



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION NO. E118 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

**UNIVERSITIES ACADEMIC
STAFF UNION (UASU).....PETITIONER**

VERSUS

UNIVERSITY OF NAIROBI.....1ST RESPONDENT

THE UNIVERSITY COUNCIL,

UNIVERSITY OF NAIROBI.....2ND RESPONDENT

AND

CABINET SECRETARY,

MINISTRY OF EDUCATION.....1ST INTERESTED PARTY

THE PUBLIC SERVICE

COMMISSION.....2ND INTERESTED PARTY

THE ATTORNEY GENERAL.....3RD INTERESTED PARTY

COMMISSION FOR UNIVERSITY

EDUCATION.....4TH INTERESTED PARTY

CORRIGENDA RULING

It has just been brought to my attention that the ruling delivered on 10th December 2021 has a typographical error on the last paragraph thereof where the word “*disobeyed*” is erroneously typed as “*obeyed*”. The same is hereby corrected and the said paragraph 82 of the ruling is corrected to read as follows –

82.I therefore find that he deliberately disobeyed the said orders and therefore find him guilty of contempt of the said orders. Sentencing on 27th January 2022. Prof. Stephen G. Kiama to

appear in Court on that date of sentencing.

The correction is done pursuant to Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides that the Court shall, either at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

JUDGE

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E118 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF:

ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010,

AND

IN THE MATTER OF:

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS UNDER ARTICLES 1(1), 2(1-4), 3(1), 10, 24, 35, 41, 47, 73, 75, 118,

131(2)(a), 153(4), 232 AND 248 OF THE CONSTITUTION OF KENYA, 2010,

SECTIONS 22, 23 AND 26 OF THE UNIVERSITIES ACT NO 42 OF 2012,

SECTION 40 OF THE EMPLOYMENT ACT 2007 SECTION 4 & 5 OF

THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015, sections

4(1), 5(1) (a) and (d) OF THE ACCESS TO INFORMATION ACT NO. 31 OF

2016. (l)d; e, f and (g) AND 259(1) & 3 OF THE CONSTITUTION

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION (UASU).....PETITIONER

VERSUS

UNIVERSITY OF NAIROBI.....1ST RESPONDENT

THE UNIVERSITY COUNCIL, UNIVERSITY OF NAIROBI.....2ND RESPONDENT

AND

CABINET SECRETARY, MINISTRY OF EDUCATION....1ST INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION.....2ND INTERESTED PARTY

THE ATTORNEY GENERAL.....3RD INTERESTED PARTY

COMMISSION FOR UNIVERSITY EDUCATION.....4TH INTERESTED PARTY

RULING

1. Vide an application by way of a notice of motion dated 19th July 2021, the Petitioner/Applicant seeks the following orders –

i. Spent.

ii. *THAT a Conservatory Order be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing either by itself or forwarding to either the 1st, 2nd, 3rd or 4th Interested Parties for implementation of the 1st Respondent's Vice Chancellor's Proposed Governance Reforms dated July 2021 and Memo dated 14th July 2021 pending the hearing and determination of this Application.*

iii. *THAT a Conservatory Order be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing either by itself or forwarding to either the 1st, 2nd, 3rd or 4th Interested Parties for implementation of the 1st Respondent's Vice Chancellor's Proposed Governance Reforms dated July 2021 and Memo dated 14th July 2021 pending the hearing and determination of this Petition.*

iv. *THAT the costs of this Application be borne by the Respondents.*

2. The grounds upon which the application is anchored are set out on the face of the application and in the supporting affidavit of Dr. Constantine Wasonga, the Secretary General of the Applicant.

3. It is the Applicant's case that the Respondents have initiated reforms at the University of Nairobi without consulting the Petitioner whose members are likely to be affected by the reforms. Further, that the reforms are against the law.

4. It is also the Applicant's position that the said changes abolished some faculties, courses, schools and colleges which exist to date.

