



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 8 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 2, 10, 22, 23, 27, 34, 35, 41, 46, 47, 56, 75, 156, 232 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF DEPUTY VICE CHANCELLOR (ACADEMIC AND STUDENT AFFAIRS), MERU UNIVERSITY

AND

IN THE MATTER OF PUBLIC SERVICE COMMISSION

AND

IN THE MATTER OF SECTION 35(1)(a)(v) OF THE UNIVERSITIES ACT, 2013 AND THE STATUTE LAW (MISCELLANEOUS AMENDMENT) ACT 2018

AND

IN THE MATTER OF STATUTES FOR MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY

-BETWEEN-

UNIVERSITY ACADEMIC STAFF UNION, MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY CHAPTER (UASU-MUST).....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

HON. ATTORNEY GENERAL..... 2ND RESPONDENT

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST INTERESTED PARTY

MERU UNIVERSITY..... 2ND INTERESTED PARTY

RULING

Before me, for determination is the Petitioner/Applicant’s Notice of Motion Application dated 22nd January, 2020. It seeks the following orders:

1. That this Court be pleased to order that this Application be heard and determined on priority basis.

2. That the Court be pleased to issue a conservatory order stopping the purported recruitment of the Deputy Vice Chancellor (Academic and Student Affairs) Meru University of Science and Technology, pending hearing and determination of this Application.
3. That the Court be pleased to issue conservatory order stopping the purported recruitment of the Deputy Vice Chancellor (Academic and Student Affairs) Meru University of Science and Technology, pending hearing and determination of this Petition.
4. That this Court be pleased to give directions relating to the hearing and determination of this Petition.
5. That the costs of this Application be in the cause.

This Application is premised on the grounds that:

1. The 1st Respondent is in the process of conducting interviews for recruitment of the Deputy Vice Chancellor (Academic and Student Affairs) – Meru University of Science and Technology on 23rd January, 2020 contrary to the law and Constitution hereof.
2. Under the circumstances, it is desirous and in absolute Public Interest that this Court intervenes for an immediate stop to the unfair, unjust, capricious, discriminatory, irrational, unreasonable, unlawful and unconstitutional recruitment of the Deputy Vice Chancellor (Academic and Student Affairs) – Meru University of Science and Technology by the 1st Respondent scheduled for 23rd January, 2020 hereof.
3. The 2nd Interested Party, Meru University of Science and Technology was established pursuant to Meru University of Science and Technology Charter (2013) and in accordance with the Universities Act, 2012.
4. The establishment of the said university was possible because of the huge support and donation of over 600 acres of land by residents of Tigania West sub-county in Meru County. Therefore, residents of Tigania West, Nyambene region and Meru County are key stakeholders in respect of the said University.
5. Pursuant to a letter dated 15th August, 2019, the Cabinet Secretary, Ministry of Education appointed Prof. Simon Thurania Taaliu as the acting Deputy Vice Chancellor (Academic and Student Affairs)- Meru University of Science and Technology. The Petitioner avers that this was a highly negotiated appointment to ensure inclusion of a resident of the local stakeholders into the top university management thereof. The said Prof. Simon Thurania Taaliu hails from Tigania West sub-county in Meru County and is very competent and experienced.
6. The 1st Respondent has purported to publish the names of all the applicants and the shortlisted candidates of the Deputy Vice Chancellor (Academic and Student Affairs) – Meru University of Science and Technology among others.
7. The 1st Respondent has discriminated against gender contrary to Article 27 of the Constitution.
8. The 1st Respondent has discriminated against the only qualified and acting applicant from Tigania West, Nyambene region, Meru County which is a key stakeholder and minority & marginalized group, contrary to Article 56 of the Constitution.
9. Further, the said recruitment by the 1st Respondent does not factor in regional balance because the chancellor comes from Murang'a County: Vice – chancellor from Migori and the Deputy Vice Chancellor (Administration, Finance and Planning) from Nyeri yet a candidate from the County where the university is located and a key stakeholder was not considered despite high qualifications and performance. This contravenes the Constitution of Kenya, 2010 that provides for reasonable representation of stakeholders.

The Application is further supported by the Affidavit of BENDIBBIE MUNYAO MULWA sworn on 22nd January, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Article 22 and 23 of the Constitution of Kenya, 2010 and all enabling provisions of the Law.

The 1st Respondent opposed the Application by filing a Replying Affidavit deposed by **SIMON K. ROTICH**, the Secretary/CEO of the 1st Respondent herein on 28th January, 2020 in which he contends that the instant Application as well as the Petition is an abuse of the Court process and is void of merit. He urged this Court to dismiss the same with costs.

The 1st Respondent contends that it is mandated by dint of Section 35(1)(a)(v) of the Universities Act, 2012 in the case of Public Universities, to undertake recruitment of Deputy Vice Chancellors. That the 1st Respondent acted within its mandate when it declared a vacancy for the Position of Deputy Vice Chancellor for the 2nd Interested Party and placed an advertisement for the said position.

The 1st Respondent further contends that the interviews subject to this suit took place on 23rd January, 2020 and as such the instant Application and Petition are overtaken by events.

The 1st Respondent further contends that the 2nd Interested Party is a national institution and therefore the Petitioner/Applicant's contention that the same should be headed by someone from the region does not hold any water and ought not to be entertained by this Court.

It further maintained that it did adhere to the Constitution, the enabling legislations as well as recruitment policy while undertaking recruitment contrary to the Petitioner/Applicant's contention.

The 1st Respondent further contends that the Petitioner has failed to demonstrate with precision how its fundamental rights and freedoms under the Constitution have been violated or threatened, relying on the decision in the cases of **Mumo Matemu v Trusted Society of Human Rights Alliance (2013) eKLR** and **Annarita Karimi Njeru (1979) KLR 154**.

In conclusion the 1st Respondent urged this Court to dismiss the instant Application with costs to the Respondent.

For the 1st Interested Party, Prof. George Magoha swore a Replying Affidavit on 28th January, 2020 in which he reiterates the averments made by the 1st Respondent in its Replying Affidavit. He further maintains that the process of recruitment of the Deputy Vice Chancellor was done in accordance with the provisions of Section 35(1)(a)(v) of the Universities Act, 2012 that vests the same on the Council of the University in consultation with the Cabinet Secretary following a competitive process by the Public Service Commission.

The 1st Interested Party further avers that pending the recruitment of a substantive Deputy Vice Chancellor, he did vide a letter dated 15th August, 2019 addressed to the 2nd Interested Party appoint Professor Simon Thurania as Acting Deputy Vice Chancellor (Academic and Student Affairs) for a period of six (6) months with effect from 1st August, 2019. That this appointment was conditional on the position being filled substantively.

He further deposes that the 1st Respondent subsequently declared a vacancy for the position of Deputy Vice Chancellor (Academic and Student Affairs), placed an advertisement, received applications and subsequently proceeded with the process of shortlisting candidates.

The 1st Interested Party maintained that the process of recruitment was lawful, constitutional and above board. It was further the 1st Interested Party's contention that there was no discrimination in the process as alleged by the Petitioner/Applicant. That there is no risk/harm/prejudice and/or damage the Applicant will suffer if the orders sought herein are not granted. Further that it will not suffer irreparable harm that cannot await the hearing of the Petition.

He reiterated that the Petitioner/Applicant has failed to demonstrate with precision how its fundamental rights and freedoms under the Constitution have been violated or are threatened contrary to the provisions of Article 22 (1) of the Constitution of Kenya, 2010.

In conclusion the 1st Interested Party urged this Court to dismiss the instant Application with costs. He further maintained that if the Orders sought are granted it would be tantamount to interference of the Constitutional mandate of the 1st Respondent.

Parties made oral submissions of the application on 28th January, 2020. There was no response by the 2nd Interested Party who also did not attend court for the hearing of the application.

Submissions by the Parties

Mr. Kurauka submitted on behalf of the Petitioner/Applicant that his client has made a case for granting of the Conservatory Orders sought in the instant Application. That the 1st Respondent failed to follow the law in the recruitment of the Deputy Vice Chancellor (Academic and Student Affairs) for reason that the Public advertisement was not placed in at least 2 dailies of Nationwide circulation. Secondly that the current holder of the office was appointed following negotiation between the Ministry and the 1st Interested Party, a fact that is not disputed by the 1st Interested Party. He further submitted that the recruitment was discriminatory.

He submitted that Article 27 of the Constitution of Kenya, 2010 has been breached as the gender rule was not observed. That Article 56 of the Constitution was equally not adhered to as the respondents failed to consider applicants from marginal groups.

The Petitioner/Applicant contended that there was a serious error in the process of shortlisting as none of the Applicants from Meru County were shortlisted. That they were thus denied participation in the interview process.

The Petitioner/Applicant submitted that the rules of interviews requiring fairness, reasonableness and participation of all stakeholders and public participation were not observed. He further maintained that the Replying Affidavits on record fail to show why the current holder of the office was not shortlisted.

The Petitioner further submitted that the assertion by the 1st Respondent that the instant Application has been overtaken by events is not true as no appointment has been made.

It is further the Petitioner/Applicant's contention that no prejudice will be suffered by any party if the orders sought in the instant Application are granted.

Mr. Kurauka urged this Court to allow his application as prayed.

Respondents' Submissions

In his Submissions on behalf of the Respondents herein, Mr. Odukenya relied on the Replying Affidavit of the 1st Respondent and the 1st Interested Party and annexures thereto.

He submitted that the conditions for the grant of Conservatory Orders have not been met by the Petitioner/Applicant herein. That the interviews were done on 23rd January, 2020 and therefore the Application is overtaken by events. He further submitted that the Petitioner/Applicant is contesting the process because its preferred candidate was not shortlisted.

Mr. Odukenya submitted that the 1st Respondent is mandated under Section 35(1)(a)(v) of the Universities Act to undertake recruitment of the Vice Chancellor, Deputy Vice Chancellors, Principals and Deputy Principals. That once the process is concluded by the PSC it forwards names to the Cabinet Secretary who in consultation with the respective universities appoints the substantive holder of the respective office.

He submitted that the current holder of the office was appointed by the Council and was approved by the Cabinet Secretary in an acting capacity pending appointment of a substantive office holder. That the Applicant is seeking to turn the issue into a Meru affair.

It was further Mr. Odukenya's submission that the process of recruitment followed the law and that there was no discrimination as alleged.

He urged this Court to dismiss the instant Application with costs.

Petitioner/Applicant's Rejoinder

In a brief rejoinder Mr. Kurauka submitted that the Application is not meant to advocate for the shortlisting of candidates from Meru region as alleged by the Respondents. That the current office holder's acting appointment was a highly negotiated process and that it was for the Respondents to prove why they failed to shortlist the current Deputy Vice Chancellor.

Mr. Kurauka insisted that the recruitment was discriminatory and violated the provisions of the Constitution. He therefore urged the Court to allow the Application as prayed.

Determination

After considering the parties' arguments and the evidence adduced, the issue for determination is whether the Applicant has met the threshold for granting "*Conservatory Orders*" pending hearing and determination of the main Petition.

The principles for grant of conservatory orders were outlined in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** as follows:

- a) The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.
- b) Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.
- c) The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
- d) Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

In **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another (2016) eKLR**, Odunga J. cited with approval the decision of Musinga J. (as he then was) in **Centre for Rights Education and Awareness & 7 others v The A.G. H. C. Pet No. 16 of 2011** where it was held that:

"At this stage a party seeking conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, he will suffer prejudice as a result of a violation or threatened violation of the constitution."

Further, in **Judicial Service Commission v Speaker of the National Assembly & Another (2013) eKLR**, it was held that:

"Conservatory Orders in my view are not ordinary civil law remedies provided for under the constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

The foregoing position was acknowledged by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others (2014) eKLR** when it held that:

"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 are therefore, 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 applicant's case for stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."

The Petitioner/Applicant has alleged violation of various provisions of the Constitution of Kenya including Articles 22, 23, 27 and 56.

The reasons advanced by the applicant in support of the application are that the over 600 acres of land upon which the university was constructed was donated by the residents of Tigania West who are therefore stakeholders, that the appointment of Prof. Simon Thurania Taaliu as acting Deputy Vice Chancellor (Academic and Student Affairs) was a highly negotiated appointment to ensure inclusion of a local in the top management of the University and his exclusion from the shortlisted candidates is discrimination as he is qualified and is from a minority/marginalised group. That this is contrary to Article 56 of the Constitution.

It is further the applicant's argument that the recruitment did not meet gender and regional balance since the Chancellor comes from Muranga County, the Vice Chancellor from Migori County and the Deputy Vice Chancellor (Administration, Finance and Planning), comes from Nyeri County. That the 1st respondent shortlisted all acting Deputy Vice Chancellors (Academic and Student Affairs) for Laikipia, Kibabii and Nairobi Universities but left out the one from Meru University.

It is further the applicant's argument that the publication of names was not in at least two local dailies as required by the 1st respondent's policy and in the Statute Law (Miscellaneous Amendment) Act, 2018, that there was no public participation as UASU and residents were not involved and that the interview notice was too short to allow objections thereto.

The Constitution and legislation provide for qualification and process of appointment of top management of Universities. The fact that a community has donated land for establishment of a university is not part of the qualifications for recruitment of a member thereof to any of the offices. The fact that acting Deputy Vice Chancellors of other public universities were shortlisted is also not one of the factors provided for in either the Constitution or relevant legislation. The shortlisting of the said Acting Deputy Vice Chancellors must have been based on the advertised qualifications.

The other averments such as noncompliance with gender and regional balance are matters to be proved by evidence. So is the issue of advertisement and notice. The applicant has not provided any evidence of any of these averments.

On the regional balance, the list of applicants for the position of Deputy Vice Chancellor (Academic and Student Affairs) – Meru University, there are 4 candidates from Meru and 2 from Tharaka Nithi. Out of these Prof. Eric Muchiri and Jonah Nyaga Kindiki were shortlisted from Meru and Tharaka Nithi. The applicant has not demonstrated by evidence that the two candidates shortlisted from the region, or any other candidates shortlisted, were less qualified than Prof. Thurania Taaliu as proof of discrimination on regional balance.

On the issue of gender balance, the list of candidates reflects that no female candidate applied. A person who has not applied for a position cannot complain about discrimination. And even though the Constitution provides for gender balance, this can only be determined after considering the entire staff compliment of senior positions at the University, and not on the recruitment of a single position.

The applicant has not produced the staff compliment for comparison by the court. Further there are 42 tribes in Kenya and not all of them can be appointed to be Vice Chancellors or Deputy Vice Chancellors of public universities because of regional balance. It has not been demonstrated that any region is over represented.

From the foregoing, I find no prima facie case has been established to justify the grant of the conservatory orders sought. Further, the applicant still has a chance to adduce more evidence to prove the averments at the full hearing. This court has powers to annul an appointment if after hearing it is found to have been either unlawful or unconstitutional.

As was stated by the Supreme Court in the case of **Gatirau Peter Munya** (supra), conservatory orders should only be granted on the merit of the case bearing in mind public interest, constitutional values and proportionate magnitudes and priority levels. In the present case, the impression given by the applicant is that since this is a University in Meru where the locals donated land for establishment of the University, they have a right to be in the administration irrespective of all other legal and constitutional considerations. This is not sufficient reason to grant conservatory orders. The public interest would demand that the best candidate be recruited for the position unless that candidate does not meet either the constitutional or legal qualifications.

The applicant has further not demonstrated the prejudice it shall suffer if the orders sought are not granted, as the court will still be in a position to grant any merited orders after full hearing of the petition. The failure to grant the orders will not render the petition nugatory.

For the foregoing reason, I decline to grant the conservatory orders sought in the application herein with the result that the application is dismissed.

Costs shall abide the outcome of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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