



REPUBLIC OF KENYA



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Mito v Nyanjom & 4 others (Petition 69 of 2018)
[2020] KEELRC 386 (KLR) (15 October 2020) (Judgment)
George Olilo Mito v Joyce Oduor Nyanjom & 4 others [2020] eKLR
Neutral citation: [2020] KEELRC 386 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 69 OF 2018
MN NDUMA, J
OCTOBER 15, 2020

BETWEEN

GEORGE OLILO MITO PETITIONER

AND

JOYCE ODUOR NYANJOM 1ST RESPONDENT

KISUMU NATIONAL POLYTECHNIC 2ND RESPONDENT

THE COUNCIL KISUMU POLYTECHNIC 3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION . 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The petitioner in the petition filed on 13th November 2018 prays for the following reliefs:
 - (i) A declaration that the actions of the 1st, 2nd, 3rd and 4th respondents were against Public Policy, Constitution and the relevant statute.
 - (ii) A declaration that the 5th respondent breached Article 156 in failing to promote, protect the rule of law and defend public interest by failing to give proper legal advice and in failing to carry their constitutional mandates.
 - (iii) Costs of the suit.



Facts of the petition

2. The petitioner deposes that on or about 24th October 2018, the 1st respondent officially retired from the employ of the 1st and 2nd respondent. That the 1st respondent has connived with the 2nd and 3rd respondent to maintain herself in office for another two years.
3. That upon retirement the 1st, 2nd and 3rd respondents ought to have advertised the position of the 1st respondent in accordance with Section 8 of the relevant statute to enable cabinet secretary to then appoint her replacement following transparent and competitive recruitment process.
4. That retention of the 1st respondent upon attaining retirement age is unlawful and was done without public participation and outside the powers of the 2nd and 3rd respondents and is therefore ultravires and illegal.
5. The petitioner alleges Article 10 on national values of the constitution has been violated by the respondents. Further the petitioner alleges breach of Article 156 of the constitution by the respondents in failing to promote and protect the rule of law and defend public interest.
6. The petitioner prays for the reliefs sought.
7. The petitioner had sought interim conservatories orders in an application that accompanied the petition. The application was refused by Hon. Rika J. in a ruling dated 16th November 2018 stating that the petitioner had not disclosed who or what he is in relation to the respondents and did not disclose in what way he would suffer irreparable harm if conservatory orders were not granted. The petitioner filed written submissions thereafter.

Response

8. The 1st, 2nd and 3rd respondents filed grounds of opposition to the petition dated 13th November 2018 and the application on the same date.
9. The respondents state that the petition has been overtaken by events since the 1st respondent M/S Joyce Nyanjom formally retired and handed over the office of principal including instruments of office to Zedekiah Chanzu Lommollo the then Deputy Principal Administration who took over as Acting Principal on 11th December 2018.
10. That the petition was filed prematurely amidst preparations for handing over and the 1st respondent has since left the institution after handing over and has no further role thereof.
11. That the term of the 2nd respondent expired on 15th January, and appointment of new councils had been halted for all polytechnics nationwide including the 2nd respondent by the Cabinet Secretary Ministry of Education. That the orders sought in the application and the petition are moot.
12. That the petitioner has not demonstrated with precision how his fundamental rights and freedoms under the constitution have been violated or threatened contrary to Article 22(1) of the constitution and the holding in the Locus Classicus decision in Mumo Matemu vs Trusted Society of Human Rights alliance (2013) eKLR and Anmanta Kanini Njeru (1979) KLR 154.
13. That Cabinet Secretary has since appointed the Council of Kisumu Polytechnic in consultation with TVET (Technical Vocational Education and Training Board) as per the provisions of Section 28 of the TVET Act as set out in Section 5(1) of legal order No. 113 of 2014.
14. That the petition is wholly lacking in merit and it be dismissed with cost.



Determination

15. The two issues for determination are:
 - (i) Whether the petitioner has disclosed any violation or threatened violation of his constitutional rights in a precise manner as demanded of a petitioner.
 - (ii) Whether the petition is spent having been overtaken by events.
16. The court will deal with issues (i) and (ii) together. In *National Gender and Equality Commission vs Independent Electoral and Boundaries Commission*, Petition 209 of 2017; (2018) eKLR Mativo J. held thus:

“A matter is moot if further legal proceedings with regard to it can have no effect or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness also arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual, practical impact”.
17. In the present petition, it is beyond peradventure that the petition was filed seeking to have the 1st respondent retire having reached retirement age. The petition was clearly filed under the misconception that the term of the 1st respondent had been extended for a further 2 years after retirement.
18. This contention is not factual at all since the 1st respondent was at the time the suit was filed preparing to hand over the office of Principal upon attaining retirement age. The petitioner proceeded on retirement on 11th December 2018 and the contention by the petitioner became moot since it had no basis in the first place.
19. Secondly the cabinet secretary in consultation with TVET Board as per the provisions of Section 28 of TVET Act read with section 5(1) of legal order No. 113 of 2014, appointed the council of Kisumu Polytechnic.
20. There is clearly no dispute between the petitioner and the respondents, the petition having been filed prematurely and without any proper basis.
21. Accordingly, the petition not only fails for lack of any proper basis as per *Mumo Matemu* case (supra) but the same has been overtaken by events and is moot as described by Mativo J. in *National Gender and Equality Commission* case (supra).
22. The court finds that this petition ought not to have been filed in the first place and was an abuse of court of process and the petitioner should pay the costs of the petition.
23. The petition is therefore dismissed in its entirety with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF OCTOBER, 2020

MATHEWS N. NDUMA

JUDGE

ORDER



In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mwamu and Company Advocates for the petitioner

Rache and Amollo Advocates LLP for the 1st, 2nd and 3rd Respondents

Chrispo – Court Clerk