5. The Applicant avers that the changes were discussed at meetings in which it was not invited.

6. The Applicant further avers that after being served with the pleadings herein the Respondents purported to reverse the impugned actions at a meeting held on 20th August 2021. That this is an admission that proves a *prima facie* case.

7. It is further the Applicant's averment that some of the positions abolished have been advertised by the Public Service Commission. The Applicant posits that the Public Service Commission Act is not inferior to the Vice Chancellor and that the Vice Chancellor cannot override the Act.

8. The Applicant avers that the Respondent's actions violate Article 10 of the Constitution which requires the involvement of persons to be affected by administrative decisions. It further avers that the Respondents violated Article 23 of the Constitution which mandates State organs to involve persons who will be affected by decisions.

9. Counsel further avers that the Respondents violated Articles 231 and 232 of the Constitution and Section 37A of the Public Service Commission Act on guidelines for recruitment.

10. The 1st and 2nd Respondents oppose the application and have filed a replying affidavit of Professor Julia Auma Ojiambo sworn on 31st August 2021. Senior Counsel Ngatia for the 1st and 2nd Respondents submits that the pillars of the motion and petition which are "*the Vice-Chancellor's proposed Governance programme of July*". That proposed means it is futuristic.

11. That the Applicants further state that there was no consultations and that the Vice-Chancellor (VC) has no legal mandate to come up with governance programs. Further, that there is no management programs, that there would be loss of employment and finally that the Petitioner was never involved.

12. Senior Counsel submits that there is nothing known as Vice Chancellor proposed reforms dated July 2020. Counsel refers to paragraphs 3 and 4 of the Replying affidavit of Professor Ojiambo which clarified that the Vice Chancellor's communication was not the origination of the reforms. That Section 35 of the University Act establishes the Governance structure of universities which are the Council, the Senate and Management Board.

13. Senior Counsel Ngatia submitted that as stated in paragraph 20 of the Replying affidavit, the Council of the University recommended a structure that is less top heavy.

14. On the averments of exclusion of the Petitioner from the decision making forum, counsel submitted that academic staff are part of the membership of the Senate and were present at the meeting held on 16th June 2021, which also has representatives of the students.
15. That under directions of the Senate, the reforms were communicated to the University. Counsel submits that the averments in the affidavit of Professor Ojiambo have not been controverted.
16. Senior Counsel further relied on the replying affidavit of Professor Ogengo which sets out members of the Senate who are members of the Applicant and those that are members of the student body.
17. Counsel submits that there is no section of the law that has been violated.
18. On the reference to the affidavit of Cabinet Secretary, Dr. Matiangi, Counsel submits that it is not for the Cabinet Secretary to state who has violated the law as this is a power of the judiciary.
19. Further, that Section 20(3) of the University Act which the Cabinet Secretary alleges to have been violated has nothing to do with the matter before the Court.
20. On the contempt application counsel reiterates that there is nothing known as “*Vice Chancellor Proposed Reforms dated July 2021*” referred to in the order of the Court and therefore there is no order capable of being violated. That what is referred to by the Applicant is in actual fact a program of the Senate, not the Vice Chancellor. That although it was pointed out in the affidavit and the Applicant had time to amend its pleadings, it did not do so.
21. Further, that the programs had been approved and implemented before the Applicant came to Court.
22. Relying on the decision in **Republic v National Land Commission & Another Ex Parte Simon Kimondo Mubea**, counsel submitted that the impugned decision having not been that of the Vice Chancellor, the orders sought cannot lie.
23. Counsel further relied on the decision in **Attorney General v Law Society of Kenya & Another [2009] ekLR** and **Daniel Odhiambo, Kaudo & Another v Speaker, County Assembly of Homabay & 6 others [2021] ekLR**.
24. In both decisions the Court of Appeal held that the Court will not suspend what has already been done. That on this basis both applications ought to be dismissed.
25. In a rejoinder, Mr. Ogembo who appeared with Mr. Koceyo for the Applicant submitted that the memo dated 14th July 2021 is a document of the 1st Respondent who is the Vice Chancellor and Chief Executive Officer of the University who communicates on behalf of the University.
26. He submitted that the major issue the Respondent is battling is the act of decisions made without consultations. That these measured directions affect the charter of the University. That the University cannot amend the charter even if it originates from the Senate. Further, that the Senate cannot abolish facilities without recommendations of the Commission of Higher Education and the Cabinet Secretary. That this also applies to charters as provided in Section 23 of which provides that a charter cannot be abolished without being published in the Gazette.
27. Mr. Ogembo submitted that the other issue raised by the Applicant is consultation. He submitted that the fact that members of the Applicant sit in the Senate does not amount to consultation of the Applicant as they do not occupy those positions as representatives of the Applicant who is a trade union and is not co-opted in the governance structures of the University Senate. He submitted that proceeding to implement the changes is to violate the rights of the Petitioner who has agreement. He submitted that there is no evidence of direct involvement of the Petitioner before implementation.
28. He submitted that the relevant date is after July 2021 and any attempt to engage the Applicant after that date cannot be proper consultation.
29. He submitted that the reason why the Applicant had to be involved is that the changes have the effect of abolishing positions and affecting positions of its members. That even if nobody has lost their job the reorganization must involve the Applicant. He submitted that there is likely to be irreparable damage. He prayed that the Court finds that there was an illegality and that *status quo* be maintained until determination of the petitions.

