



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION NO. 66 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

DR. WILFRIDA ARNODAH ITOLONDO.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

CS, MINISTRY OF EDUCATION.....2ND RESPONDENT

TECHNICAL UNIVERSITY

OF KENYA COUNCIL.....3RD RESPONDENT

JARAMOGI OGINGA ODINGA

UNIVERSITY COUNCIL.....4TH RESPONDENT

UNIVERSITY OF KABIANGA COUNCIL.....5TH RESPONDENT

MAASAI MARA UNIVERSITY COUNCIL.....6TH RESPONDENT

AND

PROF. FRANCIS ADUOL.....1ST INTERESTED PARTY

PROF. STEPHEN AGONG.....2ND INTERESTED PARTY

PROF. WILSON KIPNG'ENO.....3RD INTERESTED PARTY

PROF. MARY WALINGO.....4TH INTERESTED PARTY

JUDGMENT

This petition was initiated by way of a certificate of urgency and a Notice of Motion dated 18th January 2018 by Dr. Wilfrida Itolondo challenging the appointment of the first to fourth interested parties as vice-chancellors of the third to sixth Respondent universities to a second term. The petitioner seeks;

1. That the court issues temporary orders suspending the occupation of the office of Vice-Chancellor by the Interested Parties.
2. That the court grants Stay Order staying the re-appointment of the Interested Parties as Vice-Chancellors.
3. That the Court be pleased to join other parties relevant to this Petition.
4. That the Court issues further directions and orders as may be necessary to give effect to the orders.

5. The costs of the petition.

The grounds for the application are that the Constitution was not applied in appointments and re-appointments to public office which was devoid of a competitive process. The petitioner states she instituted this petition in public interest. The petition seeks to invalidate the said appointments.

According to the petitioner, these appointments were done by the second Respondent as indicated by a statement in the Daily Nation newspaper at page 22 on 20th May 2018 a statement which purports that the Cabinet Secretary had indicated that some councils had recommended the sacking of their current Vice-Chancellors while others were to be retained and it was therefore not clear whether the Interested Parties were among those to be sacked.

The petitioner indicates that the process for re-appointment was fatally defective as it was not subjected to an inclusive, competitive, accountable and transparent process and that there was no competitive process since no advertisement nor interview was conducted for the positions by the third to sixth Respondents.

The petitioner avers that she has on several occasions raised concerns with the 2nd Respondent as attested to by correspondence filed with the petition as follows;

1. On 3rd July 2015 indicating that the advertisement by Maseno University for the position of a Vice-Chancellor done on 17th July 2015 was correct since it provided for a competitive process and made a request to the 2nd respondent to advise other institutions to do what is constitutionally correct. This letter was acknowledged by an individual acting on behalf of the Principal Secretary Ministry of Education on 13th August 2015 thanking the petitioner for her patriotism and informing her that the institutions had been advised to strictly follow the law.
2. On 27th October 2016 the petitioner wrote to the 2nd Respondent protesting a clause in the Draft Regulations under The Universities Act 2012.
3. On 28th May 2018 the petitioner wrote to the 2nd Respondent requesting for the revocation of the re-appointment of the Interested Parties.

The petitioner indicates that the position of Vice-Chancellor is a public service post and the Constitution and all other relevant laws should be followed during appointment and the 2nd Respondent has acted outside the law by re-appointing the Interested Parties without subjecting them to a competitive process. Further, the petitioner states that no audit was carried out in the universities where the Interested Parties were Vice-Chancellors and they should therefore vacate office immediately.

The petitioner admits the jurisdiction of this Court to stop the 2nd Respondent from the alleged disregard of the law. The petitioner maintains that the petition has high chances of success and that it will be rendered a nugatory if the a stay of the re-appointments is not granted since some of the duties of the Vice-Chancellors will continue to be performed and may not be reversed if the petition is successful. The Interested Parties will continue enjoying the privileges attached to the offices and the people will suffer great loss. Also the universities will not suffer any loss if stay is granted since the universities have provisions for acting positions and therefore there will be no vacuum.

This petition is supported by the affidavit of the petitioner sworn on the 18th June 2018 in which the petitioner seeks that the court relies on the bundles marked and annexed in the affidavit.

In their written submissions dated the 23rd August 2018 the Petitioner submits that the re-appointment of the Interested Parties, was not competitive since there was no advertisement for the positions and as a consequence no shortlisting of Applicants and no invitation of Kenyans to present memoranda. In summary, the re-appointment of the Interested Parties was done in secrecy locking out other potential Kenyans who would have presented themselves for the position of Vice Chancellor and it did not allow the Interested Parties to be subjected to public scrutiny.

Further, the Petitioner submits that there is no evidence that the Interested Parties in this matter were re-appointed in accordance to the Constitution of Kenya 2010, the Universities Act 42 of 2012 and amendment Act 48 of 2015. On the contrary, the 3rd to 6th Respondents were misguided and relied heavily on the letter dated 23rd November, 2010 written by the former Permanent Secretary/Secretary to the Cabinet and Head of Public Service Amb. Francis K. Muthaura which required that CEO positions in Public Service be declared vacant only if the respective Boards of public bodies concerned did not intend to renew such contracts or the CEO was not interested in the renewal. The said letter was declared invalid by the Court in *Anne Kinyua Vis Nyayo Tea Zone Development Corporation & 3 Others (2012) eKLR* since it was not in consonance with the letter and spirit of the Constitution as promulgated in 2010.

Further, the Petitioner submits that though the Universities Act 2012 is silent on the procedure for re-appointment, it does not grant the Respondents the mandate to come up with a law that is inconsistent with the Act and the Constitution. The petitioner continues that where the law is silent on the procedure of re-appointment, the initial procedure that was laid down by the law-making body will be used. If the framers of Universities Act had wanted the procedure for re-appointment to depart from the one of first appointment, it would have explicitly stated so. The Petitioner continues that as public officers, the Interested Parties must either be elected in a free and fair elections or be selected through fair competition and merit taking the requirement of accountability to the public for decisions and actions; transparency, involvement of the people in decision making and inclusiveness in terms of Articles 10, 27, 35, 73 and 232 of the Constitution. On the need to subject an immediate incumbent Vice Chancellor to a competitive process in line with the Constitution and particularly Articles 10, 35, 73 and 232 to another term, the Petitioner pointed out that to the 2nd Respondent in a letter dated 30th July, 2015 and in the response the official noted the universities should ensure application of the Constitution of Kenya, 2010 for the appointment of public officers, and especially the

Universities Act 2012 in the recruitment and appointment of Vice Chancellors and other officers of public universities. The Constitution and the Act envisaged that appointment to public offices shall be competitive, inclusive, non-discriminatory and transparent.

In support of the petition, the Petitioner seeks to rely on the following authorities;

Isaiah Biwot Kangwony v Independent Electoral & Boundaries Commission & Another [2018] eKLR in which the Court held:

“My finding is that if indeed, the lawmakers intended that a vacancy, through resignation, may be communicated through any other means other than a letter addressed to the President, then the Act would have explicitly stated as much. Perhaps this case will serve as a wake-up call to lawmakers to reconsider the provisions relating to the resignations by commissioners with a view to plugging the gaps therein so as deal with the stalemate that is currently existing at the commission as a result of the commissioners opting to tender their resignations through the press instead of a letter addressed to the President as is required by the law.”

Mutuura Mberia & Another v Cabinet Secretary Education, Science & Technology & 2 Others that dealt with the appointment of the Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) to a second term, the Court at paragraph 22 concurs with the submissions of the Attorney when it held:

“We rely on the provisions set out above in holding the view that the Minister should have applied the provisions of Articles 10 and 232 of the Constitution as well as Section 36 (1)(d) of the Act and subjected the appointment of the Interested Party’s Council members subject of this Petition to an inclusive, competitive, accountable and transparent process that involves public participation and best practices in management, equal and affordable opportunities for all, promotes public trust, is non-discriminatory, promotes equity, equality and social justice.”

David Kariuki Muigua v Attorney General [2012] eKLR that dealt with the appointment by the Minister for Industrialization of the chairman of the Standards Tribunal without fair competition or merit, the Court held that:

“There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner like his successor, the petitioner was appointed on the basis of a Gazette Notice: the basis of appointment criteria followed in appointing him and the other members of the tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the Petitioner would be to give a seal of approval to the old order, it is imperative that all public appointments are made in accordance with the Constitutional values and principles.”

Community Advocacy and Awareness Trust V Attorney General, (2012) eKLR at paragraph 73, the court remarked as follows:-

“27th August 2010 ushered in a new regime of public appointments of public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, new dispensation requires a break from the past. “

In conclusion, the Petitioner submits that the Petition has been precipitated by an apparent disregard of the said aspirations of Kenyans. The Petitioner beseeches this Court to allow this Petition and the amended petition.

Jaramogi Oginga Odinga University Council- 4th Respondents and Prof. Stephen Agong’-2nd Interested Party

The parties filed grounds of opposition to the petition on the 4th July 2018 on the grounds that;

1. It is frivolous, lacks merit, is an abuse of court process, and the injunctive and stay orders are spent since the appointment has been made.
2. The application is fatally defective since it is filed in the High Court while the Employment and Labour Relations Court has jurisdiction over all constitutional matters relating to the relationship between an employer and an employee.
3. Petitioner has not demonstrated any prejudice or damage she is likely to suffer if orders sought are not granted.
4. The application is based on rumours, innuendo and not backed by evidence and has not set with certainty the clear constitutional rights that have been violated by the parties.
5. Petitioner has failed to lay any legal basis on which the orders sought should be granted.

The grounds of opposition are supported by;

Replying affidavit by Prof. Stephen Agong’ dated 4th July 2018 who is the Vice-Chancellor of the 4th Respondent.

Replying affidavit of Dr. Juma Ongeti the chairperson of the 4th Respondent. The Chairperson affirms that the 4th Respondent complied with the law and constitutional provisions in the consideration and appointment of the 2nd Interested Party to serve his second and final term as

Vice-Chancellor.

Further, the 4th Respondent relies on Section 30(2) of the Universities Act, the employment contract for the 2nd Interested Party on 10th July 2013, Article 1.12 of The Mwongozo Code of Governance for State Corporations, Statute VIII(3) of JOOUST, Public Service Commissions for implementation of Performance Rewards and Sanctions in the public service, The Office of The President Circular Reference Number OP/CAB.9/1A dated 23rd November 2010 guiding Boards and Councils on the procedure to be used in considering the re-appointment of Chief Executive Officer in state corporations, the 2nd Interested Party letter on the 15th December 2017 requesting for the renewal of his contract and submitted chapter 6 documents. Following this events, the council sat down in meetings and adopted an evaluation criteria to be used in evaluating and appraising the performance of the 2nd Interested Party, council minutes prove the process of appraising the performance of the 2nd Interested Party and consequently he was given a letter of appointment on 19th March 2018 renewing his contract for a term of 5 years effective from 20th June 2018.

The 4th Respondent continues that the Constitution was not followed since the 2nd Interested Party's case was different as it was not a new appointment which would demand that the position be advertised and an interview conducted on all the shortlisted candidates before the most suitable is appointed. The 4th Respondent had complied with all the constitutional requirements when it made the initial appointment of the 2nd Interested Party therefore the second term was renewal of the contract based on the evaluation of his performance and this meant that if his 1st term was served satisfactorily, then his second term was pursuant to Sec 39 of the Universities Act. As sworn, the Ministry of Education approved the process adopted by the 4th Respondent by the Regulations exhibited by the petitioner as exhibit WA1 03 which they believe was meant to operationalize Section 39(3) of the Universities Act.

The 4th Respondent maintained that it had acted in line with Article 73 and 232 of the Constitution during appointment of the 2nd Interested Party on 10th July 2013 and various legal instruments have prescribed that the 4th Respondent could only advertise the position if the incumbent had upon expiry of the 1st term not expressed interest in renewal of the contract or they had failed in the evaluation process. As it were, the 2nd Interested Party had not been given a new appointment or promotion as envisaged by Article 232(g) but his term has been renewed as envisaged in his employment contract. Also as a general practice, an employee on fixed term contract would always get his term renewed on the basis of appraisal by the employer and this shows that the 2nd Interested Party had legitimate expectation on renewal of term subject to appraisal as provided in his employment contract, Article 41(1) and Section 39(3) of the Universities Act.

The 4th Respondent and 2nd Interested Party in support of their grounds of opposition and supporting affidavits filed their written submissions on 10th September 2018 and affirmed their position on the petition. First, they maintain that legally the term for the 2nd Interested Party was 10 years with a mid-term review on the 5th year to examine his performance upon which he would proceed if it was satisfactory failure to which a recruitment process would begin. According to the Respondent, it would contradict Sec 41 of the Employment Act if he was to be subjected to a recruitment process in the middle of his contract midterm. This is supported by the cases of *John Rioba Maugo v Riley Falcon Security Services Limited (2016) eKLR* and *Antony Mkala Chitavi v Malindi Water & Sewerage Co. Limited (2013) eKLR* where the court captured the principles of Sec 41 of the Employment Act. In line with this, the 4th Respondent submits that advertising the position of the 2nd Interested Party who was lawfully entitled to a second term would amount to terminating his contract without giving him an opportunity to be heard. The opportunity for the party to be heard was availed to the 2nd Interested Party when the evaluation process was carried out in his presence using the evaluation tool that had been agreed on by both parties.

Secondly, on whether a Chief Executive Officer (CEO) eligible for a second should be subjected to competitive recruitment process the 4th Respondent and 2nd Interested Party relied on the following authorities. *Henry Nyabuto Ondieko v Charles Apudo Owelle & 2 others [2017] eKLR* in which the judge held that setting aside a reappointment process that had complied with the dictates of Mwongozo would undermine the principles that underpins the running of public institutions and concluded by saying that the reappointment of the Chemilil Sugar Company Limited CEO through an evaluation could not be faulted. The courts agreed with this position as was evidenced in *Republic v Cabinet Secretary for Education, Science & Technology & 3 others [2014] eKLR*, in *Peter Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 others [2016]* where the courts opined that the Constitution did not envisage anybody eligible for re-appointment to a public office to be taken through a fresh competitive process because the blood of constitutionalism which the candidate had been subjected to was still running through the appointment. There was caution however that the process of making the said reappointment should not be flawed. According to the submissions, the aspect of competitive recruitment was reaffirmed by the Court of Appeal in the case of *Wilfrida Itondolo & 4 others v President & 7 others [2015] eKLR* where the court pronounced itself by stating that the aspect of competitive recruitment did not arise in the context of the case because the 6th Respondent was not being appointed into office and hers was a reappointment provided for by Sec 10(3) of the Act.

Thirdly, the motive for filing the petition is questioned by the 4th Respondent and the 2nd Interested Party since it is in the knowledge of the Petitioner that the Supreme Court had given a decision in the aforementioned case by affirming that the Court of Appeal had the last jurisdiction in determining the constitutionality issue on whether a public officer who is applying for reappointment should be subjected to a competitive recruitment process.

Fourthly, the 4th Respondent and the 2nd Interested Party demystify the *Anne Kinyua v Nyayo Tea Zones Development Corporation and 3 others [2012] eKLR* which they believe is what the Petitioner is anchoring the petition on. They submit that the same is bad law and the same had come out clearly during subsequent decisions by the High Court and the Court of Appeal where it was held that it was not applicable to the facts in the present cases. In the Anne Kinyua case, the Board had recommended that Anne Kinyua be reappointed for a fourth term. The Permanent Secretary of Agriculture rejected the same and the court agreed with the decision since there was no competitive recruitment.

Fifthly, it is submitted that the principle of legitimate expectation is implied in employment contracts and this was held in the case of *Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR* which gave conditions which if present would lead an employee to have reasonable expectation that his fixed term would be renewed by the employer. The conditions are;

1. The employee's contract had a provision for renewal.
2. The employee's performance has been satisfactory and there was feedback on this good performance from the employer.
3. The employee had expressed his willingness to continue serving the employer in the same capacity.
4. The employer had not given the employee any notice that his contract would not be renewed.
5. The employer must have had the authority to renew such a contract.

The 2nd Interested Party had a contract of employment with an express provision to renew it, the employee's performance over the years had been evaluated by the council and his performance was found to be satisfactory with a score of 88% in the evaluations, he had applied for renewal of his contract six months prior to the expiry of the contract through a letter, the employer had not served the employee with any notice that they do not intend to renew the contract and the 4th Respondent has power to carry out evaluation and recommended the reappointment of the 2nd Interested Party to the 2nd Respondent who had power to make the appointment. According to the submissions, there was legitimate expectation on the part of the 2nd Interested Party since they had satisfied all the requirements set out for renewal of contract on the basis of legitimate expectation. If the 2nd Interested Party were to be subjected to a reappointment process open to competition like fresh appointment would be amount to unfair and unlawful termination of the employment contract.

Lastly, the 4th Respondent and 2nd Interested Party submit that there is sufficient evidence to prove that they complied with the law in the reappointment and therefore the petition and the amended petition should be dismissed with costs to the 4th Respondent and the 2nd Interested Party.

University of Kabianga Council-5th Respondent and Prof. Wilson Kipng'eno- 3rd Interested Party.

Dr. Florence Nyamu who is the chairman of the 5th Respondent swore a replying affidavit on 4th July 2018 and deposes that the petition and motion are fatally defective, incurably incompetent devoid of merit as this court lacks jurisdiction as provided by Order 53 of the Civil Procedure Rules. It continues that the petition has no weighty constitutional issues raised to rely on Article 22 and no public interest and national values are raised.

The appointment of the 3rd Interested Party on 27th June 2013 was done after a competitive recruitment process conducted by the 5th Respondent and reappointment was through a letter date 24th May 2018 and this was within the dictates and confines of the law. The reappointment followed due process as outlined in the guidelines of Circular OP/CAB9|21/2A/LII/43, Circular No. 6 OP/CAB/9 1A dated 23rd November 2010. Further, the office was not vacant at any given time requiring the recruitment of a new Vice-Chancellor. According to Sec 39(3) of the Universities Act and Sec 15(2) of the University of Kabianga Charter which states that an office holder shall hold office for a term of five years and may be eligible for a further term of five years. The eligibility of the 3rd Interested Party to be appointed upon the application for another term would be defined as reappointment and not a new appointment. The procedure for reappointment of the 3rd Interested Party was above board as Sec 39 of the Universities Act as read with Sec 1.2.6 Statute VI, Sec 1.2.17 Statute XVII of the 5th Respondent Statute had been followed. The 3rd Interested Party had on 20th December 2017 made an application for renewal of his contract and on 19th February 2018 the 5th Respondent had deliberated on the request. On 27th March 2018 the Vice-Chancellor made a presentation on his achievements for the last five years during a special meeting to assess his performance. The following day after deliberations and conducting intense appraisal of his performance, the 5th Respondent wrote to the 2nd Respondent recommending the reappointment of the 3rd Interested Party. On 8th May 2018, the 2nd Respondent upon review of the recommendations appointed the 3rd Interested Party for a second five year term. On 24th May 2018, the chairman of the 5th Respondent wrote a letter to the 3rd Interested Party affirming the reappointment.

The 5th Respondent and 3rd Interested Party maintain that the Petitioner has failed to show that the reappointment was flawed stating that they complied with Article 2 and 10 of the Constitution. They state that the Petitioner alleges infringement of rights as provided in the Bill of Rights but fails to seek remedies in conformity with Article 23(3) making the petition a non-starter. According to them, Article 22 provides for questions of public interest and where there is breach or any threat, there has to be a nexus between the one who purports to enforce the right and the petition filed in the question.

As regards the competitive recruitment process they submit that it is invoked when the incumbent Vice-Chancellor does not renew their contract or apply for reappointment as outlined in the guidelines. It is their submission that the reappointment was transparent, accountable and verifiable as required by law since all the stakeholders in the process were involved and the process conformed to the constitution and related statutes.

In their written submissions, the 5th Respondent and the 3rd Interested Party argue that the petition does not fall within the purview of this Court and support the same by referring the Court to Sec 12 of the Employment and Labour Relations Court Act. They submit that there is no nexus between the parties in the petition as there is no contract of service between the parties nor is there an issue of payment of wages.

As to the matter of infringement of rights as provided by Chapter 4, the parties submit that the petition raises purely constitutional issues since the petitioner is challenging the constitutionality of the Circulars involved during the reappointment and as such a decision can only be made by the High Court sitting in a constitutional court and not the Employment and Labour Relations Court.

On the question of the matter being of general public importance, the 5th Respondent and 3rd Interested Party rely on the case of *Olive Mugenda v Winfred Itolondo & 11 others [2016] eKLR* where the apex court held that for the principle of general public importance

matters, the question or questions must have arisen in the court or courts below and must have been the subject of judicial determination. As such, the petition fails on general public importance and thus falls short on the prayers being sought.

As regards the reliefs sought, the 5th Respondent and the 3rd Interested Party submit that the same must fail as they are of a judicial review nature. This is because the Petitioner is not challenging the decision to reappoint the 3rd Interested Party but the process which they allege failed to employ the competitive recruitment process. This is supported by the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & others [1997] eKLR**. The concerned parties complied with the Constitution, legislation, circulars and directives as deponed in the affidavit.

The 5th Respondent and 3rd Interested Party rely on the cases of **Peter Macithi Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 others [2016] eKLR**, and **Republic v Cabinet Secretary for Education, Science and Technology & 3 others [2014] eKLR** and maintain that the 3rd Interested Party was an eligible candidate for reappointment. They further invite the court to be persuaded by the Court of Appeal decision in the **Wilfrida Itolondo & 4 others v President & 7 others [2015] eKLR** as regards competitive recruitment and Article 3, 10, 22, 232 and 258 of the Constitution.

In conclusion, the 5th Respondent and 3rd Interested Party they challenge the supplementary affidavit of the Petitioner for failing to be indicative whether the said position had become vacant or whether the incumbent was seeking reappointment. Finally they submit that they submit that the petition lacks merit.

Maasai Mara University Council – 6th Respondent and Prof. Mary Walingo- 4th Interested Party.

In their grounds of opposition, the parties maintain that the 4th Interested Party was appointed to office in accordance with the provisions of Article 152 of the Constitution. They maintain that the university council is a governance organ and is unlike a public university which is a body corporate under Section 20 and therefore it has no capacity of suing or being sued in its own name and therefore the petition against it is not tenable.

They submit Section 29(3) of the Universities Act provides that the Vice-Chancellor of a public university shall hold office for a term of five years and shall be eligible for a further term of five years and since the respondent University Statute allows the council, the 6th Respondent recommended renewal of the term as the 4th Interested Party had legitimate expectation. It is their belief that the petition is not filed in good faith or in furtherance of a genuine public interest but of personal interests seeing that the petitioner has commenced numerous cases involving public universities which seek only to propel the petitioner's interests. With this they submit that the court should stop abuse of court process because the Petitioner relies on press statements in the Daily Nation on 20th May 2018 and this lies within the parameters of hearsay and cannot be held to be credible or reliable evidence in court.

In their written submissions, they submit that the reappointment of the 4th interested party was legal and conformed to the Constitution. While agreeing with the provisions of Article 232, they express that the same is silent on the issue of reappointment and therefore they proceeded on the basis that they had complied with all the constitutional requirements during the initial appointment. As regards the competitive process they indicate that the Constitution is also silent on eligible Vice-Chancellors being subjected to the same for reappointment and it was because of this that they recommended reappointment to the Cabinet Secretary. They rely on the cases of **Peter Macithi Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 others [2016] eKLR**, and **Republic v Cabinet Secretary for Education, Science and Technology & 3 others [2014] eKLR** to support their sentiments.

Similarly, they submit that the 4th interested party had a fixed term contract which had a stipulated time. The term was to begin on 25th September 2013 and end after five years upon which the party would be eligible for reappointment for another term and so the reappointment was constitutional.

The 6th Respondent and 4th Interested Party submit that provisions of Sec 39 of the Universities Act was strictly adhered to during the initial appointment and that the 4th Interested Party's contract of employment that should she wish to be reappointed she required to give six months written notice prior to expiry of term. In addition they rely on Circular Reference Number OP/CAB.9/1A dated 23rd November 2010 from the office of the President and Article 1.12 of the Mwongozo Code of Governance for State Corporations as regards the tenure of a Chief Executive Officer and submit that they considered all the legal instruments and procedures available during the reappointment process.

When dealing with the orders sought in the petition, the 6th Respondent and 4th Interested Party submit that it has no legal and that the petitioner has failed to prove her case to the required standards and rely on the case of **Caltex Oil (Kenya) Limited v Rono Limited** where the court held that a prayer for damages must be specifically pleaded and particularized. This is in particular about the prayers which the Petitioner has prayed as to parties as the Petitioner refers to people unknown to them.

As far as the petition being of general public importance, the 6th Respondent and 4th Interested Party submit that the same was filed for the Petitioner's own interests and caution the court against entertaining matters which could be an abuse of court process by parties who institute purported public interest litigations for their own publicity and vested political interests. With that they pray that the court dismiss the petition with costs.

Technical University of Kenya Council- 3rd Respondent and Prof. Francis Aduol – 1st Interested Party.

In their written submissions date 19th September 2018, the 3rd Respondent and 1st Interested Party identified and dealt with four issues in dispute. First, was to establish whether the reappointment of the 1st Interested Party for a second term was legal. They submit that it is not disputed that the legal basis for reappointment of a Vice-Chancellor is Sec 39(1) of the Universities Act and in the case of the 3rd

Respondents Sec 15 of their University Charter. Going by the above the 1st Interested Party was entitled to a renewal of the contract of employment which was effective from the 16th May 2013 to 15th May 2018. In line with the laid down procedures, the 1st Interested Party sought reappointment by writing a letter on the 15th December 2017 and after the receipt of the letter the 2nd Respondent evaluated the performance of the 1st Interested Party after which they made a recommendation to the 2nd Respondent. Having done the above, they are satisfied that due process during reappointment was carried out making the same proper.

Secondly, the 3rd Respondent and 1st Interested Party deal with the issue of whether the process of reappointment undermined the need for competitive recruitment of public officers. They rely on the decisions of the court in *Civil Appeal 120 of 2014, Wilfrida Itolondo & 4 others v President & 7 others* where the court held that the matter was a reappointment and not a fresh recruitment and therefore the 6th respondent was entitled to reappointment if she so wished and also on the decision of *Peter Macithi Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 others [2016]* where the court opined that the competitive process only kicks in when a person is being recruited for the first time but when it was reappointment, the body responsible for the appointment bears the responsibility of assessing the person and makes a decision. It is therefore their submission that if the laws required that an incumbent be subjected to a competitive process during reappointment, it should have been stated in the laws.

On the third matter of whether the Petitioner ought to be granted the reliefs that they seek, the 3rd Respondent and 1st Interested Party rely on Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the cases of *Kenya Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & others [1997]eKLR*, *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*, *Kevin Mwiti & others v Council of Legal Education & others JR Miscellaneous Application No. 377 of 2015 consolidated with Petition 395 of 2015* and *JR Miscellaneous Application No. 295 of 2015*. With the above cases, they submit that an order of injunction cannot be issued against an action that has already been done and also the Petitioner should have approached the relevant court.

Lastly on the issue of who should bear the costs of the petition, the 3rd Respondent and 1st Interested Party attack the motive behind the filing of the petition. They indicate that the Petitioner claims to have instituted the petition in the public interest. As to what amounts public interest, they rely in the case of *John Wekesa Khaoya v Attorney General [2013] eKLR*. They submit that the Petitioner has filed numerous cases which have been dismissed for lack of merit and that this Petition is aimed at intimidating the 1st Interested Party who has been opposing demands by university academic staff of higher remuneration among other demands. They therefore submit that the court should stay awake and avert the mischief being employed by the Petitioner as they maintain that the petition is frivolous and lacks merit and hence costs should be awarded.

Determination

I have considered the pleadings and the submissions of parties. The main issue for determination is whether the reappointments of the Interested Parties as Vice Chancellors of the 2nd to 6th respondents violated Articles 2, 3, 10, 35, 232 and Section 7 of the 6th Schedule to the Constitution, Section 39(1)(a) of the Universities Act 2012.

It is not in contention that the Interested Parties were properly appointed to their positions as Vice Chancellors of the 3rd to 6th respondents. It is further not disputed that their terms of appointment and the relevant legal instruments provided that they were eligible for re-appointment for a second term of 5 years. What is in contention is the process of the reappointment for the second term. The petitioner opines that the Vice Chancellors ought to have been subjected to another competitive process and the reappointments without requiring them to go through the process was therefore irregular and unconstitutional.

The determination of this issue revolves around the interpretation of section 39(1) and (3) of the Universities Act, 2012 which provides that-

(1) (Copy)

(2) ...

(3) *The Vice-Chancellor of a public university shall hold office for a term of five years and shall be eligible for a further term of five years*

The Act is explicit about the procedure for appointment but does not provide for the procedure for reappointment. This has been the bone of contention not only in this matter but in several cases as acknowledged by the parties hereto in the submissions summarised herein above. What then do the words further term connote? Is it another competitive process as the petitioner posits or an extension as urged by the Respondents and Interested Parties?

The term eligible is defined in Black's Law Dictionary Tenth Edition as: "*fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status*"

In the Concise Oxford English Dictionary, Twelfth Edition, the word eligible is defined as "*satisfying the appropriate conditions*".

The meaning of the provision according to these definitions is therefore that a Vice-Chancellor, once appointed for a first term, is fit and proper, and is legally qualified for the office, for a second term. It means that the person satisfies the conditions for appointment and does not have to go through another selection criteria, another process to ascertain the fitness, as is required of a person who is not eligible.

The same issue has arisen for determination by the courts before. In the case of *Republic –V- Cabinet Secretary for Education, Science and Technology and 3 Others (2014) eKLR*, the issue was the reappointment of Prof. Mabel Imbuga as Vice-Chancellor for Jomo Kenyatta University of Agriculture and Technology (JKUAT).

The Korir J. held and I deliberately quote the decision at length because the issues are on all fours with the present petition –

“In accordance with the cited definition, the 1st Interested Party was fit and qualified to be appointed as a vice-chancellor of JKUAT for a second and final term. The question would then be whether there was need to take her through competitive recruitment. The law is not clear on this. The body responsible for the recruitment of the Vice-Chancellor of JKUAT conducted an assessment on the performance of the 1st Interested Party and found her deserving of a second term. Thereafter the Council recommended that she be re-appointed for a further five years and the Cabinet Secretary acted accordingly. I do not think that the drafters of the Constitution expected that any person eligible for re-appointment to a public office ought to be taken through a competitive process. One cannot compare the appointment to a public office to an electoral process in which the incumbent seeking another term should submit himself/herself to an election. The competitive process, in my view, only kicks in when a person is being recruited for the first time. When it comes to re-appointment for a further term the body responsible for re-appointment assesses the person and makes a decision whether to re-appoint the incumbent or open up the position for competition.

*I do not find any illegality in the actions of the 2nd Interested Party and the 1st Respondent. Had the 2nd Interested Party found the performance of the 1st Interested Party below par, it was at liberty to advertise her position and the 1st Interested Party would have been entitled to submit her application like every other qualified citizen. With respect to the advocates for the Applicant and the respondents, I must state that the decision in the **Anne Kinyua V Nyayo Tea Zone Development Corporation & 3 Others [2012] eKLR** is not applicable to the facts of this case. In that case, the Permanent Secretary of Agriculture rejected the Board’s recommendation that the Anne Kinyua be re-appointed the Chief Executive Officer of Nyayo Tea Zone Corporation for a fourth term on the ground that there was no competitive recruitment. The Ministry of Agriculture was the parent Ministry of the Corporation. The Court agreed with him.*

The ANNE KINYUA case, supra, is different from the case before me since in that case the Court was considering guidelines issued by the Head of Public Service concerning the procedure to be followed in the re-appointment of chief executive officers of state corporations. As for the case before me the law clearly provides for re-appointment for a further term. It does not state that the re-appointment should be conducted through a competitive process. It was therefore sufficient for the Council to recommend the re-appointment of the 1st Interested Party after carrying out an appraisal of her performance. The re-appointment of the 1st Interested Party did not in any way offend the constitutional provisions cited by the Applicant. The 1st Interested Party’s initial appointment had been done through a competitive process and the requirements of the Constitution were met. There is no evidence that at the time of her re-appointment the 1st Interested Party was not fit to hold the office of the vice-chancellor of a public university.”

Again in the case of **Peter Macithi Muigai –V- Cabinet Secretary for Industrialisation and Enterprise Development and 4 Others (2016)**, the issue was that –

“The Petitioner states that in spite of clear regulations on the appointment of the Director for KIRDI, the 1st Respondent proceeded to reappoint the 4th Respondent in total disregard of the law and policy. The Petitioner adds that the reappointment ignored several issues raised by the 2nd Respondent.

It is the Petitioner's case that the aforesaid action by the 1st Respondent is in violation of Articles 10, 153 and 232 of the Constitution of Kenya, 2010.”

The court held that –

“I agree with the holding by Korir J. However, this ratio is only applicable where the candidate is eligible for re-appointment by virtue of law and past satisfactory performance. It cannot be used to cure an otherwise flawed re-appointment. I have already stated that the 4th Respondent was not a competent candidate for re-appointment, based on law and regulation.”

Further, in the Court of Appeal decision in **Wilfrida Itolondo & 4 Others –V-**

President & 7 Others (2015) eKLR, the issue was that Prof. Olive Mwhiki Mugenda (the 6th respondent) was appointed as Vice-Chancellor of Kenyatta University for a period of 5 years which expired on 31st March 2011. The process of reappointment had not been undertaken yet, according to the Petitioners, the 6th respondent remained in office purporting to act as the Vice-Chancellor. The Court of Appeal held as follows –

*“The appellants appear to claim that that principle in public service was not upheld when the 6th respondent was reappointed as Vice-Chancellor. From whatever angle one looks at this argument, it raised two points. Firstly, the 6th respondent was not being recruited and therefore appointed into office. Hers was a reappointment as provided for under Section 10(3) of the Act. In this context the aspect of “**competitive recruitment**” did not arise.*

And as we have already said, this was not a fresh recruitment, anyway. It was a reappointment provided for under section 10(3) of the Act to which the 6th respondent was entitled if, she wished for one, after the expiry of her contract. And again as we have already said, the process of reappointing was according to the law and the procedure laid down. Therefore we find that this ground lacks merit and it, too, is dismissed.”

From the foregoing I feel comfortable to assert that the process of reappointment for a second term where not specifically set out in legislation or in the instrument of appointment, is that there is no requirement for a competitive process providing the appointing body has

reviewed and is satisfied with the performance of the appointee during the first term in office. The last authority cited, being that of the Court Appeal, pretty much settles the issue as far as reappointments under section are concerned, as this court is bound by decisions of the Court of Appeal.

This being the case, I find no fault the process of reappointment of the Interested Parties for a second term in office and believe that I do not need to belabour this point any further. I find no proof of violation of Articles 3, 10, 27, 35, 73 and 232 of the Constitution by the 2nd Respondent in the reappointment of the Interested Parties to serve a second term in office as Vice-Chancellors of the 3rd to 6th Respondents.

The other issue for determination is the jurisdiction of this court to determine this petition. It is the contention of the 5th Respondent and 3rd Interested Party that this court has no jurisdiction under section 12 of the Employment and Labour Relations Court Act to determine the issues raised in the Petition as there is no employer employee relationship between the Petitioner and the Interested Parties.

This court is established under Article 162(2) of the Constitution and the Employment and Labour Relations Court Act. Section 12(1) of the Act sets out its jurisdiction which is basically to deal with employer/employee related disputes and labour relations matters involving disputes in trade unions.

Article 165(5)(b) provides as follows –

(5) The High Court shall not have jurisdiction in respect of matters—

(a)

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

The applicants appear to have taken a narrow interpretation of Article 162(2)(a) and Section 12(1) of the Employment and Labour Relations Court Act. The Section states in part that –

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

Majanja J in *Petition No. 170 of 2012 – United States International University (USIU) Vs The Attorney General & Others*, as upheld in *Daniel N Mugendi v Kenyatta University & 3 others (2013) eKLR*, where the Court while adopting the position enunciated in the South African case of *Gcaba Vs Minister of Safety and Security & others CCT 64/08 (2009) ZACC 26*, Majanja, J proceeded that;

“I would adopt the position of the Constitutional Court of South Africa in Gcaba Vs Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling with the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

In the Case of *George Joshua Okungu v Kenya Pipeline Company Limited & 3 Others [2016] eKLR* the same issue of jurisdiction of this court was raised in a preliminary objection. While dismissing the preliminary objection Abuodha J. stated-

This Court recently held in the case of Wilbert Kipsang Choge & 6 Others v. Communication Authority of Kenya & Another (2016) eKLR that its jurisdiction is not confined by the narrow path that employer-employee relationship must exist for it to have jurisdiction. The Court is granted jurisdiction by the Constitution and Employment and Labour Relations Act over employment and labour relations and connected purposes and not employer-employee disputes only.

The Court has relied severally in other decisions where arguments over its jurisdiction have been raised on the Australian case of Dean Patty v. Commonwealth Bank of Australia (2000) FCA 1072 where Justice Paul L. G. Brereton stated as follows:-

“When a Federal Law confers jurisdiction on a court in respect of a “matter” arising under the Constitution or a Federal statute, the jurisdiction so conferred extends to authorize determination of the whole “matter”. It has long been established that a matter is a “justiciable controversy”, the determination of which may involve both Federal and State law. The accrual of State jurisdiction to the High Court, so that it could determine non-federal parts of a “matter” arising under the Constitution or a federal law has been recognized for many years. This means that once the jurisdiction of the High Court is attracted by reason of the matter arising under Federal law, the Court is clothed with full authority essential for the complete adjudication of the “matter”, and not merely the federal aspect of it. Subsequently, it was recognized that other courts exercising federal jurisdiction also had accrued jurisdiction.”

In an earlier Australian case of Philip Morris Inc v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR at page 535 Aickin J stated that:-

“The vesting of Judicial power in the specific matter permitted by the Constitution carries with it such implied power as is necessarily inherent in the nature of the judicial power itself”.

The Judge further observed that-

“... That is to say, Courts of equal status as the High Court, at the risk of sounding tautologous, are themselves High Court and are properly clothed with jurisdiction to determine consequential or accrued aspects of a dispute before them which would have otherwise been determined by the High Court. The same principle applies to the High Court finding itself in similar circumstances.”

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“The 1st Respondent’s view narrows the jurisdiction of the Court while both the Constitution of Kenya, and the Employment and Labour Relations Court Act, broaden the jurisdiction. Article 162 [2] [a] of the Constitution which contemplates the creation of this Court, defines the material jurisdiction of the Court to include all disputes relating to employment and labour relations. The Article does not say contractual disputes, between Employers and Employees; it states all disputes relating to employment and labour relations. Section 12 of the Employment and Labour Relations Court Act refers to Article 162 [2] [a] of the Constitution and “ the provisions of this Act, or any other written law which extends jurisdiction to the Court relating to employment and labour relations including.....” In the case of **Hakika Transporters Services Limited v. Kenya Long Distance Truck Drivers and Allied Workers Union [2015] e-KLR**, the Court held the view that Section 12 is inclusive. It is not an exclusive list of the dos and don’ts of this Court. The Court has assumed jurisdiction and determined claims for employment related defamation and malicious prosecution in **Beatrice Achieng Osir v. Board of Trustees Teleposta Pension Scheme [see Claimant’s Submissions for citation]**, **George Onyango Akuti v. G4S Security Services Limited [2013] e-KLR** and **Stanley Mungai Muchai v. National Oil Corporation [2012] e-KLR**. The jurisdiction of this Court extends to all disputes relating to employment and labour relations. Personal jurisdiction is no longer confined to Employers and Employees as was the case under the Trade Dispute Act Cap 234, but to all persons implicated in an employment and labour relations dispute.”

From these decisions, it is clear that the jurisdiction of this court to hear and determine constitutional matters touching on employment is now settled. I thus find no merit in the submissions of the 5th Respondent and 3rd Interested Party objecting to the jurisdiction of this court.

On *locus standi*, under Article 258 of the Constitution provides that –

258. Enforcement of this Constitution.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.**
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
 - (a) a person acting on behalf of another person who cannot act in their own name;**
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;**
 - (c) a person acting in the public interest; or**
 - (d) an association acting in the interest of one or more of its members.**

The Petitioner describes herself as a resident of Nairobi City County, a law abiding citizen of Kenya, a public spirited individual and defender of the Constitution of Kenya and a Lecturer at Kenyatta University.

Under Article 258 I find that the petitioner has *locus standi* to file the instant petition.

Having found that the reappointment of the Interested Parties were properly carried out by the Respondents and that they were eligible for reappointment, I do not need to discuss the remedies sought by the Petitioner.

In the end having found that the reappointment of the Interested Parties did not contravene either the Constitution, the University Act or statutes, the petition must fail. I accordingly dismiss it.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE