



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC PETITON NO. 68 OF 2018.

(Before Hon. Justice Mathews N. Nduma)

PROF. SAMSON ROSANA ONDIGI.....PETITIONER/APPLICANT

VERSUS

COUNCIL OF MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY...RESPONDENT

RULING

1. The application dated 5th November 2018 seeks conservatory orders restraining conduct of interviews for the position of Deputy Vice Chancellor (Administration and Finance) that was scheduled on 9th November 2018 pending the hearing and determination of the suit. Interim orders were issued by Rika J. on 5th November 2018.
2. The basis of the application is set out in grounds set out in the Notice of Motion and Supporting Affidavit of the Applicant Professor Samson Rosana Ondigi which may be summarized as follows:
3. On 12th June 2018, Respondent advertised the vacancy of Deputy Vice Chancellor (Administration and Finance) hereinafter (DVC A&F).
4. That 24 candidates applied and the shortlisting committee at a sitting held on 1st August 2018 resolved that none of the 24 Applicants qualified due to lack of documents from Higher Education Loans Board (HELB); Kenya Revenue Authority (KRA); Directorate of Criminal Investigations (DCI); Credit Reference Bureaus (CRBs) and Ethics and Anti-corruption Commission (EACC) with doubts being cast on the validity of those submitted.
5. It was resolved to re-advertise the position within three (3) weeks which happened on 3rd August 2018 with applications to be received by 24th August 2018. The 9th Special Council Meeting met on 24th August 2018 and ratified the recommendation by the *Adhoc* committee.
6. Subsequently, and pursuant to the repeat exercise, the *Adhoc* committee shortlisted five (5) candidates for the position of DVC (A&F) and disqualified the remaining 19 candidates. All the 24 candidates had re-applied for the position.
7. Two of the shortlisted candidates were scored at 46.60% and 55.15% and failed to reach the pass mark of 72% earlier set by Summary Committee after the first advertisement.
8. That the 19 rejected applicants were not individually or severally informed the reasons for their disqualification in violation of *Article 47 of the Constitution of Kenya 2010*. On 23rd October 2018, the respondent published the list of all the 24 candidates and the 5 shortlisted candidates in the Daily Nation newspaper.
9. That the petitioner through M/S Omondi Abande Advocate wrote to the Chairperson of the Respondent requesting for information on the shortlisting ranking and reasons why the 19 applicants were rejected.
10. The Chairman responded vide a letter dated 31st October 2018 that Council would deliberate the mater and revert without giving any date for that eventuality.
11. This suit was filed on grounds that the conduct by respondent violated *Article 27, 35 and 47 of the constitution of Kenya 2010*.
12. That the respondent was bound by values set out under *Article 10 on good governance, accountability, transparency, integrity, equality and non-discrimination* and that the conduct by the respondent did not meet this threshold.

13. That application was brought timely and without delay and it be granted accordingly.

Response

14. The respondent filed a replying affidavit sworn to by the Chairman of the Council Dr. Jeremy Bundi on 23rd November 2018.

15. The respondent states that the petitioner was not an applicant of the position of DVC (A&F) in the first instance.

16. That in the initial bunch of 24 applicants only one candidate met the mandatory requirements under *Chapter six (6) of the constitution of Kenya 2010* but even that one candidate had not served as a Dean or a Director which was one of the mandatory requirements, hence the re-advertisement which happened on 3rd August 2018.

17. That 24 candidates applied second time round by 24th August 2018. One application was received late on 27th August 2018.

18. Shortlisting was done by a fresh Summary Committee on 8th and 9th September 2018. That in the advertisement the position of DVC (A&F) had requirements for submission of Clearance Certificates from:

- (a) Kenya Revenue Authority
- (b) Higher Education Loans Board
- (c) Ethics and Anti-Corruption Commission
- (d) Directorate of Criminal Investigation and
- (e) Credit Reference Bureaus

19. That only six (6) applicants out of the 24 provided valid clearance documents from the aforesaid institutions. That those are mandatory requirements of the Constitution of Kenya 2010.

20. That the above requirements coupled with other academic and administrative requirements reduced the candidates to only five (5) hence the shortlisting the subject of the suit.

21. That the application lacks basis and it be dismissed for lack of merit.

Determination

22. The issues for determination are:

23. Whether the applicant has met the requirements for grant of conservatory orders in a public dispute set out in **the Wambora Case and Munya case by the Supreme Court.**

(Martin Nyaga Wambora vs Speaker of the County Assembly of Embu and 3 others, Petition (2014) eKLR and

Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR)

Gatirau Munya Case

(86)'.....Conservatory Orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the 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 merits of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes'.

Wambora Case

(59) 'In determining whether or not to grant Conservatory Orders, several principles have been established by the Courts. The first is that:.....'[an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution'

(60) To those erudite words I would only highlight the importance of demonstration of 'real danger'. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial action or redress by

the court. Thus an allegedly threatened violation that is remote and unlikely will not attract the court's attention.'

(61) 'The second principle, which naturally follows the first, is whether if a conservatory order is not granted, the matter will be rendered nugatory.'

24. Having considered the competing facts of the case, bearing in mind that it is appropriate to determine issues of fact upon full hearing of the main suit. Having further considered the public law and policy considerations set out in the two authorities above, the court is of the considered view that the petitioner/applicant who was not an applicant of the vacancy of DVC A&F), has failed to meet the requirements for grant of a conservatory order pending the hearing and determination of the suit.

25. This court is not bound by the High court decision in *Trusted Society of Human rights Alliance and 3 others vs Judicial Service Commission and another (2016) eKLR.*

26. In any event, Hon. Ondunga in that case held *inter alia*, that inclusion of extraneous matters as requirements for qualification does not by itself warrant the quashing of the process. This was in specific reference to the requirement for presentation of clearance certificates which are not specifically provided for in the statute and the constitution of Kenya 2010.

27. The judge further held that the right of access to information is not an unlimited right and may be limited as provided by law.

28. The decision was specific to the requirements for appointment of judge of a superior court and is not on fours with the present matter in respect of several findings by the judge.

29. The court shall no doubt make a full determination on the issues raised upon hearing the suit on the merits.

30. The application lacks merit and is dismissed for want of satisfying the requirements for grant of a conservatory order in public disputes.

Ruling Dated, Signed and delivered this 2nd day of May, 2019

Mathews N. Nduma

Judge

Appearances

M.M. Omondi for Petitioner/Applicant

Mr. Kitwa for Respondent

Chrispo: Court clerk