Principals and Deputy Principals of constituent colleges.

26. Section 35(1)(a)(v) concerns itself with new appointments and is, as submitted by the 3rd Respondent, silent on the aspect of re-appointment or renewal of contracts for this group of University employees. The applicable provisions for purposes of such renewal in the circumstances, would be Section 16(1) of the Kisii University Charter which provides as follows:

“Deputy Vice-Chancellors shall hold office for five years and shall be eligible for a further term of five years.”

27. This particular provision confirms that indeed, a Deputy Vice-Chancellor is eligible for two terms of five years each.

28. From the wording of the Kisii University Charter, the 3rd respondent is eligible for a second term as he has only served one term. Re-appointment or renewal of contract is not a fresh appointment/recruitment. The Court of Appeal in the case of ***Wilfrida Itolondo & 4 others v President & 7 others [2015] eKLR***, stated as follows as regards reappointment:

“Firstly, the 6th respondent was not being recruited and therefore appointed into office. Hers was a reappointment as provided for under section 10(3) of the Act. In this context the aspect of “competitive recruitment” did not arise.....”

29. The **Black Law’s Dictionary 9th Edition, page 597, defines “eligible”** as fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status.”

30. Secondly, it is evident to this court that the 3rd Respondent duly applied for renewal of his contract, he was evaluated by the University

Council and thereafter re-appointed as evidenced by the letter of renewal of contract dated 4th October, 2021 produced before this court.

31. The Universities Act (as amended in 2018), that is the subject of this application, does not provide for a competitive procedure for the re-appointment or renewal of contract of Vice-Chancellors, their Deputies and Principals of constituent colleges.

32. In a new recruitment, a candidate is taken through a competitive process which may not be necessary in the case of a reappointment for the simple reason that the employee is deemed to have satisfied the requirements for appointment to the position, during the initial appointment, and which requirements, remain the same at the point of renewal of contract and/or re-appointment. **Korir J** in the case of **R V Cabinet Secretary for Education, Science and Technology ex parte Naftaly Rugara Muiga JR No. 280 of 2013** stated as follows in respect of eligibility for renewal of contract:

“I do not think the drafters of the Constitution expected that any person eligible for re-appointment to a public office ought to be taken through a competitive process. The competitive process, in my view, only kicks in when the person is being recruited for the first time. When it comes to re-appointment for a further term, the body responsible for the appointment assesses the person and makes a decision whether to re-appoint the incumbent or open up the position for competition.”

33. The body responsible for the appointment subject of this application, is clearly stated under Section 35(1)(a)(v) of the Universities Act (as amended in 2018). It is the University Council and for this case the 2nd Respondent.

34. The 2nd Respondent evidently followed the laid down procedure necessary for renewal/re-appointment of the Deputy Vice-Chancellor. The 3rd Respondent was thus re-appointed within the law and the court finds and holds that the application is devoid of merit and is dismissed in its entirety.

35. In the same breath, the court makes further orders that in the re-appointment or renewal of contract of Vice-Chancellors, Deputy Vice-Chancellors, Principals and Deputy Principals of constituent colleges, competitive recruitment does not arise and is thus not subject to Section 35(1)(a)(v) of the Universities Act (as amended in 2018).

36. The court concludes that the application is without merit and is hereby dismissed.

37. This being litigation in the public interest, each party shall bear their own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Konosi h/b for Mr. Ndubi for the Applicant

Mr. Omuti for the Respondent

Ms. Christine Omollo-C/A