Determination

30. The Applicant is a trade union that represents academic staff of the 1st Respondent. It has both a recognition agreement and periodically negotiates collective bargaining agreements for terms and conditions of service for its members.
31. It is common ground that the governing organs of the 1st Respondent came up with reforms that were communicated by the Vice Chancellor through a communication dated 14th July 2021. The communication announced in part as follows:-

“The panel through pointed findings, buttressed the need for an all-encompassing reform towards greater institutional efficiency and effectiveness. These reforms touch on areas of legal and legislative structure, relations with other stakeholders service delivery, human resource safety and security, procurement amongst other reforms.”

32. It is this communication that the Applicant refers to as the “1st Respondent’s Vice Chancellors Proposed Governance Reforms dated July 2021 and memo dated 14th July 2021” in the instant application and whose implementation the Applicant seeks to be enjoined by this Court.

33. Issues of determination are:

- i. What the Applicant refers to as “1st Respondents Vice Chancellor’s Proposed Governance Reforms dated July 2021 and memo dated 14th July 2021”;
- ii. Whether the Applicant has established a **prima facie** case to warrant the grant of the orders sought;
- iii. Whether the Respondent is in contempt of the orders of this Court issued on 21st July 2021 and if the named persons ought to be cited for contempt;

1st Respondents Vice Chancellor’s Proposed Governance Reforms and memo dated 14th July 2021

34. From the analysis above and an appreciation of the averments in the affidavits and documents filed by the parties, it is clear that the Applicant has not established that there is a document known as “1st Respondent’s Vice Chancellor’s Proposed Governance Reforms of July 2021.” There is however a memo dated 14th July 2021 which has been appended to the affidavits by both parties as Annexure “CW1” in the Applicant’s application and Annexure “JOB” in the Respondent’s Replying Affidavit of Professor Julia Auma Ojiambo.

35. I therefore agree with the submissions of the 1st and 2nd Respondents that such a document does not exist only in so far as the 1st Respondent’s Vice Chancellor’s proposed Governance Reforms of July 2021” is concerned. The said document has not been proved to be in existence. However, the memo of 24th July 2021 is in existence and has clearly been referred to and produced by both parties.

Prima Facie Case

36. *Prima facie* case was defined in the case of **Mrao Ltd v First America Bank of Kenya Ltd & 2 Others [2003] eKLR** as –

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

37. In **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, the Court of Appeal agreed with the definition of a prima facie case in the **Mrao case** and stated:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.”

38. In the case of **Ezra Chiloba v Wafula Wanyonyi Chebukati and 7 Others (2018) eKLR**, Radido J. set out the principles to be considered in the grant of interlocutory conservative orders thus –

*“The test for grant of conservatory orders was outlined by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others (2014) eKLR**, and the test has been explained in several decisions of the High Court and Court of Appeal (see **Lipisha Consortium Ltd & Ar. v Safaricom Ltd (2015) eKLR**.*

The Supreme Court laid the test thus –

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

In summary, a party seeking conservatory orders should demonstrate, a prima facie case with a likelihood of success; prejudice likely to be suffered if the orders are not granted; grant of the orders would enhance constitutional values and objects; that a

*Petition would be rendered nugatory if the orders are declined and that public interest favours grant of the orders (see **Lipisha Consortium Ltd & Ar. v Safaricom Ltd (2015) eKLR.***

This Court is therefore enjoined to consider whether the case material placed before it by the Applicant fall within the threshold principles set out above to warrant grant of conservatory order(s) as sought.

And because the Petition is still pending hearing on the merits, the Court cautions itself that it must avoid making definitive findings on the facts or the law before hearing full addresses, unless it is absolutely necessary.”

39. In the instant case, the communication dated 14th July 2021, at the second last paragraph states –

“On 12th July 2021, the Council invited all trade Unions including UASU, KUSU, and KUDHEHIA for engagement and consultations on the ongoing reforms. We had a lengthy and fruitful engagement with KUSU and KUDHEHIA and agreed on the way forward. The council will continue to engage all stakeholders to ensure the University of Nairobi delivers its mandate as expected.”

40. It is clear from the 1st Respondent’s own letter that there was no consultation with UASU, the Applicant herein. The Applicant has annexed communication to the affidavit to the effect that the Applicant wrote to the 1st Respondent’s Vice Chancellor on 9th July 2021 seeking information on Governance Restructuring at the University of Nairobi. The letter is reproduced below –

“OUR REF: 002/21

9th July 2021

The Vice Chancellor,

University of Nairobi

Dear Prof. Kiama,

RE: GOVERNANCE RESTRUCTURING AT THE UNIVERSITY OF NAIROBI

The above subject matter refers. On behalf of the UASU - UoN Chapter, I wish to address the above issue previously outlined in our meeting of 30th June 2021 and in the consequent memorandum dated 6th July 2021. This matter has generated disquiet among University Academic Staff and as it relates to their immediate welfare as workers, the Union is seized of the same. In the spirit of partnership set in first meeting with you; we request as follows:

1. *That your office furnishes the Union with the entire document that details the envisaged University governance restructuring that your office has been pushing as an agenda through University Senate, within 5 days of receipt of this letter.*

2. *That as this document detailing this restructuring is furnished to the Union, a hold is sustained of its agenda to enable the Union study its ramifications to its members and the public it is meant to serve. Change of governance structures is an extremely serious matter that MUST be driven bottom-up by those who will directly be affected. Stakeholder involvement and participation is a requirement for such fundamental policy changes.*

3. *That as your office is aware, public participation as envisaged in the Constitution of Kenya in. article 10, 118, 124, 201, 221 and 232 is a basic requirement, and you as a duty bearer should ensure existence of forums and opportunities for the academic staff of University of Nairobi to be sufficiently involved, participate and engage in matters affecting their lives; in this case their world and work environment.*

4. *That the Chapter takes umbrage to the manner information about this restructuring is being treated and the secrecy with which the process was started and is being executed, which to say the least is causing panic and affecting productivity to an already demoralized staff.*

5. *That the Union expects to be involved and participate in the restructuring process as a key stakeholder and legally mandated protector of the welfare and rights of workers, to ensure that negative effects of restructuring are mitigated at the formulation stage, and members are made aware of the same and their concurrence sought. This would ensure that all of us are on board.*

We trust that our letter will receive acknowledgement from your office and a quick response would be appreciated. We remain available for engagement on this matter.

Yours Sincerely,

SIGNED

Dr. Maloba Wekesa

Chapter Secretary”

41. A reminder was sent on 14th July 2021. The reminder is reproduced below:

“OUR REF: 003/21

9th July 2021

The Vice Chancellor,

University of Nairobi

Dear Prof. Kiama,

RE: PROTESTING GOVERNANCE RESTRUCTURING AT THE UNIVERSITY OF NAIROBI

The above subject matter refers. On behalf of the UASU - UoN Chapter, I wish to register my disappointment over your silence to revert to my earlier letter to your office Ref: 002/21. This silence has further pushed the anxiety of UASU — UoN members and severely affected lecturers’ morale.

Our request in the referenced letter was three-fold:

- i. Your office furnishes the Union with complete documents regarding any envisaged governance restructuring that your office has been pushing.
- ii. That implementation of any governance restructuring is suspended as the union studies the ramifications the supposed governance restructuring of university management will have on academic staff.
- iii. Your office adopts a more open and participatory manner of communication devoid of the secrecy that has been the hallmark of the push for governance restructuring at the University.

By choosing to ignore the Union which is the recognized protector of academic staff workers’ labour rights, your office is going against the spirit of partnership that was agreed upon during our first meeting with you on the 30th June 2021. It sets a bad precedence in our relationship with your office and the union hastens to add, that it does not portend well for a calm working future with the Union.

I can only hope that your office rethinks its strategy in dealing with the Union which if handled with deft collegiality will help creating a better working relationship with academic staff. In the absence of this, am afraid we have set to a tumultuous future ahead.

Yours Sincerely,

SIGNED

Dr. Maloba Wekesa

Chapter Secretary”

42. There is further communication which appears at Appendix CW7 at pages 45 inviting the Applicants chairman to a meeting on 12th July 2021 to which he responded that he would be out of office until later on that day and requested that the meeting be rescheduled to the following day.

43. Apparently, the meeting was not rescheduled and hence the communication on 14th to the effect that only KUDHEIHA and KUSU were consulted.

44. The foregoing is clear indication that the Applicant was never consulted.

45. That upon getting wind of the intended changes, the Petitioner’s Chapter Secretary on 6th, 8th and 14th July sought from the Vice Chancellor relevant information touching on the proposed governance reforms, which request was declined by the Vice Chancellor contrary to the requirements under **Section 4 and 5 of the Access to Information Act**. Denial of the relevant information denied the Petitioner the opportunity to give their input in the Report.

46. The Applicant further alleges violation of the following instruments

- i. Section 4 of the University of Nairobi Act establishes various colleges of the University under the Schedule to the Act.
- ii. Statute XVII and XIX establishes Colleges, faculties, schools, institutes and centres of the University of Nairobi.
- iii. The University of Nairobi Charter enacted under Legal

Notice No. 192 of 2013 at Sections 7 establishes the Colleges of the University. The Applicant further alleges violation of Sections 37 of the Public Service Act and Article 10, 27, 47, 73,75, 201 and 234 of the Constitution.

47. Going by the test set by the Court of Appeal in **Nguruman Ltd (supra)** it is clear that on the face of the pleadings by the parties, **a prima facie**, case has been established by the Applicant that would require this Court to investigate further.

48. As pleaded by the Applicant, should the orders sought not be granted, its members who hold the positions to be abolished will suffer irreparable loss.

49. I therefore find that the application meets the threshold for grant of injunctive orders.

50. On the application for contempt, the Applicant seeks orders that:

i) *Spent.*

ii) *THAT Court do find the following persons in contempt of the Court Order made on 21st July 2021 that is;-*

a) *Prof Stephen Kiama – Vice Chancellor of the 1st Respondent*

b) *Prof. Winfred Kamau – Ag. Executive Dean Faculty of Law*

c) *Prof. Bernard Mwangi- Senior Assistant Registrar*

Faculty of Business and Management Science.

d) *Prof. Leonidah Kerubo - Associate Dean, Faculty of Science & Technology.*

e) *Prof. Mohamud Jama - Ag Executive Dean, Faculty of Social Science.*

iii) *THAT the alleged contemnors be directed to personally attend Court during the hearing of this Application.*

iv) *THAT the alleged contemnors cited at prayer (2) above be punished for contempt of Court by committal to civil jail for a period of not more than Six (6) Months or as directed by the Court and/or fined Kshs.500,000/= each in accordance with the Law.*

v) *THAT the Court do declare and make an order declaring as null and void any actions decisions or steps taken by the alleged contemnors towards the implementation of the stayed 1st Respondent vice Chancellor's proposed Governance Reforms dated July 2021 and Memo dated 14th July 2021.*

vi) *THAT Cost be provided for.*

51. The orders of this Court issued on 21st July 2021 were as follows:-

i. Spent.

ii. That a Conservatory Order be and is hereby issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing either by itself or forwarding to either the 1st, 2nd, 3rd or 4th Interested Parties for implementation of the 1st Respondent's Vice Chancellor's Proposed Governance Reforms dated July 2021 and Memo dated 14th July 2021 pending inter partes hearing of the application.

52. It is the Applicant's position that the orders were duly served upon the Respondents and that the import, contents and tenor of the order was within the knowledge of the alleged contemnors.

53. That the Respondents violated the existing Court order and proceeded to implement the illegal and unlawful changes to the governance and academic structure of the University which the Court had stayed.

54. That the illegally and unlawfully appointed staff in non-existent positions began issuing directives, memos and performing their roles yet their occupation of the said positions was stayed by the Court.

55. That the 1st Contemnor is the overall head of the 1st Respondent who assigned the 2nd to 5th Contemnors the positions which had been stayed but to which they were performing in blatant disregard of the Court order.

56. That the 2nd to 5th Contemnors were officers, servants and agents acting on behalf of the Vice Chancellor, 1st Contemnor and are bound by the Court order served upon the Respondents.

57. In the supporting affidavit of Dr. Constantine Wasonga, he refers to and annexed a notice in an internal memo dated 26th July 2021

addressed to all Heads of Department of the Faculty as set out therein signed by Professor Leonidah Kerubo, an internal memo dated 27th July 2021 from Bernard Mwangi Senior Registrar addressed to All members of Academic Staff, FOB & MS calling for a meeting for Tuesday 3rd August 2021 at 11.00 a.m; an internal memo dated 22nd July 2021 from Executive Dean to All Staff, FSS informing them about intuitional reforms at the University of Nairobi which according to the memo, had taken effect following the Vice Chancellor's announcement of 14th July 2021. The changes set out in the memo are as follows:

“Consequently, the following have been implemented:

1. *College of Humanities and Social Sciences ceased to be a College.*
2. *ALL academic activities have been reorganized and placed under the following Faculties:*
 - a. *Faculty of Arts.*
 - b. *Faculty of Law.*
 - c. *Faculty of Business and Management Sciences.*
 - d. *Faculty of Social Sciences.*
3. *The academic activities for the faculty will continue to be managed at the Education Building, Main Campus where we have students.*
4. *The Faculty Management is as follows:*
 - a. *Executive Dean - Prof. Mohamud Jama*
 - b. *Chairman, Department of Economics, Population & Development Studies - Prof. Anthony Wambugu*
 - c. *Chairman, Department of Political Science, Diplomacy & Public Administration - Prof. Fred Jonyo*
 - d. *Chairman, Department of Journalism & Mass Communication - Prof. Ndeti Ndati*
 - e. *Chairman, Department of Sociology, Social Work*
 - f. *and African Women studies - Prof. Charles Nzioka*
 - g. *Chairman, Department of Anthropology, Gender & African Studies - Prof. Onyango Ouma*
 - h. *Faculty Administrators - Mr. Leonard Musyoka & Mr. Philip Kivati”*

58. Lastly, he annexes guidelines for Examination of Thesis, Dissertations and Project Papers signed by Professor Stephen G. Kiama, PhD, Vice Chancellor on 29th July 2021.

59. In the Replying affidavit of Professor Stephen G. Kiama sworn on 7th September 2021 he refers to and relies on the averments in the affidavits sworn by Professor Julia Ojiambo, the Chairman of the Council of the University of Nairobi (UON) and Professor Julius Oging'o the secretary to the Senate to the effect that:

a) Contrary to the Petitioner's allegations, the Reforms at U.O.N were developed by U.O.N's Senate and submitted to the Council by U.O.N's Senate for approval in accordance with the provisions of the Universities Act, 2012 (hereinafter referred to as 'the Universities Act') and the University of Nairobi Charter, 2013 (Legal Notice No. 192, Legislative Supplement No. 55) (hereinafter referred to as 'the Charter').

b) As the Reforms undertaken at U.O.N have not been "developed" by the Vice Chancellor of U.O.N as alleged by the Petitioner, there are no reforms initiated at U.O.N known as "Vice Chancellor's Proposed Governance Reforms" neither are there reforms initiated at U.O.N pursuant to a "Memo dated 14th July 2021".

60. He avers that the orders of 21st July 2021 were issued in a vacuum and are therefore incapable of being disobeyed. Further that the Court has not declared the reforms developed by the Council of the University of Nairobi illegal and unlawful. That the Petitioner has neither the legal nor the factual basis for contending that the Respondents are implementing “*illegal and unlawful changes to the governance and academic structure of the University which the Court has stayed.*”

61. He deposes that the Council of U.O.N held a meeting on 12th July 2021 and in exercise of its powers under Section 35 of the Universities Act, made appointments from the U.O.N's current members of staff to fill the re-organized positions albeit in Acting capacity, pending the Gazettement of the relevant Statutes.

62. That the allegation that the persons named at prayer (2)(b) — (e) were appointed to their respective positions by the Vice- Chancellor of U.O.N is misplaced and misguided.

63. That the motion by the Petitioner seeking conservatory orders is dated 19th July 2021. That as at that date, implementation of the Council reforms had been undertaken in that appointments of persons to occupy the re-organized positions pursuant to the reforms had already been made by the Council on 12th July 2021.

64. That this Court did not issue an order suspending any action that had been taken in implementation of the reforms prior to 21st July 2021 when the conservatory order was issued. That the persons appointed by the Council on 12th July 2021 to occupy the re-organized positions are in office legally.

65. That no order has been issued by this Honourable Court to the effect that the appointment of persons to occupy the re-organized positions by the Council of U.O.N is *"illegal and unlawful."*

66. That the functions of U.O.N are set out at Section 3 of the Universities Act, 2012 as read together with Section 6 of the University of Nairobi Charter, 2013. The order of 21st July 2021 did not stay the performance of the functions of U.O.N.

67. That all employees of U.O.N including the persons named in the Petitioner's Motion as alleged contemnors are performing the duties and responsibilities attendant to their respective offices in a bid to fulfil the functions of U.O.N and achieve the goals of U.O.N.

68. That pursuant to Section 66 of the Universities Act, an officer or employee of U.O.N cannot be held personally liable for executing the functions, powers or duties of U.O.N.

69. THAT the Petitioner has only made a general averment to the effect that the Respondents are implementing *"illegal and unlawful changes to the governance and academic structure of the University which the Court has stayed"*. However, the Petitioner has not demonstrated the manner in which the alleged changes have been implemented in disobedience of the order of 21st July 2021.

70. THAT the Petitioner has not adduced evidence of service of the Order of 21st July 2021 upon the officers named at prayer 2(b) to (e) of the Motion dated 8th August 2021. As such there is no basis for the reliefs sought against the aforesaid officers.

71. That the 1st Respondent's officers have no intention to undermine the rule of law and administration of justice. That the order issued on 21st July 2021 has not been disobeyed as alleged by the Petitioners or at all.

72. Contempt of Court consists of *conduct which interferes with the administration of justice or impedes or perverts the course of justice Civil contempt consists of a failure to comply with a judgment or order of a Court or breach of an undertaking of Court.* – See **Osborne's Concise Law Dictionary, P. 102.**

73. In the case of **Sam Nyamweya & Others v Kenya Premier League Ltd and Others [2015] eKLR** Aburili J. stated that:-

"Contempt of Court is constituted by conduct that denotes wilful defiance of or disrespect towards the Court or that wilfully challenges or affronts the authority of the Court or the supremacy of the law, whether in civil or criminal proceedings."

74. **Halsbury's Law of England, Vol. 9(1) 4th Edition** states as follows;

"Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury."

75. In the case of the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR** where it was held:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

76. Mativo J. restated the test for establishing contempt in his decision in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** where he stated –

"40. It is an established principle of law that in order to succeed in civil contempt proceedings, the Applicant has to prove

(i) *the terms of the order,*

(ii) Knowledge of these terms by the Respondent,

(iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book **Contempt in Modern New Zealand** who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate."

77. In the instant case there is no evidence that Prof. Winfred Kamau – Ag. Executive Dean Faculty of Law; Prof. Bernard Mwangi- Senior Assistant Registrar Faculty of Business and Management Science; Prof. Leonidah Kerubo - Associate Dean, Faculty of Science & Technology and Prof. Mohamud Jama – Ag Executive Dean, Faculty of Social Science were served or were aware of the orders of this Court alleged to have disobeyed. I therefore find no proof that they are guilty of contempt.

78. However, for Professor Stephen Kiama, he has deposed in his replying affidavit that he had knowledge of the Court orders and the only reason he did not comply was that according to paragraph 5 and 6 of his replying affidavit –

5. THAT in absence of reforms being undertaken at U.O.N known as "U.O.N's Vice Chancellor's Proposed Governance Reforms", the Order of 21st July 2021 was issued in a vacuum and hence is incapable of being disobeyed.

6. THAT this Honourable Court has not declared that the reforms developed by the Council of U.O.N are "illegal and unlawful". Accordingly, the Petitioner has neither the legal nor factual basis to contend that the Respondents are implementing "illegal and unlawful changes to the governance and academic structure of the University which the Court has stayed'.

79. The memo dated 14th July 2021 was issued by none other than Professor Kiama himself. The orders of the Court prohibited the Respondents from implementing the memo dated 14th July 2021, specifically the orders state that:-

"THAT a conservatory order be and is hereby issued against the Respondents whether by themselves, their servants or/or whoever is acting on their behalf from implementing either by itself or forwarding to either the 1st, 2nd 3rd or 4th Interested Parties for implementation of the 1st Respondent's Vice Chancellor's proposed Governance Reforms dated July 2021 and memo dated 14th July 2021 pending the inter partes hearing of the application." [Emphasis added]

80. The averments in the affidavit of Prof. Kiama prove deliberate defiance of this Court's orders. As was stated in the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another (supra)** "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

81. Until such orders were vacated, Prof. Kiama was under obligation to stop any further implementation of the orders. By issuing the Guidelines for Examination of Thesis, Dissentions and Project Papers, Prof. Kiama disobeyed the orders of this Court that he has admitted he was aware of.

82. I therefore find that he deliberately obeyed the said orders and therefore find him guilty of contempt of the said orders. Sentencing on 27th January 2022 Prof. Stephen G. Kiama to appear in Court on that date of sentencing.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be

delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE