



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.2 OF 2018

REPUBLIC.....APPLICANT

VERSUS

EGERTON UNIVERSITY COUNCILRESPONDENT

EX PARTE APPLICANT.....PROF.ROSE MWONYA

RULING

The ruling herein relates to Notice of Objections filed by the respondent, Egerton University Council on 9th November, 2018 on the grounds that;

a. The respondent sued, Egerton University Council, and pursuant to which leave was granted on 19/09/2018 to the applicant to apply for the Judicial Review Orders of Certiorari Mandamus and Prohibition is not a legal person capable of suing or being sued and this proceedings are incurably incompetent, nullity “ab initio” and for dismissal as this honourable court has no jurisdiction to entertain the application against a nonlegal person.

b. “Egerton University Council” not being a legal entity, legal person in law under the Universities Act No.42 of 2012 this [these] proceedings against it are fatally incompetent and for sticking out with costs “in limine” for being the grossest abuse of the court process.

The court directed the parties to file written submissions.

The respondent submits that the public universities are governed by Universities Act, 2012 (the Act). Egerton University was granted a Charter on 1st March, 2013 pursuant to section 21 of the Act and by dint of section 20 the University became a body corporate. The respondent Council is defined under section 2 of the Act as the governing body of the University and does not give such body a legal capacity of a body corporate. The respondent sued is devoid of a legal personality or legal standing to be sued in its name as held in **George Omondi & another versus National Bank of Kenya Ltd & 2 others [2014] eKLR; Prof. Kiama Wangai versus Pamela Tsimbili & 7 others Civil Case No.304 of 2012; Grace Mwenda Munjuri versus Trustees of the Agricultural Society of Kenya Cause No.1317 of 2010** and in **Trustees Chrisco Church Nakuru versus Samwel Kibowen Towett & 4 others [2017] eKLR** the court held that a case automatically fails for want of capacity where a suit is filed against a non-legal person.

In this case the leave granted to the applicant is incapable of being transposed as it never existed. The respondent has no legal capacity to be sued. The objections made should be allowed, the Notice of Motion filed and leave granted be set aside and costs be paid to the respondent’s advocate.

In response, the *ex parte* applicant submits that the respondent is a formally constituted quasi-judicial body capable of being sued in judicial review. The respondent Council was appointed pursuant to section 36(1) of the Act and constituted vide Gazette Notice No.2340 of 14th March, 2017 and the chairperson appointed vide Gazette Notice No.9713 dated 21st September, 2018.

Section 15(2) of the Act empowers the university to set up a governing body, the Council meaning the university is an inanimate institution and the entity making decisions and controlling the actual power is the respondent Council. Section 63(1) of the Act enjoins the Council to uphold fair administrative action rights of any person in performance of its functions and proceedings herein seek to hold the respondent council accountable for its actions made in violation of the *ex parte* applicant’s right to fair administrative action, thereby affecting her employment.

The Council upon gazettelement became a formal quasi-judicial entity with functions prescribed in law. By its membership which includes the Vice-Chancellor, Council is the institution between management and governance organ. The pleadings as drawn name the Egerton University against whom reliefs are sought.

The question of capacity of a party have no place in judicial review provided the respondent sued is a public administrative body exercising quasi-judicial powers. The respondent council is amenable to judicial review proceedings in so far as it is an administrative body exercising quasi-judicial powers and the objections made are without merit.

Section 2 of the Fair Administrative Act, 2015 defines 'administrator' and 'administrative action' and under section 7 the law allow for judicial review proceedings against any person exercising administrative powers. In this case the respondent Council was exercising its administrative under section 63 of the Act. court have in the past issued judgement in judicial review cases against university council by determining the merits in **Kenyatta Universities Staff Union versus University Council of Maside Muliro University of Science and Technology & 2 Others [2018] eKLR** and in **James Mwangi Nganga versus Kenyatta University Council & 4 others [2009] eKLR**.

The grant of the orders or Certiorari, Mandamus and Prohibition is discretionary. The court is interested in the process against which judicial review is sought and must be satisfied that there is reasonable basis to justify the orders sought. The key questions for the court to address is whether the process followed by the decision-maker is proper, and whether the decision is within the confines of the law. Then make a determination as to whether that decision or action is unauthorized or invalid. The court then must interfere or affirm.

The relevant agency to which the court must address as above must have the legal capacity to act. To be stopped. To be prohibited. As otherwise, to issue orders and directions against a party/person/entity without the requisite legal capacity is to act in futility. Such non-legal party has no capacity to obey. Do that which the court has directed and ordered.

In **R versus Electricity Commissioner ex parte Electricity Joint Committee (1942) 1 KB** the court held that orders of judicial review must issue against a body acting in its administrative capacity or having *quasi-judicial* function.

The submissions by the *ex parte* applicant that the respondent Council is an administrator as defined under section 2 of the Fair Administrative Act, 2015 read together with section 63 of the Universities Act is appreciated noting an 'administrator' under the Act is an administrative body against which judicial review proceedings can be sought. Proceedings herein relate to the application of constitution provisions articles, 23, 25, 41, 47 and 50 and Law Reform Act section 8 and 9, Order 53 of the Civil Procedure Rules and Fair Administrative Act, and the Universities Act.

The proceedings herein commenced by the *ex parte* applicant seeking leave to commence judicial review proceedings against the respondent Council for purpose of quashing its decision vide letter dated 7th September, 2018 for being unlawful, illegal and procedurally irregular. The Court assessment of such referenced letter is issued by *Egerton University Council*, the respondent herein and signed by Joshua N. Otieno, Session Chair for Full Council meeting on 7th September, 2018.

Leave was granted and a Notice of Motion has since been filed on 11th October, 2018 seeking for orders of *Certiorari*, *mandamus* and *Prohibition* and for the purpose of brining quashing the respondent's suspension letter dated 7th September, 2018 issued to the *ex parte* applicant for being unlawful, illegal and procedurally irregular.

On the face of the objections now made and the substance of the proceedings now before court, there must be an interrogation as to the lawfulness, legality and validity of the letter issued to the *ex parte* applicant by the entity of the respondent Council, *Egerton University Council* and not Egerton University granted Charter on 1st March, 2013 pursuant to section 21 of the Act and by dint of section 20 when the University became a body corporate as against the respondent Council stated to lack legal person in law under the Universities Act, 2012.

The respondent issued the impugned letter dated 7th September, 2018. Does the respondent then have the legal mandate to issue such communication? Has the respondent acted within the law? is the decision and letter of the respondent valid?

The above questions must be gone into in their merits and cannot be addressed by way of objections as herein done. The questions above go to the very heart of the Motion now filed by the *ex parte* applicant.

The *ex parte* applicant, aggrieved by the decision of the respondent, Council has the right with reference to Article 22(3) of the Constitution, 2010 read together with Fair Administrative Act, 2015 to file for judicial review proceedings with the court.

Parties have made effort to settle the matter and no agreement is achieved.

Section 10 of the Fair Administrative Act, 2015 eschews undue regard to procedural technicalities in judicial review applications and this read together with section 3 of the Employment and Labour Relations Court Act, 2011 and the foundation of Article 159 of the Constitution, 2010 the court is properly seized of the matter herein.

The above put into account the court reminds parties of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 with regard to filing any proceedings with the court to put into account the following;

7(1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

2. A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

3. Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court. [Underline added].

In addressing the procedure to apply in addressing employment and labour relations disputes, the court in **Nicholas Mayieka & others versus Judicial Service Commission Petition No.260 of 2016** held as follows;

In matters of employment and labour relations, unless otherwise prescribed, through a Statement of Claim a party is allowed to urge its case. Such memoranda give the other party a fair chance to call its witnesses and cross-examine them and have the court address the case on its merit(s). The application of technical procedures under a petition [and judicial review] with mere citations of various articles of the constitution where ordinarily a suit ought to be commenced by way of Statement of Claim only serves to deny the other party and the court crucial evidence to the disadvantage of the petitioner.

The court relied on the Court of Appeal in the case of in **Gabriel Mutava & 2 others versus Managing Director Kenya Ports Authority & another [2015] eKLR**, in addressing the question as to why a party ought to take great caution before filing a constitutional petition and rather should file as provided under the applicable statute held that;

... there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...

Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.... **I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.**

Accordingly, the above put into account, objections made are found without merit and hereby dismissed. The parties shall address the substance of the Motion before court. each party shall bear own costs.

Delivered at Nakuru this 11th day of February, 2019.

M. MBARU

JUDGE

In the presence of: