



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.229 OF 2019

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE PUBLIC SERVICE COMMISSISON.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION,

SCIENCE AND TECHNOLOGY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE COUNCIL, GARISSA UNIVERSITY.....1ST INTERESTED PARTY

THE COUNCIL, LAIKIPIA UNIVERSITY.....2ND INTERESTED PARTY

RULING

The petitioner filed the Notice of Motion dated 2nd December, 2019 under the provisions of articles 20, 22, 23(3), 50(1), 159(2) (d), 162(2) (a), 165(5) and 258 of the Constitution, 2010; Rules 2, 7(2), 18, 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and seeking for orders that;

1. Spent.

2. Spent.

3. Pending the inter-parties hearing and determination of this application and/or the petition herein the court be pleased to issue a temporary order of prohibition prohibiting the respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to conduct interviews for the position of Vice Chancellor and Deputy Vice Chancellor (Academic and Students' Affairs) and Deputy Vice Chancellor (Finance, Administration and Planning) at Garissa University, scheduled to be held by the Public Service commission on 3rd December, 2019.

4. Consequent to the grant of the prayers above the court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or favour the cause of justice.

5. Costs be in the cause.

The application is supported by the affidavit of the petitioner and on the grounds that persons to be interviewed were ambushed on the afternoon of Friday 29th November, 2019 that interviews would be conducted on 3rd December, 2019 giving the public and interviewees a notice of only one working day.

In July, 2019 pursuant to section 35(1)(a)(v) of the Universities Act, the Public Service Commission (PSC) advertised three (3) vacancies at the Garissa University in the positions of the Vice Chancellor, Deputy Vice Chancellor (Academic and Students' Affairs) and the Deputy

vice Chancellor (Finance, Administration and Planning). The PSC also advertised a vacancy in the office of the Deputy Vice Chancellor (Administration, Finance and Planning) at Laikipia University for appointment to the positions. The deadline for the application was on 20th August, 2019.

Thereafter matters went quiet without long lists of applicants or shortlists of candidates to be interviewed were publicised until 29th November, 2019 when PSC wrote to the chairman Garissa University Council inviting him and other council members to attend scheduled interviews for the 3 positions on 3rd December, 2019 at their offices in Nairobi.

On the same date, 29th November, 2019 the PSC informed candidates to be interviewed of the interviews.

The recruitment process has been opaque and there is no provision for public participation at any stage of the entire process. The sudden and secretive announcement of interviews amounts to an ambush. No lists of applicants were publicised or lists of shortlisted candidates or the public invited or given an opportunity to comment on the shortlisted candidates and the venue and times for the interviews were not advertised or publicised.

The invitation to the chairman and council members of Garissa University to attend interviews undermines the purpose of section 35(1) (a) (v) of the Universities Act whose purposes is to restrict the council and the cabinet secretary to choosing and appointing the Vice Chancellor and the Deputy Vice Chancellors from the names of 3 successful candidates for each post to be presented to them. the appointment of the new Vice Chancellor and Deputy Vice Chancellor of universities must be undertaken pursuant to section 35(1) (a) (v) of the Universities Act as amended.

Section 39(1) (a) of the Universities Act vests the power to appoint the Vice Chancellor of a public university in the cabinet secretary on the recommendation of council after a competitive recruitment process conducted by the council. Section 35(1) (v) of the Act vests the power to appoint a Vice Chancellor in the Council in consultation with the cabinet secretary after a competitive process conducted by the PSC.

The petitioner's other grounds in support of the application are that parliament was aware of section 39 of the Universities Act when it amended section 35 thereof and which takes precedence. The amendments remove councils of public universities from being directly involved in recruiting the Vice Chancellor of their universities other than provided by the la and their role is in consultation with the cabinet secretary to appoint the successful candidate after the competitive recruitment process undertaken by the PSC.

Under section 35(1)(a)(v) the power of the council in consultation with the cabinet secretary to appoint the Vice Chancellor only comes in after a competitive process conducted by the PSC which must recruit qualified candidates through an independent process then submit the names to the council and the cabinet secretary for appointment.

The on-going process of recruitment and appointment of the new Vice Chancellor and Deputy Vice Chancellor for Garissa and Laikipia universities is a nullity *ab initio* as section 35(1)(a)(v) of the Universities Act has not been followed. The PSC inclusion of council members in the interview panels invalidates the whole process. The PSC has a statutory duty to carry out an independent, competitive recruitment process for Vice Chancellor and Deputy Vice Chancellor and upon completion to advice council and cabinet secretary of the outcome for appointment.

The council would upon receiving from PSC notification of the successful candidates identified consult with the cabinet secretary and appoint the Vice Chancellor and DVC. Inviting the chairman and members of the council to participate in the interviews, the PSC fatally undermined its ability to ensure the process was independent.

Both the council and PSC are juridical persons which enjoy legal rights and have duties and obligations to obey and uphold the constitution and the law. the PSC must undertake the recruitment process as provided under the law and including section 35(1) (a) (v) of the Universities Act as amended.

Other grounds in support of the application is that the conservatory orders sought are to protect and enforce rights and freedoms in the Bill of Rights pursuant to article 23(3)(3) of the constitution. the application and petition are about the implementation, defence, enjoyment and securing the constitution and uphold the values and principles therein.

In his Supporting Affidavit, the petitioner avers that he has right of access the court to safeguard rights and defend the constitution which are in danger of infringement. The application and petition are filed in good faith and urge the court to grant the application as prayed.

In reply, the 1st respondent filed the **Replying Affidavit of Simon Rotich** the secretary and chief executive officer and who avers that the petitioner is correct in his averments that under section 35(1) (a) (v) of the Universities Act as amended and the 1st respondent put out an advertisement for positions of Vice Chancellor and DVS for Garissa and Laikipia universities and thereafter shortlisted and published on its website he list of candidates to be interviewed.

There is no legal requirement that the public should participate in a recruitment process as this one but the 1st respondent went out of its way to request members of the public to avail any credible information they may have against the shortlisted candidates and the allegations that the advert and list of shortlisted candidates were not published is not true and the same is only meant to stop the process for reasons that his financiers missed the shortlist.

The candidates shortlisted for interview were informed in good time of the interview date and no complaint was received by the 1st respondent that the time allocated was not sufficient and which would have necessitated a re-schedule. The petitioner was not shortlisted for the interviews as shown in the listed candidates and hence has no legitimate complaint over the time given to attend the interview.

Mr Rotich also avers in reply that the 1st respondent put into place an interview panel to carry interviews for the posts subject to the instant application and invoked section 12(2) of the Public Service Commission Act which allow it to co-opt into its committees persons whose knowledge and skills are necessary for the proper performance of its function and thus the inclusion of the chairman and council members of Garissa university.

The role of the members co-opted to the panel was purely limited to providing technical capacity as they had no vote on the matters before hand and their recommendations were not binding on the final decision taken by PSC.

Once a panel has interviewed candidates for a position the PSC makes recommendations to the Board which may adopt, vary or reject. It is therefore not true that the inclusion of the council and members in the interview panels undermined the independence of the panel or the PSC which is allowed in law to regulate its own process in a manner it conducts business while discharging its mandate and it did so in this particular recruitment.

The orders sought in this application and petition are overtaken by events as the 1st respondent has already concluded the interview process and hence the application is moot.

The application lacks merit and is in abuse of court process and intended to interfere with an institution's administrative procedures and hence the same should be struck out with costs.

The 1st interested party filed **Replying Affidavit of Christopher Gatama Gakahu** the chairman and who avers that this is a governance organ and is unlike a public university which is a body corporate and therefore has no capacity to sue and be sued in its own name and the application and petition against it is untenable.

There was conformity with the law and constitution in the recruitment process which was fair, open, competitive and transparent since all stakeholders in the process were involved.

Pursuant to Section 35(1) (a) (v) of the Universities Act the 1st Interested Party declared various positions vacant and to be advertised in the local dailies.

The newspaper advert dated 30th July, 2019 the 1st respondent invited applications to the position of Vice Chancellor and Deputy Vice Chancellor and the 1st Interested Party prepared the terms of reference and job description, qualification and competences and submitted with the PSC for advertisement and interviews.

The 1st Interested Party executed its mandate in accordance with the law under section 35(1) (a) (v) and 39(1) (a) of the Universities Act.

The petition is therefore frivolous and the orders sought cannot issue since the interviews have already been conducted. An order of injunction cannot issue against an action that has already been done. The petitioner has not demonstrated what prejudice he shall suffer where the orders sought are not granted. There is no certainty with regard to the nature of constitutional violations to justify the instant application.

Article 22 of the constitution requires a party to set out what public interest is breached or threatened and there is nexus between the petitioner and the one who purports to enforce the rights in the petition.

Employment contracts are personal in nature and there is no privity of contract between the petitioner and the respondents and the dispute herein relates to private law. the petition is not filed in good faith but for personal interests seeking to propel person interests, publicity and political interests which the court must not allow.

The balance of convenience tilts in favour of declining the orders sought. The 1st respondent is an independent commission and in the performance of its mandate is not subject to control or direction from any person.

The 2nd Interested Party filed the **Replying Affidavit of Prof Kibett Rotich** who avers that he is the vice chancellor and secretary to council of the 2nd interested party. The 1st respondent's actions are not its own but an obligation under section 35(1)(a)(v) of the Universities Act where they are mandated to recruit qualified candidates for the position of Vice Chancellor and Deputy Vice Chancellor of public universities.

Prof. Rotich also avers that after the vacancy of Deputy Vice Chancellor the 1st respondent advertised in accordance with the law pursuant to the mandate to recruit for this position competitively and the attempt to derail the process by the petitioner can only be construed as malicious and an abuse of the court process for hidden interests.

The petitioner has not shown any deviation from the process of recruitment by the 1st respondent to warrant an overhaul the same by the grant of the orders sought. The allegation that there was no sufficient time for shortlisted candidates to prepare for interviews rises eyebrows as the petitioner was not an applicant for any of the advertised posts.

There is no legal basis to the allegations made and the petitioner has no standing before the court.

The petitioner filed his **Supplementary Affidavit** and avers that contrary to the averments by Mr Rotich for the 1st respondent there were no lists of applicants advertised or publicised; there is no list of shortlisted candidates advertised or publicised and the public was only invited at the last minute and not given adequate opportunity to comment on shortlisted candidates or attend at the interview venue and time which

were not disclosed.

Article 10 and 232 of the constitution expressly require public participation in the recruitment process such as the one the PSC was supposed to undertake. It is standard practice for the PSC to involve the public when recruiting officers to public office. The alleged invitation made on 29th November, 2019 to the public to comment only by email by close of business on 4th December, 2019 was unreasonable. There was no notice or advertisement in at least one daily newspaper of nationwide circulation pursuant to section 37(1) of the Public Service Commission Act.

The petitioner also avers that candidates to be interviewed were informed on Friday 29th November, 2019 and there is no evidence to the contrary by the PSC that there was notice on its website as alleged.

The inclusion of the council and its members in the PSC interviews defeats the very purpose of the law and is in conflict of interest which parliament had sought to cure by amending the law in the year 2018.

The court has already arrested the recruitment process vide conservatory orders issued on 3rd December, 2019 and the application and petition are with merit.

The petitioner also avers that the 1st Interested Party reply through the affidavit of Mr Gakahu and the contents therein are denied and pursuant to article 260 of the constitution the 1st Interested Party is capable of being sued and the court orders of 3rd December, 2019 secured the recruitment process and the application and petition are with merits.

The petitioner also avers that the 2nd Interested Party reply through Prof. Kibett Rotich and that by involving the chairman and council members on the panel conducting interviews the on-going process of recruiting and appointing the new Vice Chancellor and Deputy Vice Chancellor by the Interested Party is a nullity as it violates section 35(1)(a)(v) of the Universities Act as amended.

The 1st respondent is required to avoid conflict of interests by conducting independent, competitive recruitment process for CV and Deputy Vice Chancellor and on completion advise the council and the cabinet secretary on the outcome.

The petitioner also avers that after the PSC advertised for the position of Vice Chancellor and Deputy Vice Chancellor for Garissa and Laikipia Universities it did not publish long lists of all the applicants and the shortlists of candidates to be interviewed and such failure undermined article 10 and 232(1)(f) of the constitution as it lacked transparency.

Exhibit „SR? to Mr Rotich Replying Affidavit of 4th December, 2019 was uploaded at the 11th hour and in the absence of the long list of the applicants there is nothing to hold against it. The public were also restricted to emails only. Such requirements was practically impossible to meet by 4th December, 2019. The public was ambushed on the afternoon of Friday 29th November, 2019 and only given one day to email comments on the shortlisted candidates in a case where the PSC was bound to follow the provisions of article 10 and 232(1) of the constitution.

The PSC is bound to follow section 35(1)(a)(v) of the universities Act and which locks out the chair and council members of the Interested Party from begin members of the PSC interview panel as otherwise this would render the amended provisions of the law nothing.

The PSC has a duty to empanel an interview Committee of person who are not council members of affected universities as such members are already conflicted and locked out by the law.

The interim orders of the court of 3d December, 2019 stopped the interviews and have not been lifted and any activity undertaken after such date is unlawful.

The petition qualifies as a public interest motion as the petitioner has relied on article 22 and 258 of the constitution and filed in good faith and the orders sought should be allowed.

Determination

On the application, affidavits and written submissions the issues for determination at this instance are summarised as follows;

Whether the subject of the application and petition are spent;

Whether the court should prohibit the conduct of interviews for the position of Vice Chancellor and Deputy Vice Chancellor scheduled by the PSC; and Whether the court should issue orders which may be necessary to give effect to the cause of justice.

On record, the petitioner moved the court on 2nd December, 2019 under Certificate of Urgency seeking orders to stop the recruitment process scheduled for 3rd December, 2019 at the offices of the PSC.

The court seized of the matter and the nature of urgency directed for immediate service upon the respondents and Interested Party and which was done. there are returns filed vide Affidavit of Service by Michael Kojo Otieno dated 3rd December, 2019.

In particular, the PSC was served on 2nd December, 2019 at 2.30PM through the mail officer in room 18, Ground Floor at the Commission

House. They were required to attend court the next day, 3rd December, 2019.

On the 3rd December, 2019 the petitioner and interested party were present and the court stayed the interviews and allowed the respondents and Interested Party to reply and attend hearing on 16th January, 2020. State Counsel for the respondents submitted that they had filed a Replying Affidavit on 16th December, 2019.

The court extended the interim orders. These orders have remained in force since.

They are alive.

The subject matter herein is not moot.

The court stopped the recruitment process of Vice Chancellor and Deputy Vice Chancellor Garissa and Laikipia Universities on 3rd December, 2019 on the date the interviews were to be conducted. The respondents were dully served. Even where there may be a case that the scheduled interviews had commenced on 3rd December, 2019 which is not the case here, upon service of the court orders such ought to have stopped.

Service upon the 1st respondent is confirmed in the Replying Affidavit of Mr Rotich dated 4th December, 2019 a day after the subject interviews were to be conducted. He was responding to the petitioner's application aware of the contents of the petition.

With service in time, nothing stopped the PSC from stopping the recruitment process to avoid the scenario of the application and petition being spent and the interim orders have remained active and alive since.

Save for the interviews stopped pursuant to section 35 of the Universities Act, the provisions of section 39 thereof completing the process of recruitment for the positions of Vice Chancellor and Deputy Vice Chancellor for the Garissa and Laikipia universities were stopped. The entire process of recruitment was stopped. There can be no case that the application and petition are moot.

The court finds no matter as to adherence to the provisions of section 39 of the Universities Act making the matter in court active and alive. Save for what Mr Gakuha for the 1st Interested Party avers in his affidavit that the application and petition is overtaken by events, for the Interested Party he fails to disclose when they were seized of the list(s) of persons interviewed and identified for appointment by the PSC. In this regard, the process of recruitment of the Vice Chancellor and Deputy Vice Chancellor secured by the court on 3rd December, 2019 the position stands as of such date.

With regard to the standing of the petitioner, the petition and application are filed pursuant to article 22, 23 and 258 of the Constitution, 2010.

Whereas a petitioner filing a petition under the provisions of article 22 and 258 should not use such provisions as a proxy and to advance personal interests as held in the case of **Daniel Muthama Muoki versus Ministry of Health & another**;

Shenzhen Mindray Bio-Medical Electronics Co. Ltd & 5 others (Interested Parties) [2020] eKLR the court in the case of **Brian Asin & 2 Others versus Wafula W. Chebukati & 9 Others [2017] eKLR** held that;

- The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and to publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations.

The application and petition herein are premised on the application, enforcement and provisions of article 10, 19, 20, 21, 22, 23, 24, 27, 41, 47, 73, 75, 77, 129, 153, 232 and 259 of the Constitution, 2010 read together with sections 35(1)(a)(v) and 39(1)(a) of the Universities Act with regard to the constitutional and legal validity of the on-going process by the PSC to recruit and appoint the new Vice Chancellor and Deputy Vice Chancellor for Garissa and Laikipia Universities. Such provisions allow a party pursuant to articles 22 and 258 of the Constitution, 2010 to move the court for conservatory orders under article 23 of the Constitution, 2010.

The petitioner is a proper party.

On Whether the court should prohibit the conduct of interviews for the position of Vice Chancellor and Deputy Vice Chancellor scheduled by the PSC for Garissa and Laikipia Universities; such recruitment is governed by the provisions of section 35(1)(a)(v) of the Universities Act, 2012 as amended. Where the provisions of the law are not adhered to, an applicant seeking to conserve and ensure the rule of law, the principles governing such party is that an interlocutory application seeking for conservatory orders within the framework of Article 23 of the Constitution, 2010 are settled. the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition as held in the case of **Platinum Distillers Limited versus Kenya Revenue Authority [2019] eKLR**.

The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a *prima facie* case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

The tenor, import and scope of a conservatory order was highlighted by the Supreme Court in **Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows;

- **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 a case*, bearing in mind the **public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.**

At this stage the petitioner is only required to demonstrate that he has a *prima facie* case with a likelihood of success and the prejudice to be suffered if orders are not granted. That the case is not frivolous. It has arguable issues. That there are violation of rights, arguable constitutional issues.

In this case, the petitioner’s application is that the PSC advertised for positions of Vice Chancellor and Deputy Vice Chancellor for Garissa and Laikipia Universities in July, 2019 with the deadline being 20th August, 2019. No long lists or shortlists of candidates to be interviewed were published. This effectively denied the public an opportunity to comment on shortlisted candidates. That On 29th November, 2019 the PSC wrote to the chairman, Garissa University Council inviting him and other council members to attend scheduled interviews on 3rd December, 2019. the invitation to attend at the interviews by the chairman and council members of the subject universities is contrary to section 35(1) (a) (v) of the Universities Act as amended and section 39(1) (a) of the same Act which provisions requires the PSC to independently and competitively recruit a Vice Chancellor and Deputy Vice Chancellor of a public university and then submit the names to the council and cabinet secretary for appointment. In this case the PSC invited chairman and council members to participate in the recruitment process in conflict of interest and contrary to the provisions of the law.

In response, Mr Rotich for PSC asserted that the PSC published the list of shortlisted candidates and the candidates shortlisted for interviews were informed in good time of the interview dates and there was no complaint in this regard. He however failed to attach evidence of such publication of the shortlists or the invitation to attend interviews. Save to attach a short list for the various positions, the publication of it is without evidence.

It is also the PSC case that under section 12(2) of the Public Service Act the PSC is allowed to co-opt into its committees persons whose knowledge and skills is necessary for the proper performance of its functions and that the inclusion of the chairman and council members of Garissa university in the recruitment of the Vice Chancellor and Deputy Vice Chancellor was done purely to provide technical capacity.

The PSC as an independent constitutional commission pursuant to article 233 of the Constitution, 2010 is also regulated under the Public Service Commission Act and which for purposes of the instant application, in undertaking recruitment of public officers is regulated under section 37 as follows;

- (1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission’s website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.
- (2)The Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person.
- (3)The advertisements in subsection (1) shall be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.

These provisions are couched in mandatory terms.

Where a vacancy in a public office is to be filled, the PSC must invite for applications by advertisement in at least one daily newspaper of national wide coverage, the radio and other modes of communication. The purpose is to reach as wide a population of potential applicants as possible.

There was only notice posted at the PSC website on 29th November, 2019. There was no effort to apply other modes of communication to allow for a national wide reach and allow the reach of all possible applicants.

Such inaction flies contrary to article 232 (1) (e) and (f) of the Constitution which requires that;

232.(1) The values and principles of public service include—

...

e. accountability for administrative acts;

f. transparency and provision to the public of timely, accurate information;

The PSC as the body with constitutional mandate to promote the values and principles mentioned in Articles 10 and 232 of the Constitution, 2010 throughout the public service is placed at a high threshold of ensuring transparency and accountability with regard to recruitment in the public service.

An irregular recruitment process attracts a wrong outcome. Failure to ensure a proper recruitment process impedes the outcome. The outcome is already compromised by failure to abide provisions of section 37 of the Public Service Commission Act.

Further, the participation of chairman and council members of Garissa and Laikipia Universities in the recruitment process while at the PSC offices is a direct conflict of interest pursuant to the provisions of section 35 and 39 of the Universities Act. the purpose and rationale for the amendment of the Universities Act is lost.

The recruitment process undertaken by the PSC with regard to a Vice Chancellor and Deputy Vice Chancellor of Garissa and Laikipia universities, being public institutions must comply with section 35(1)(a)(v) of the Universities Act, 2012 as amended by the Statute Law Act, 2018.

The court reading of section 35(1)(a)(v) of the Universities Act is that the purpose is to give the PSC an independent recruitment process outside of the organs of the subject university(ies) and the Minister/cabinet Secretary upon identification of suitable candidate(s) present a given list of successful candidates to the Cabinet Secretary and Council for appointment. Section 39(1)(a) on the other hand vests the power to appoint the Vice Chancellor and Deputy Vice Chancellor in the Cabinet Secretary on the recommendation of PSC pursuant to section 35, as set out above.

The PSC hence mandated to ensure the process meets the threshold of best practice pursuant to the applicable law and the constitution cannot be found to state that the chairman and council members of Garissa and Laikipia Universities were invited to participate in the recruitment process for the Vice Chancellor and Deputy Vice Chancellor of Garissa and Laikipia Universities because they had the knowledge and skills necessary for the proper performance of its function and thus the inclusion of the chairman and council members was found necessary. Such justification is placed under section 12 of the Public Service Commission Act which allow the co-option of persons with knowledge and skills in the given sector save such provisions cannot be applied in conflict with other laws and particularly the requirement of the PSC to recruit suitable persons and then hand over a list from thereof to the very persons co-opted to attend at the interviews for their appointment of the Vice Chancellor and Deputy Vice Chancellor. Such would result in a serious contradiction of terms and the very purpose for which Parliament enacted the Universities Act and found it necessary to make amendments to ensure the Council and Cabinet Secretary were not involved in the recruitment process and only receive a given list of candidates found fit to serve for appointment.

The invitation and inclusion by PSC of the chairman and council members of Garissa and Laikipia Universities in the recruitment of the Vice Chancellor and Deputy Vice Chancellor renders the process invalid. The same goes contrary to the mandatory provisions of section 39(1)(a) of the Universities Act, 2012 read together with section 35(1)(a)(v) of the Universities Act as amended by Statute Law (Miscellaneous Amendments) Act No.18 of 2018.

In the case of **Okiya Omtatah Okioti & 3 others versus Nairobi City County & 5 others [2014] eKLR** the court in addressing the duty imposed on those responsible for making public appointments held as follows;

- *the 1st respondent overlooked the standards for public appointments imposed on it by the Constitution. Even had the Water Act and Corporate Governance Guidelines not imposed on it the requirement for stakeholder engagement and an open, transparent process, the Constitution does. I need not repeat the provisions of Article 10, 73 and 232 which I have already set out above.*

In the case of **Benson Riitho Mureithi -vs- J.W Wakhungu and 2 Others Pet No. 19 of 2014**, this court, after setting out the constitutional provisions at Article 73, observed as follows:

“It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution.”

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd versus First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

a *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.

The PSC advertised for the positions of Vice Chancellor and Deputy Vice Chancellor Garissa and Laikipia Universities in July, 2019 with the deadline being 20th August, 2019. There was no list of applicants or shortlists of applicants to be interviewed publicised in accordance with the Public Service Act or in accordance with Articles 10, 232(1) read together with Article 73 of the Constitution, 2010 which requires accountability, transparency and stakeholder engagement.

In the circumstances the Petitioner has not only established a *prima facie* case, but this is also a clear case that warrants a mandatory injunction particularly in light of the public interest In ensuring the proper conduct in the recruitment of public officers by the respondents with regard to discharging the constitutional and statutory functions, but it is also the case that the PSC should not allow conflicted persons to

attend during the recruitment process.

The recruitment process for the position of Vice Chancellor and Deputy Vice Chancellor of Garissa and Laikipia universities as initiated by the PSC is invalid. To allow it to proceed as framed impedes the provisions of section 35(1) (a) (v) of the Universities Act, as amended. This renders it null and void *ab initio*.

As regards the remaining prayers in the application, this Court is granted powers to issue conservatory orders in constitutional petitions under Article 23 (3)(c) of the Constitution, and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The applicable principles for the grant of a conservatory were detailed in the case of Board of

Management of Uhuru Secondary School versus City County Director of Education & 2 Others [2015] eKLR.

In this regard and for the purpose of the application by the petitioner the court finds there is a *prima facie* case to justify a conservatory order of injunction stopping the recruitment process on an interlocutory application as there is a clear case of the breach of the constitution and the law.

Accordingly, application by the petition dated 2nd December, 2019 is hereby found with merit and is herein allowed in the following terms;

- a. The process of recruitment and appointment of the new Vice Chancellor and Deputy Vice Chancellor for Garissa and Laikipia universities is hereby rendered a nullity *ab initio*;**
- b. The Public Service Commission inclusion of chairperson and council members in the interview panels renders the recruitment and appointment of Vice Chancellor and Deputy Vice Chancellor invalid;**
- c. The respondents are hereby restrained whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to conduct interviews for the position of Vice Chancellor and Deputy Vice Chancellor (Academic and Students' Affairs) and Deputy Vice Chancellor (Finance, Administration and Planning) at Garissa University as currently constituted pending the hearing of the Petition herein; and**
- d. Costs shall abide the petition. Orders accordingly.**

DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2020.

M. MBAR?

JUDGE