



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

JUDICIAL REVIEW NO 1 OF 2020

MOES EKAL.....APPLICANT

VERSUS

THE CHAIRMAN OF COUNCIL TUC.....1ST RESPONDENT

THE CS FOR MIN OF EDUCATION.....2ND RESPONDENT

THE PRINCIPAL TUC.....3RD RESPONDENT

PROF. STEPHEN ODEBERU.....4TH RESPONDENT

RULING

1. By a Motion dated 2nd April, 2020 the applicant sought orders among others that: -

(i) **AN ORDER OF CERTIORARI**, quashing the decision of the 1st and 2nd respondent in appoint the 4th respondent as Acting Deputy Principal (Administration, finance and Planning) of Turkana University College (TUC) vide letters dated 5th March 2020 and 22nd January 2020 and also quashing the decision of the 1st respondent’s directive on a Notice to Show Cause Letter against the Principal of Turkana University College (TUC) PROF THOMAS EKAMAIS AKUJA vide a letter dated 26th February,2020.

(ii) **AN ORDER OF PROHIBITION** against 1st, 2nd,3rd respondents from acting illegally and unprocedural and barring the 4th respondent from occupying the position of acting Deputy Principal (Administration, Finance and Planning) at Turkana University College (TUC) vide a letter dated 5th March 2020.

2. The application was supported by the affidavit of Moses Ekal who deponed on the main that: -

(a) THAT I am a citizen of the Republic of Kenya and have been a student of Turkana University College (Hereafter TUC) since 2017and therefore and ever present throughout the developments leading to the Notice of Motion application herein and that present. I am an employee of Turkana University College (TUC) where I have also enrolled for masters programme hence duly presenting this suit under the auspices of **Article 258** of the Constitution which guarantees *locus standi* to any person, the right to institute court proceedings in the event of any constitutional infringement and /or threats towards the said Constitution.

(b) THAT I am also the Chairman of Turkana County Youth Association consisting of staff and students of Turkana University College (TUC) as well as section of the host community hence competent to swear this Affidavit in support of the application herein.

(c) THAT Turkana University (TUC) was founded in 2017 as a constituent college of Masinde Muliro University of Science and Technology (hereinafter MMUST) by dint of **LEGAL NOTICE NO 8 OF 27TH JANUARY 2017**.

(d) THAT by dint of Gazette Notice Number 2353 of 10th March 2017, the 1st respondent was appointed as chairman of Turkana University College (TUC) Council for a term of three years.

(e) THAT as is the norm within government institutions since Turkana University College (TUC) did not have capacity in terms of manpower. MMUST seconded some of tis own staff and among those seconded was the 4th respondent who was to serve as acting Deputy Principal (Administration, Finance and Planning).

(f) THAT according to council minutes of 18th July 2018, Turkana University College (TUC) sat and resolved to send the seconded staff back to their mother institution (MMUST) and the position of Deputy Principal Administration , Finance and Planning was to

remain vacant until a substantive office bearer was employed using proper provisions of the law under Public Service Commission guidelines for the nomination of chancellors and recruitment of vice chancellors, Principals and Deputy Principles of public Universities and constituent colleges 2019.

(g) **THAT** the 4th respondent was aggrieved and, in the circumstance, he filed a suit for wrongful termination against Turkana University College (TUC) and the matter is pending in court being **ELDORET ELRC NO 256 OF 2018 PROF. STEPEHN ODEBERO VRS TURKANA UNIVERSITY COLLEGE AND OTHES**).

(h) **THAT** despite of a pending court case, the 1st and 2nd respondents wrote letters directing the Turkana University (TUC) Principal **PROG. THOMAS EKAMAIS AKUJA** reinstate the 4th respondent to a position of acting Deputy Administration, Finance and Planning.

(i) **THAT** acting on the advice of the legal officer, of Turkana University College (TUC) MR. SHADRACK MUYESU, the Principal PROF. THOMAS EKAMAIS AKUJA wrote to the chairman of Turkana University College (TUC) Council and the Ministry of Education challenging the directive of reinstating the 4th respondent on grounds that doing the same would be in contempt of an ongoing court process but that did not seem to add up.

(j) **THAT** the legal officer of Turkana university College (TUC) in his advice enumerated that: -

(i) The 4th respondent could not be reinstated when a matter on the same issue was pending in court and to do so would be contemptuous.

(ii) The 4th respondent's employment had not been wrongfully terminated as he claimed only, he was asked to report back to his mother institution (MMUST) by dint of the council resolution.

(iii) While the Ministry of Education claimed to have conducted investigations which informed its decisions, they had neither visited TUC premises nor heard all the parties concerned to verify the claim. The Ministry had not even spoken to TUC; s advocates on record being the Federation of Kenya Employees.

(iv) While the Ministry would advise, the Universities Act No 42 of 2012 was very clear that their directive do not bind the institution.

(v) The 4th respondent was already an employee of (MMUST) where he earned a salary and to reinstate him would have meant that he was dually employed by Turkana University College (TUC) which is not the case.

(k) **THAT** the 1st respondent ignored all the advices given to him and on numerous occasions, he pressed the Turkana University College (TUC) Principal PROF. THOMAS EKAMAIS AKUJA to reinstate the 4th respondent.

(l) **THAT** PROF. EKAMAIS AKUJA stood his ground and reiterated to do so was extremely unlawful and as a result was sent on compulsory leave and subsequently served with a Notice to cause for summary dismissal by the 1st respondent.

(m) **THAT** the 1st respondent raised baseless accusations just full of malice and witch hunt simply because the Principal of Turkana University College (TUC) PROF. THOMAS EKAMAIS AKUJA refused to commit the illegality and become part of the law breakers. The said accusations at no time were the investigation done by relevant authorities such Auditors Report, Anti-corruption body or the office of the Director of Criminal Investigations.

(o) **THAT** in his place, PROF FREDRICK NYONGESA KASILY was appointed to act as the Principal of Turkana University College (TUC) until date.

3. In opposing the Motion, the respondent's through the 4th respondent filed a replying affidavit in which he deponed on the main that: -

(i) **That** I am the current Ag Deputy Principal Administration, Finance and Planning at Turkana University College (TUC) (hereafter referred as "TUC") and the 4th respondent herein hence competent and duly authorized to swear this affidavit on my behalf and on behalf of the 1st, 2nd and 3rd respondents herein.

(ii) **THAT** the aforesaid jurisdictional and competency questions notwithstanding I am of utmost conviction that these proceedings are mere grope in the dark, instituted in bad faith, mere abuse of court and are clearly without any semblance of merits or justification hence proper candidate for dismissal.

(iii) That I have further been advised by the Senior State Counsel on record that the decision of the mentoring institution, MMUST made in 2017 is equally not amenable to judicial review order of certiorari of it is time barred under Order 53 rule 2 of the CPR's and also MMUST is not a party in these proceedings.

(iv) That I know of my knowledge that when the Council was first inaugurated sometimes in May, 2017 its first mandate at TUC was to competitively recruit competent personnel for the positions of Principal, Deputy Principal Academic and Student Affairs and Deputy Principal Administration, Finance and Planning.

(v) That in pursuance of its mandate the 1st respondent only managed to recruit the Principal and Deputy Principal Administration, Finance and Planning was deferred as the Council only received my application.

(vi) That in consultation with TUC the mentoring institution, MMUST, recommended to the Council that I be seconded as an acting Deputy Principal Administration, Finance and Planning pending competitive recruitment for the position and the Council communication this decision to me vide impugned a letter dated 5.3.2020.

(vii) That I know of my knowledge that Council has twice attempted to competitively fill this position of Deputy Principal Administration, Finance and Planning at TUC but on all instances the Council only received my application and Council always deferred the recruitment and I have never complained.

(viii) That since this remains vacant due to the above stated deferments and to ensure prudent mentorship, administration and management of TUC the mentoring institution, MMUST, cannot be blamed for the corrective steps it has always taken through secondments including my secondment to the institutions as acting Deputy Principal Administration, Finance and Planning.

(ix) That I am aware that the decision of the mentoring institutions, MMUST, was ratified by the Council of TUC and the 1st respondent cannot be blamed for communicating the ratification of the Council through letter dated 5.3.2020 which was issued on a 'without prejudice basis.

(x) That I have further been advised by the Senior State Counsel that flowing from these factual underpinning it is patently clear that decision of the mentoring institution, MMUST, to second me as the acting Deputy Principal Administration, Finance and Planning at TUC as well as the entire ratification of my secondment in the stated position and subsequent issuance of the letter dated 5.3.2020 on a 'without prejudice basis was within the mandate and powers of the mentoring institution and the Council represented by 1st respondent procedural and legal for all intents and purposes.

(xi) That I know of my knowledge that the decision to second me as acting Deputy Principal Administration, Finance and Planning at TUC and subsequent issuance of letter dated 5.3.2020 cannot, in the circumstances, be said to have been irrational, unprocedural or illegal as MMUST and the Council were legally permitted to take all corrective measure to fill a patently important position, albeit temporarily, on acting capacity pending substantive appointment competitively.

(xii) That I know of my knowledge that the University Act, 2012 the University Regulations, 2014 and the Public Service Commission Guidelines and Manual on secondment permitted the actions undertaken and on secondment the employee's emoluments are drawn from the institution in which he or she is seconded hence the 1st respondent was justified to issue the letter dated 5.3.2020.

(xiii) That while applicant suggests that on 18.7.2018 TUC University Council abolished the position of Deputy Principal Administration, Finance and Planning there exist no such resolution in the minutes of 18.7.2018 nor was there an appointment of a substantive Deputy Principal Administration, Finance and Planning or even upon an acting capacity and when MMUST recommended for my further secondment in January, 2020 to help mentor the college in matters administration, finance and Planning the Council of TUC obliged by ratifying the secondment and further communicating the ratification to me on 5.3.2020.

(ix) That it is also instructive to note that I filed Eldoret ELRC No 256 of 2018 where I was contesting a unilateral and unfair termination of my secondment without reference to me or MMUST who had seconded me and on non-existent allegations of redundancy following alleged abolishment of the position when such decision or resolution was never made or even existed in the first place.

(x) That I am aware that the Council of TUC has engaged me on the pending matter with an aim of an out of court settlement and that a host of issues in the matter have been settled save for payment of withheld emoluments between the time I was hounded out of office at gun point following the purported termination of my secondment and on 29.1.2020 when the Council ratified by secondment.

(xi) That in any case there was no order restraining the Council from engaging me or reinstating me to my office and therefore the issue of contempt of court cannot arise against the Council. On the contrary, Article 159 of Constitution recognizes and encourage a negotiated settlement of dispute pending in court.

(xii) That I know of my knowledge that the relief directed at a letter dated 26.2.2020 is not only a non-starter but is an abuse of court process by Prof. Thomas Ekamais Akuja who is merely behind the applicant's face for the following reasons.

(a) Prof Thomas Ekamais Akuja on complaints materially and substantially similar to the issues herein, commenced Eldoret ELRC No 10 of 2020 yet the applicant who is privy to the goings on regarding Prof. Thomas Ekamais Akuja has deliberately withheld this critical information for his selfish ends.

(b) That contrary to applicant's suggestion that Prof. Thoms Ekamais Akuja's employment as Principal of the college was terminated the corrected position is that Prof. Thomas Ekamais Akuja is merely on compulsory leave pending investigations and disciplinary processes.

(c) Prof. Thomas Ekamais Akuja sought for injunctive relief in Eldoret ELRC No 10 of 2020 but the court declined to issue the same as no sufficient basis was laid and Prof. Thomas Ekamais Akuja is serving a compulsory leave as already stated.

(d) That I know of my knowledge that the court in ELRC No 10 of 2020 has already made a determination that the Council is mandated to initiate and prosecute disciplinary process against its staff as long as it is done fairly.

(xiii) That the appointment of Prof. Fredrick Nyongesa Kassily as the acting Principal of TUC cannot be impugned for neither is Prof. Fredrick Nyongesa Kassily a party in this matter nor did the Council flout any law to appoint him in acting capacity as the Constitution of Kenya and existing laws including the Human Resource Policies and Procedures Manual for Public Service (2016) allow critical public offices to be urgently filled on acting capacity pending disciplinary processes.

4. The court considered submissions by Counsel for the applicant in support of the Motion urging the grant of the orders sought. However, in an unprecedented move Counsel for the 1st and 3rd respondent filed submissions whose effect was to support the application whilst the 4th respondent deponed that he filed the replying affidavit in opposition to Motion on behalf of all the respondents whose authority he stated he had , at no point did the 1st and 2nd respondent disavow the deposition by the 4th respondent that he had their authority to swear the said affidavit in reply to the Motion herein.

5. The purpose of submissions is to persuade the Court to reach a finding in favour of a party so submitting based on the facts as pleaded. Further, it is a cardinal rule of pleadings that a party is bound by their pleadings hence a significant departure from the same is not permitted.

6. The purported submissions by the 1st and 3rd respondent in support of the Motion is a fundamental departure from the Replying affidavit's sworn by the 4th respondent on their behalf, in opposition to the Motion. This is not acceptable as pointed out above.

7. What the Court can surmise from the action by the 1st and 3rd respondent is clearly a conspiracy to pervert the course of justice which this Court can never permit.

8. To this extent the only order that commends itself to me in the circumstances is to invoke the summary jurisdiction of the Court's and strike out the Motion.

9. **It is so ordered.**

Dated at Eldoret this 4th day of December 2020

Abuodha Jorum Nelson

Judge

Delivered this 4th day of December 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent