



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 206 OF 2019**

**IN THE MATTER OF: ARTICLES 3(1), 22, 23, 48, 50(1), 162(2)(a), 165(5), 258 AND 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 24, 27, 41(1), 47, 73, 75, 77(3), 129, 153(4)(a), 232 and 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE PRIMACY OF SECTION 35(1)(a) OF THE UNIVERSITIES ACT 2012**

**AND**

**IN THE MATTER OF: THE FAILURE BY THE PUBLIC SERVICE COMMISSION TO INSTITUTE AN INDEPENDENT PROCESS FOR RECRUITING THE VICE CHANCELLOR OF MASINDE MULIRO UNIVERSITY OF SCIENCE TECHNOLOGY AS REQUIRED BY SECTION 35(1)(a)(iv) OF THE UNIVERSITIES ACT, 2012**

**AND**

**IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE ONGOING PROCESS OF RECRUITING AND APPOINTING THE NEW VICE CHANCELLOR FOR MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY IN DEFIANCE OF SECTION 35(1)(a)(v) OF THE UNIVERSITIES ACT, 2012**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**OKIYA OMTATAH OKOITL.....PETITIONER**

**v**

**PUBLIC SERVICE**

**COMMISSION.....1<sup>st</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF**

**EDUCATION, SCIENCE &**

**TECHNOLOGY..... 2<sup>nd</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....3<sup>rd</sup> RESPONDENT**

**COUNCIL, MASINDE MULIRO**

**JUDGMENT**

1. Okiya Omtatah Okoiti (Petition) instituted the Petition herein on 6 November 2019 against the Public Service Commission (the Commission), the Cabinet Secretary, Education (the Cabinet Secretary), the Honourable Attorney General (the Attorney General) and the Council, Masinde Muliro University of Science and Technology (the Council)(all together with the Respondents) alleging that the Commission had violated section 35(1)(a)(v) of the Universities Act in allowing the Council to participate significantly in the process of recruitment of a Vice-Chancellor for Masinde Muliro University of Science and Technology.
2. The Petitioner also alleged that the decision not to renew the term of one, Prof Fredrick Otieno as Vice-Chancellor of the University was in breach of Article 41(1) of the Constitution as read with sections 5, 35, 41 and 44 of the Employment Act, 2007 as well as Article 47 of the Constitution as read with sections 3, 4 and 5 of the Fair Administrative Actions Act, 2015.
3. The Petitioner further contended that there was a conflict between section 35(1)(a)(v) of the Universities Act, 2012 as amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 and section 39(1)(a) of the Universities Act as amended by the Statute Law (Miscellaneous Amendments) Act, 2015, and therefore section 35(1)(a)(v) of the Act ought to take precedence.
4. Filed together with the Petition was a Motion under a certificate of urgency in which the Petitioner sought interim injunctive orders. The parties entered a consent in respect of the Motion on 8 November 2019.
5. The Commission caused a replying affidavit sworn by its Deputy Secretary/Executive Officer to be filed on 12 November 2019 while the Cabinet Secretary filed a replying affidavit on 26 November 2019.
6. The Council filed an Answer to Petition and a replying affidavit sworn by its Chairperson on 21 November 2019.
7. On 25 November 2019, the Court directed the Respondents who had not responded to file and serve their responses by 29 November 2019, the Petitioner to file and serve a further affidavit by 6 December 2019, and further that this Petition be mentioned at the same time with Cause No. 512 of 2019 on 26 November 2019 with a view to give directions on consolidation.
8. On 18 February 2020, this Court declined to consolidate the Petition and the Cause as the issues raised were distinct.
9. During the appearance, the Court directed the parties to file and exchange submissions and that the same be highlighted on 21 April 2020.
10. The Council filed its submissions on 21 April 2020, the Commission, Cabinet Secretary and Honourable Attorney General filed joint submissions on 8 September 2020.
11. The Petitioner's submissions were not on record by the agreed dates (initially was to be filed/served before 6 March 2020 then extended to 21 August 2020).

**Issues for determination**

12. The Commission, Cabinet Secretary and the Honourable Attorney General identified 2 Issues as arising for the Court's determination
  - (i) Whether section 35(1) (a) (v) of the Universities Act, 2012 has supremacy over Section 39(1) (a) of the Universities Act, 2012.
  - (ii) Whether the interview was legally conducted by the commission.
13. The Council on its part isolated 10 Issues to wit
  - (i) Whether the apparent conflict between section 35(1)(a)(v) of the Universities Act, 2012 as amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 and section 39(1)(a) of the Act as amended by the Statute Law (Miscellaneous Amendments) Act, 2015 is resolved by giving primacy to section 35(1)(a)(v) of the Act.
  - (ii) Whether section 35(1)(a)(v) of the Universities Act 2012 as amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 ousted the governing councils' of public universities and their members from playing any role in the recruitment process of the vice-chancellor.
  - (iii) Whether the inclusion of two members of the 4<sup>th</sup> Respondent's council in the interview panel by the 1<sup>st</sup> Respondent violated the provisions of section 35(1)(a)(v) of the Universities Act, 2012 as amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018.
  - (iv) Whether the participation of the two council members of the 4<sup>th</sup> Respondent in the interview panel influenced the recruitment process for the position of vice-chancellor of the University.

(v) Whether the decision of the 4<sup>th</sup> Respondent not to renew the contract of Prof Fredrick Otieno was lawful and distinctly separate from the recruitment process of the vice-chancellor.

(vi) Whether the Petitioner has demonstrated how his fundamental rights under the Bill of Rights has been contravened or threatened with infringement and how he and the public stand to suffer as a result of the alleged contravention.

(vii) Whether the Petition is premature and whether there are orders to quash.

(viii) Whether personal interest overrides public interest.

(ix) Whether the Issues raised in this Petition are similar to those raised in Nairobi ELRC No. 512 of 2019.

(x) Who should pay the costs of this Petition?

14. The Court has considered the Petition, motion, affidavits, submissions and authorities cited by the parties.

#### **The similarity of Issues with Cause No. 512 of 2019**

15. The parties made brief oral submissions on 18 February 2020 on whether the Issues raised in this Petition were the same as those raised in Nairobi Cause No. 512 of 2019.

16. The Court, in an *ex-tempore* Ruling made on the same day, determined that the Issues were not the same and therefore the 2 disputes would proceed separately.

17. The question therefore does not arise for consideration in this Judgment.

#### **Personal versus Public interest**

18. The Council challenged the Petitioner's interest in purporting to advance the personal interests of Prof Fredrick Otieno through this litigation.

19. According to the Council, the Petition could not have been brought in the public interest as some of the disputations revolved around the failure to renew the contract of Prof Otieno.

20. After closely examining the Petition, the Court agrees with the Council that some elements of the Petition revolved on private law interests of Prof Otieno.

21. The Court also notes that the Prof Otieno instituted litigation against the Council separately to dispute the failure to renew his contract.

22. Despite the noting, the Court is of the view that where a party directly affected is capable and able to sue, third parties should not be quick to move the Court under the guise of public interest litigation and if the Court finds abuse, it may not hesitate to condemn the party moving the Court to pay costs.

#### **Prematurity of the Petition**

23. The Council urged that the Petition was premature because the Public Service Commission had not yet released the results of the interviews it had conducted.

24. In the view of the Council, it was illogical for the Petitioner to allege bias on the part of the Commission before the outcome of the interviews had been released.

25. Consequently, the Council submitted that there was no decision to quash.

26. With respect to the Council, it appears it misapprehended the position of the Petitioner.

27. The Petitioner's foundational argument was that because 2 members of the Council participated in the interviews conducted by the Commission, any decision made therein would have no validity and therefore stood to be quashed.

28. The Court finds that the question of prematurity does not therefore arise.

#### **The validity of the participation of Council members in the Interview**

29. In asking the Court to invalidate the recruitment process, the Petitioner contended that under section 35(1)(a)(v) of the Universities Act (as amended in 2018), the Public Service Commission was required to act independently and that the participation of 2 Council members fatally undermined the independence.

30. In the view of the Petitioner, neither the Council nor any of its members had a right or role to participate in the interview process at all, as that was a role reserved for the Public Service Commission.

31. Further, the Petitioner submitted that the Council having declined to renew the contract of the then in office Vice-Chancellor, the presence of the 2 Council members amounted to a conflict of interest as the said Vice-Chancellor would not receive a fair hearing during the interviews.

32. The 2 Council members, the Petitioner contended had a personal interest in the outcome of the interview.

33. Defending the participation of 2 of its members in the recruitment interviews, the Council submitted that section 35(1)(a)(v) of the Universities Act as amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 did not expressly bar a member of Council from participating in the recruitment process for a Vice-Chancellor by the Public Service Commission.

34. The participation of the 2 Council members, the Council urged did not result in them influencing the outcome of the interview.

35. On the part of the Commission, it was asserted that section 12(2) of the Public Service Commission Act, 2017 allowed it to co-opt into any of its Committees a person whose knowledge and skills were necessary for the proper performance of its functions and that pursuant to that statutory authority it co-opted 2 Council members of the University to provide technical capacity.

36. On whether the co-opted members had any vote or influenced the process, it was deposed that they had no vote on the recruitment process and any recommendations they made were not binding on the Commission.

37. The participation of the 2 Council members, it was further asserted did not influence and/or interfere with the independence of the Commission.

38. In their submissions, the Commission and the Cabinet Secretary cited *Immanuel Masinde Okutoyi & Ors v National Police Service Commission & Ar* (2014) eKLR for the view that (in respect of similar provision in the National Police Service Commission Act)

the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the so-called panels as long as they comply with the law.

39. Section 12 of the Public Service Commission Act gives the Commission power to establish Committees from time to time for the better carrying of its functions and exercise of its powers. The section empowers the Commission to co-opt any persons with the necessary knowledge and skills into its Committees. Such co-opted persons have no vote.

40. The persons co-opted by the Commission were Council members. Section 35 of the Universities Act establishes the Council as one of the governance bodies of public universities.

41. Part of the mandate of the Council includes employment of staff and approval of policies of a University.

42. Section 7 of the Act sets out the qualifications of Council members to be the same as those of the members of the Commission for University Education.

43. The Court can therefore assume and/or conclude that the 2 Council members had specialist knowledge and skills not available to the Commission and therefore their co-option was valid.

44. And since the 2 Council members did (do) not have a vote as co-opted members of the Selection Panel, the Court finds that their participation did not interfere with or influence the independence of the Commission.

45. In the same vein, the Court finds that the participation of the 2 Council members did not render the interview process fatally defective.

**The conflict between section 35(1)(a)(v) of the Universities Act (as amended in 2018) with section 39(1)(a) of the Universities Act (as amended in 2015)**

46. 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; and

47. Section 39(1)(a) as amended in 2015, on the other hand, provides that

39. The Vice-Chancellor

(1) The Vice-Chancellor of a university shall be appointed-

(a) in the case of a public university, by the Cabinet Secretary on the recommendation of the Council, after a competitive recruitment process conducted by the Council; and ....

48. It is these two provisions which the Petitioner asserted were inconsistent and sought an order declaring that section 35(1)(a)(v) was to be given primacy.

49. The Commission appeared to agree with the position taken by the Petitioner, for in paragraph 3 and 4 of the replying affidavit by its Deputy Secretary/Chief Executive Officer, it deposed that it acted pursuant to the mandate given to it by section 35(1)(a)(v) of the Act.

50. The Cabinet Secretary was also of the same view as detailed in paragraphs 4, 5 and 6 of his replying affidavit.

51. In their submissions, these Respondents accepted that there was a conflict and urged the Court to follow the holding in *Martin Wanderi & 19 Others v. the Engineers Registration Board of Kenya & Ors* (2014) eKLR that

the canons of interpretation with regard to the timing of legislation and the doctrine of implied repeal, which is to the effect that, where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one.

52. These Respondents also drew the attention of the Court to a passage in *Institute of Patent Agents v. Joseph Lockwood* (1894) AC 347 to the effect that

No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it.

53. According to these Respondents, section 35(1)(a)(v) of the Act superseded section 39(1)(a) of the Act.

54. In its submissions, the Council urged that the sections were complementary because if Parliament wanted to do away with section 39(1)(a) of the Act, *nothing would have prevented it from doing so*.

55. The Council also submitted that section 35(1)(a)(v) of the Act did not supersede section 39(1)(a) of the Act.

56. Under section 39(1)(a) of the Universities Act, the Public Service Commission has not been bestowed with any function in respect of the recruitment of public universities Vice-Chancellors and Deputy Vice-Chancellors. This section was enacted in 2015.

57. Section 35(1)(a)(v) of the Universities Act (as amended in 2018), however, places upon the Commission the function of conducting the recruitment process for Vice-Chancellors and Deputy Vice-Chancellors of public universities, and Principals of the Constituent colleges.

58. In terms of the canons of interpretation and case law as demonstrated in the decisions cited herein by the Respondents, section 39(1)(a) of the Universities Act must yield to section 35(1)(a)(v) of the Act. Section 35(1)(a)(v) of the Act impliedly repealed section 39(1)(a) of the Act.

59. Before concluding, the Court observes that it would have dismissed the Petition on two foundational grounds.

60. First, the parties agreed and the Court directed that the Petition be prosecuted through written submissions.

61. The Petitioner did not file submissions as directed and in that regard, it can be deemed that he failed to prosecute the Petition.

62. Second, the Petitioner did not comply with Court orders as to the filing of submissions with a view to the expeditious and proportionate determination of the Petition.

## **Conclusion and Orders**

63. From the foregoing, the Court orders

(a) THAT a declaration do and is hereby issued that section 35(1)(a)(v) of the Universities Act supersedes the provisions of section 39(1)(a) of the Act in respect to the recruitment of public universities Vice-Chancellors and Deputy Vice-Chancellors and Principals and Deputy Principals of Constituent Colleges.

(b) THAT the co-option and participation of University Council members by the Public Service Commission in the recruitment process under section 35(1)(a)(v) of the Universities Act is not illegal and/or fatal to the recruitment process.

64. Save for the above orders, the other reliefs sought by the Petitioner are declined.

65. Due to the nature of the litigation, each party to bear its own costs.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 16<sup>th</sup> day of October 2020.**

**Radido Stephen**

**Judge**

### **Appearances**

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|---|--|
| Petitioner  | in person  |
| For 1 <sup>st</sup> – 3 <sup>rd</sup> Respondents | Ms. Oyugi, Senior Litigation Counsel, Office of the Attorney General |
| For 4 <sup>th</sup> Respondent                    | Kitiwa & Co. Advocates   |
| Court Assistant                                   | Judy Maina/Lindsey   |