



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION 71 OF 2018**

(Before Hon. Lady Justice Maureen Onyango)

**DR. WILFRIDA ARNODAH ITOLONGO.....1<sup>ST</sup> PETITIONER**

*VERSUS*

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF EDUCATION.....2<sup>ND</sup> RESPONDENT**

**THE VICE CHANCELLOR, KENYATTA UNIVERSITY AND CHAIRMAN OF SENATE...3<sup>RD</sup> RESPONDENT**

**THE CHAIRMAN OF ALUMINI, KENYATTA UNIVERSITY.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The Petitioner who is lecturer at Kenyatta University and a Kenyatta University Alumni brings this Petition on her own behalf and in the public interest. She avers that she derives locus standi from Article 3(1), 50(1) and 258 of the Constitution of Kenya 2010.

She avers that on Thursday 19<sup>th</sup> July 2018, she received a message on her corporate email and a short message (sms) inviting her to a brief stakeholder meeting for Kenyatta University Alumni at the main campus to participate in the process of selecting the chancellor.

That she arrived at the venue of the said meeting presided over by Prof. Vincent Onywera as Vice Chairman of Alumni and the 3<sup>rd</sup> Respondent in attendance. The Chairman of the Alumni was absent as he was out of the country.

The 3<sup>rd</sup> Respondent informed the meeting that the tenure of the incumbent Chancellor, Dr. Wairegi was coming to an end by the end of July 2018. In view of that an impromptu special Senate meeting had been convened to nominate a Chancellor because the University was having a graduation in early August and thus the urgency to appoint a Chancellor to preside over the graduation.

That the senate had endorsed the incumbent, Professor Wairegi, and he expected the Alumni to do the same. That the incumbent was endorsed by the majority through a show of hands with the Petitioner being the only person who openly voted no.

She protested over the mode of appointment of the Chancellor as the Universities Act, 2012, clearly spells out how a Chancellor of a public university is to be appointed. Her position was that if the law is silent about how an appointment to a second term should be conducted, the procedure for the first appointment should be followed.

She wrote a letter to the 3<sup>rd</sup> Respondent on her displeasure with the process of appointing the Chancellor and requested the 3<sup>rd</sup> Respondent to reconsider the endorsement of Dr. Benson Wairegi as Chancellor of Kenyatta University and allow lawful procedure to be followed. That in the event the name had already been forwarded to the Cabinet Secretary, it could still be reconsidered on intervention and advice.

That the Petitioner requested to be supplied with minutes of the Alumni meeting that was held in relation to the appointment of the chancellor for the university, which request has been denied thus violating her right to information.

That the process of appointing the Chancellor was marred with deceit since the message inviting the Alumni to the meeting stated that the Alumni was to participate in the process of selecting a Chancellor for the University only for them to be bulldozed into endorsing Dr. Benson Wairegi.

She states that the petition is founded on Articles 1, 2, 3, 4, 10, 22, 23, 27, 35, 47, 48, 50, 73, 159, 160, 165, 232, 258, 259, of the Constitution of Kenya 2010. The Petitioner prays for the following reliefs:

- a. A declaration be and is hereby issued that Articles 3, 10, 35, 47 and 232 of the Constitution of Kenya, and the Second Schedule of the Universities Act, 2010 should be applied in the appointment and reappointment of Chancellors of Public Universities in Kenya.
- b. A declaration be and is hereby issued that the Second Schedule of the Universities Act, 2010, should be applied in the ongoing process of appointing a Chancellor for Kenyatta University.
- c. In the alternative, a declaration be and is hereby issued that the Second Schedule of the Universities Act, 2010, should have been applied in the reappointment of Dr. Benson Wairegi as Chancellor of Kenyatta University.
- d. A declaration be and is hereby issued that Dr. Benson Wairegi was not validly appointed to a 2<sup>nd</sup> term as Chancellor of Kenyatta University within the law.
- e. The Court do issue and hereby issues an Order of prohibition prohibiting the on-going unlawful appointment process of a Chancellor for Kenyatta University.
- f. The Court do issue and hereby issues a Mandatory Order quashing the unlawful re-appointment of Dr. Benson Wairegi (if any) as a Chancellor of Kenyatta University.
- g. The Court do issue and hereby issues a Mandatory Order compelling the Respondents to start the process of appointing a Chancellor for Kenyatta University guided by the relevant laws.
- h. The Court be pleased to issue any other or further remedy directions and orders that it deems necessary to give effect to the forgoing orders, and/or favour the cause of justice.
- i. Costs to be in the cause.

The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed grounds of opposition and a Replying Affidavit sworn by one Professor Nelson Wawire, the Acting Deputy Vice Chancellor in charge of Administration at Kenyatta University opposing the petition. He states that the allegation that the 3<sup>rd</sup> Respondent unilaterally made the decision to re-appoint Dr. Benson Wairegi as the Chancellor for a 2<sup>nd</sup> term is false since it was done in compliance with Schedule Two of the Universities Act, 2012. A meeting of the University Senate was convened where the decision was reached to reappoint Dr. Benson Wairegi as the Chancellor of Kenyatta University for a second term.

He states that the assertion by the Petitioner that the procedure used in the first appointment shall be used in the re-appointment of a Chancellor is not anchored in law. That since Dr. Benson Wairegi was reappointed as the Chancellor of Kenyatta University for a second term the procedure for the first appointment did not apply to his reappointment. That the Chancellor was re-appointed in accordance with section 38(2) of the Universities Act, 2012.

That failure to access the minutes of the Alumni meeting did not in any way curtail or limit the rights of the Petitioner since she actively took part in the meeting and as such was privy to the deliberations of the meeting.

That in considering re-appointment of the Chancellor, the University Senate observed that the Chancellor is an individual of high moral character and moral standing as required under section 38(4) of the Universities Act, 2012.

That the Petition is fatally defective as it has not met the threshold established in *Anarita Karimi Njeru Vs Republic (1979) 1 KLR 154*. That the petition does not demonstrate with a reasonable degree of precision the provisions of the Constitution violated or threatened to be violated, if any and the manner of such violation. The Respondents urge the Court to dismiss the petition with costs.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file a reply to the petition but filed written submissions.

#### **Petitioner's Submissions**

The Petitioner submits that Article 232 of the Constitution spells out the values and principles of public service. That in keeping with the spirit of the Constitution of Kenya 2010, Parliament under the Second Schedule of the Universities Act, 2012, clearly stipulated the procedure for recruiting and appointing a Chancellor for a public university.

That the law is silent on re-appointment but the court in the case of *Mutuura Mberia & Another Vs Cabinet Secretary Education Science and Technology & 2 Others (2014) eKLR* stated:

“That even where the immediate incumbent is seeking re-appointment and the employer has assessed his performance to be good and wants to retain him, we are of the view that the vacant position must be subjected to the appointment process. His performance will be a factor to be considered in determining whether to retain him or not as against the other candidates who have been afforded an opportunity to compete for the same position.”

That an order of *certiorari* to quash the re-appointment of Dr. Benson Wairegi should be issued as the appointment was contrary to Schedule

2 of the Universities Act, 2012.

### **Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

That the Petition is about violation of the Supreme law of the land and other enabling laws and the Court should stamp its authority and allow the orders sought to ensure the rule of law is observed.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the issue arising is on reappointment and not appointment of the Chancellor. They cite the case of *Wilfrida Itolondo & 4 Others Vs President and 7 Others (2015) eKLR* where the court stated:

“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 6<sup>th</sup> 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.”

That the Cabinet Secretary’s role begins once he receives a recommendation from the Senate of the University. He has no authority to bypass the person recommended for appointment as he would be exercising excess jurisdiction or power conferred to him by the Universities Act and in contravention of section 51 of the Interpretation and General provisions Act, Cap 21 Laws of Kenya. It is submitted that the Cabinet Secretary properly exercised his authority within the legal parameters and ought not to be party in this suit.

That the Petition does not indicate the constitutional violations complained of. The Petition has not particularised the manner in which the alleged violations were committed. That it is for the Petitioner to present a factual basis as well as the evidence in support to enable the Court to make a determination whether there has been a violation. That the Petitioner had the duty to show that she had a right which was infringed.

That the Petitioner was present at the alumni meeting that approved the appointment of the Chancellor and even participated in the vote. As such she has not shown how her rights have been violated. They pray that the Petition be dismissed with costs.

### **Submissions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

The 3<sup>rd</sup> and 4<sup>th</sup> Respondent submit that section 38(2) of the Universities Act and Schedule 2 thereof. That in this regard the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the Kenyatta University Senate acted in a manner that upholds the Constitution of Kenya by ensuring that the process of reappointment of Dr. Wairegi as Chancellor was done in a transparent and accountable manner.

That the contention that the process applicable in appointment of a Chancellor shall be applicable in cases of reappointment is not anchored in law. That the Court of appeal in *Wilfrida Itolondo & 4 Others V President and 7 Others (2015) eKLR* already settled the issue and stated that competitive recruitment does not apply in cases of reappointment.

That the assertion that the Petitioner was denied access to the minutes of the senate meeting is false as the same is annexed to the 3<sup>rd</sup> and 4<sup>th</sup> Respondent’s affidavit.

They also submit that the authority of *Mutuuria Mberia* cited by the Petitioner does not apply to the reappointment of a Chancellor but to the appointment of member of various councils.

That the Petitioner has not shown with precision how the actions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents violated her fundamental rights and as such the Petition should be dismissed with costs.

### **Determination**

Having considered the pleadings, affidavits and submissions of the parties the issues for determination are:

1. Whether the Petitioner meets the threshold of a constitutional petition
2. Whether the Respondents violated the Constitution in the reappointment of the Chancellor
3. Whether the 2<sup>nd</sup> Schedule of the Universities Act should have been applied in the reappointment of the Chancellor.

The Second Schedule of the Universities Act 2012 provides for the appointment of the Chancellor of a Public University as follows –

#### **Procedure for the appointment-of the Chancellor of a Public University**

- 1. Where a vacancy occurs in the office of Chancellor of a public university, the Senate of that university shall, in consultation with the respective alumni association, identify suitable persons for appointment.**

The Kenyatta University Charter provides for appointment of a Chancellor at Section 12 as follows –

## 12. The Chancellor

**There shall be a Chancellor of the university who shall be appointed and hold office in accordance to the provisions of the Act:**

The Statutes provides for appointment of the Chancellor as follows –

### STATUTE V - THE CHANCELLOR

- 1. Subject to the Act and the Charter there shall be appointed a Chancellor for the University.**
- 2. The Chancellor shall hold office for a term of five years and shall be eligible for appointment for further one term.**
- 3. The Chancellor shall hold office, perform such functions and enjoy such powers, rights and privileges as provided for under Section 38 of the Act and these Statutes.**
- 4. The Chancellor may from time to time give advice to the Council which the Chancellor considers necessary for the betterment of the University;**
- 5. The Chancellor shall have the right to take part in any formal or informal activities of in University.**

All the above legal instruments do not provide for the procedure for reappointment although they provide that the Chancellor is eligible for reappointment for a second term.

In the present case there was a meeting of the Senate on 17<sup>th</sup> July 2018 where the re-appointment of Dr. Benson I. Wairegi as the Chancellor of Kenyatta University was discussed and a resolution passed as follows –

“Reported: That:

- i. The University Act 2012 is silent on reappointment of the Chancellor and that is why the Senate was considering Dr. Wairegi to be reappointed as the Chancellor of Kenyatta University.
- ii. The Director of Alumni Programmes had already called for a meeting of the Alumni on Friday, 20<sup>th</sup> July 2018 to discuss the reappointment of the Chancellor.

Clarified: That:

- i. According to The Universities Act, 2012 the initiation of the process of the appointment of University Chancellor rests with the Senate.

Recommended: That:

- i. Senate’s resolution for reappointment of Dr. Benson I. Wairegi *as Kenyatta University Chancellor be forwarded to Kenyatta University Alumni for concurrence.*
- ii. Dr. Benson I. Wairegi’s name be forwarded to the Education Cabinet Secretary as Kenyatta University Chancellor.

Proposed by: Prof. James B. Kung’u, Dean, School of Environmental Studies

Seconded by: Prof. Nelson Wawire, Dean, School of Economics”

A meeting of the Alumni of Kenyatta University was convened on 20<sup>th</sup> July 2018 where a resolution was passed to reappoint Dr. Wairegi as Chancellor.

The petitioner attended the Alumni meeting but was the only one who voted against the reappointment. She sent a letter of protest against the procedure of the reappointment of the Chancellor to the Vice-Chancellor, Kenyatta University, by her letter dated 23<sup>rd</sup> July 2018.

The Chancellor was reappointed by Gazette Notice No. 9558 of 17<sup>th</sup> September 2018 after the petition herein had already been filed on 26<sup>th</sup> July 2018. The court had upon the filing of the petition and a motion under certificate certified the matter urgent but declined to grant conservatory orders sought under the application on the date of filing. It is under these premises which are uncontested that the court will proceed to determine this petition and the issues as set out above.

It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions alleged to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of *Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154* where the Court stated;

“ if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also **Meme v Republic and Another [2004] 1 KLR 637**)

This principle was emphasized by the Court of Appeal in **Mumo Matemo V Trusted Society of Human Rights Alliance [2014] eKLR**, where it stated that:

“...the principle in **Anarita Karimi Njeru** (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru** (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

The Petitioner has cited various Constitutional provisions which she alleges were violated. Specifically Article 10 and 232 on inclusiveness and non-discrimination which she alleges were violated. She has gone on to state how these provisions were violated. I find that the petition discloses the provisions of the Constitution violated and the infringements complained of as averred by the Petitioner with sufficient precision and she has met the principle in the case of **Anarita Karimi Njeru**.

On the issue of reappointment the Petitioner is of the view that the

Second Schedule of The Universities Act, 2010, applies whereas the Respondents are of the view that the only requirement for reappointment as opposed to first appointment is that the same is done in a transparent and accountable manner, which in this case in their view, was done as Senate sat and proposed that Dr. Wairegi be reappointed. That at the Alumni meeting where the Petitioner was present, it was agreed that the said Dr. Wairegi continues to serve as Chancellor for a second term. The Petitioner appeared to be the only one to have been aggrieved by the decision to reappoint the incumbent to the office of Chancellor. It is the court's position that the fact that the Petitioner objected to the appointment does not mean her rights were violated.

As held by the Court of Appeal in the case of **Civil Appeal No. 120 of 2014, Wilfrida Itolonndo & 4 Others -V- The President and 4 Others (2015)eKLR**:

“The Court observed that, the 6<sup>th</sup> Respondent was not being recruited and therefore appointed into the office. Hers was a re-appointment as provided under section 10(3) of the Act. In this context the aspect of competitive recruitment did not arise.”

I agree with the same position. Dr. Wairegi was not appointed but reappointed to the position. The Senate in its meeting held on 17<sup>th</sup> July 2018 considered his performance during the first term and was satisfied with his performance during the first time and recommended his reappointment.

I further find that the respondents complied with Articles 10 and 232 on the principles of democracy, transparency and inclusivity and that the petitioner was involved in the process. Her rights and the rights of the Alumni to participate in the appointment was not violated.

I further find that the appointment did not violate the Universities Act, the Kenyatta University Charter and the University Statutes on the reappointment of the Chancellor as all of the said documents do not expressly provide for the procedure for reappointment.

For the foregoing reason I find no merit in the petition and dismiss the same.

Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**