



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION 144 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 41, 47, 118 AND 248 OF THE CONSTITUTION OF KENYA, 2010, SECTION 22 AND 26 OF THE UNIVERSITIES ACT NO. 42 OF 2012, SECTION 40 OF THE EMPLOYMENT ACT 2007, SECTION 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

*BETWEEN*

**UNIVERSITIES ACADEMIC STAFF UNION (UASU).....PETITIONER**

*VERSUS*

**CABINET SECRETARY, MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE COMMISSION FOR UNIVERSITY EDUCATION.....1<sup>ST</sup> INTERESTED PARTY**

**INTER-PUBLIC UNIVERSITIES COUNCILS CONSULTATIVE FORUM**

**OF THE FEDERATION OF KENYA EMPLOYERS.....2<sup>ND</sup> INTERESTED PARTY**

**KENYA UNIVERSITIES STAFF UNION.....PROPOSED 3<sup>RD</sup> INTERESTED PARTY**

**RULING**

The application before me for determination is dated 24<sup>th</sup> July 2019 and is filed by the Universities Academic Staff Union, a trade union registered under the Labour Relations Act to represent university lecturers. The application seeks the following orders –

1. That the Application herein be certified as urgent and heard ex parte in the first instance.
2. That a Conservatory Order be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the budget statement for the year 2019/2020 on merging and shutting down of Public Universities without the inclusion of the Petitioner’s input pending the hearing and determination of this Application.
3. That a Conservatory Order be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the budget statement for the year 2019/2020 on merging and shutting down of Public Universities without the inclusion of the Petitioner’s input pending the hearing and determination of this petition.
4. That the costs of this application be borne by the respondents.

The application was provoked by the pronouncement by the Cabinet Secretary for National Treasury and Planning during the budget statement for the financial year 2019/2020 on 13<sup>th</sup> June 2019 to the effect that there shall be a review of the financial and management systems of all public universities with a view to restructuring them and implementing radical measures that will include merger or closure of some universities and university campuses that are not able to sustain their operations against the number of students admitted or degree courses offered.

The applicant avers that this is a fundamental change of the policy framework that would transform the higher education sector, impact the quality of education, affect academic research outputs, shift budgetary priorities, affect the workforce and students and alter the social impact of education. The applicant posits that such a policy reform requires vigorous public participation by all the stakeholders, including lecturers, universities staff, students, parents and parliament. The applicant surmises that historically no public universities in Kenya have ever been merged and a change in policy to do so would be a radical change that would warrant public participation as envisaged under Article 118 of the constitution.

That since independence fundamental educational reforms have only been effected after research, debate of recommendations of educational commissions such as the Ominde Commission (1964), the Gachathi Commission (1976), the Mackay Commission (1981), which recommended the establishment of the Commission for Higher Education (CHE) and Moi University, the Kamunge Commission (1988) and the Koech Commission (1999).

That the current public universities were established pursuant to vigorous public participation and legislative intervention by Parliament which passed the Universities Act No. 42 of 2012. Section 26 of this statute provides that the Commission (CUE) shall ensure the establishment of public universities in each of the Counties, giving priority to Counties that do not have universities immediately following the coming into force of the Act.

That the pronouncement by the Cabinet Secretary for Ministry of Education and the national Treasury in June 2019 regarding the merger of public universities were not preceded by any recommendations of a commission, legislation, policy framework nor any form of discussion, debate nor participation by the stakeholders.

That University academic staff are therefore extremely concerned that the proposed merger of public universities in Kenya is neither aligned with any national educational policy goal nor principle and is being undertaken by the Respondent unilaterally without due regard to other stakeholders.

That there is further concern that some public universities have already embarked on a program of eliminating some disciplines, departments and schools in anticipation of the proposed mergers which under the Employment Act would amount to restructuring yet the Law relating to restructuring under Section 40 of the Employment has not been complied with.

That the 1<sup>st</sup> Respondent is forcing and inducing the 2<sup>nd</sup> Interested Party to breach its contractual obligations to the Petitioner by forcing the 2<sup>nd</sup> Respondent to shut down and merge some Public Universities which may result to job losses.

That mergers of universities may bring about possible job losses by university staff in the event of re-structuring.

That moreover, any elimination of universities would result in having far flung campuses of mega universities, which would highly inconvenience students who may shuttle for different courses offered at campuses that are a far removed from one another.

That the financial savings due to the mergers is likely to be very little, while quality of university education is likely to be compromised for example, where mergers mean larger classes and fewer facilities shared by more students.

That it is also notable that from the Auditor General Report, the large public universities have higher financial deficits and challenges than the younger universities. That it is no secret that some of the old universities are insolvent. That therefore, any merger involving absorption of younger universities by the older ones will only serve to extend the current financial crisis of the old public universities to the younger universities.

That the 1<sup>st</sup> Respondent has undertaken the merger of universities without involving the Petitioner who is a key stakeholder since there is in place an existing Collective Bargaining Agreement that was painfully crafted by the Petitioners and the Employers for their members which will be adversely affected by the intended merger of universities by the 1st Respondent contrary to the law.

That the exclusion of the Petitioners in the process infringes on the rights of the University Academic Staff to Collective Bargaining rights guaranteed by the Constitution of Kenya at Article 41(5), and Article 47 on fair administrative action.

That it is imperative that the 1<sup>st</sup> Respondent carries out its mandate consultatively by involving all the requisite stakeholders such as the Petitioner since the intended merger and shutting down of Public Universities directly affects the terms and conditions of service of academic staff contrary to Article 232(1)(d), (e) and (f) of the Constitution of Kenya, 2010 which requires the involvement of the people in policy making accountability and transparency.

It is the applicant's position that the respondents have infringed or are likely to infringe the rights of the petitioner and its members under Articles 10, 22, 41, 47 and 232 of the Constitution, that the likely results of the infringement would occasion injustice to the university academic staff income and is tainted with illegality.

At the hearing of the application Mr Koceyo for the applicant reiterated the foregoing and further submitted that before the budget speech is debated and passed, the 1<sup>st</sup> respondent, the Cabinet Secretary Ministry of Education has already began closing and merging universities.

That the petitioner has not been involved. That similarly no member of the public has been involved. He submitted that in all previous policy changes in the education sector there have been consultations with stakeholders.

He submitted that sudden closure or merger of universities and/or colleges would violate the provisions of Article 41 of the Constitution, which provides for fair labour practices. That the same cannot be done without the involvement of the petitioner/applicant.

Mr. Koceyo submitted that the process has already begun as the 1<sup>st</sup> respondent has demanded that the 1<sup>st</sup> Interested Party and Vice Chancellors submit a list of universities to be closed. He submitted that under Section 22 of the Universities Act the 1<sup>st</sup> Interested Party is the body charged with giving recommendations to either revoke or vary university charters after hearing universities. That no such hearing has taken place.

He submitted that Section 26 of the Act requires the 1<sup>st</sup> Interested Party to facilitate establishment of universities in each county yet the Minister is now in the process of closing the universities without involving staff and students.

Mr. Koceyo submits that if the 1<sup>st</sup> respondent is allowed to close and merge universities without intervention of the court it will be too late to reverse the siltation and the harm will not be capable of remedy by way of damages. He submitted that the court has power to stop the breach and urged the court to stop the process.

Mr. Odukenya on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 1<sup>st</sup> Interested Party opposed the application, relying on the replying affidavit of the Cabinet Secretary, Ministry of Education, **Prof. George A. O. Magoha** sworn on 1<sup>st</sup> August, 2019 and the replying affidavit of **Prof. Mwenda Ntarangwi**, Chief Executive Officer/Commission Secretary to the 1<sup>st</sup> Interested Party sworn on 31<sup>st</sup> July 2019.

In the affidavit of the Cabinet Secretary, he avers that the Ministry of Education has received concerns about the increased number of universities, some of which have not been able to sustain their operations, the quality of degrees awarded and courses offered. He deposes that the Ministry has commenced engagement with the relevant stakeholders in higher education sector with a view to initiating reforms to ensure sustainability of public universities. That a report of the National Quality Audit Inspection identified financial management challenges that were compromising quality of university education. That pursuant to the recommendations of the National Quality Audit Inspection a Joint Working Group on Quality Assurance (JWG-QA) was set up with membership from various stakeholders in the university sector to address issues of quality assurance. That at an induction meeting held in Naivasha on 10<sup>th</sup> and 11<sup>th</sup> April 2017 members of University Councils recommended rationalisation of staff establishment to ensure retention of core staff, to rationalise and review academic programs and to focus on core business of the universities.

That the Consultative Forum on the Review of Growth and Development of Public Universities held on 15<sup>th</sup> November 2017 also recommended rationalisation of the number of public universities and staff.

The Cabinet Secretary deposes that the petition is premature as engagement of stakeholders is ongoing, that the petitioner has not demonstrated with precision how its fundamental rights and freedoms under the Constitution have been violated or threatened and that the petitioner is circumventing the Employment Act and the Labour Relations Act by relying on the constitutional provisions where there are no violations at all.

In the replying affidavit of **Prof. Mwenda Ntarangwi**, he deposes that he is not aware of a meeting or directive giving him an ultimatum to prepare a list of public universities to be merged or shut down by the 1<sup>st</sup> respondent. He deposes that the 1<sup>st</sup> Interested Party is not in breach of any Article of the Constitution or any section of the Universities Act and that it is the petitioner abusing the court process.

Mr. Odukenya submitted that the two replying affidavits are sufficient to allay any fears that merger and closure is happening. That what the Cabinet Secretary, Education and the Chief Executive Officer of the 1<sup>st</sup> Interested Party are saying in their replying affidavits is that the process is just beginning, that there is no threat of any loss of jobs, that the petitioner/applicant has not told the court that any university or campus has been identified for closure or merger. He submitted that the meeting of 19<sup>th</sup> June 2019 was according to the respondent and 1<sup>st</sup> Interested Party, to chart the way forward on to how improve quality of education in our universities. He submitted that there is no threat of violation of the petitioner's constitutional rights and stopping the initiatives will be grounding the process that has just begun.

He urged the court to decline the application.

In a brieferjoinder,er Mr. Koceyo clarified that what the petitioner/applicant is alleging is that it has not been involved. That what the respondents and Interested Party are saying is that no university has been identified for merger or closure, and no job will be lost tomorrow or in the near future. That the respondents and 1<sup>st</sup> Interested Party have not denied the allegations of petitioner, and the court should not wait for the violations to occur before acting.

### **Analysis and Determination**

It has not been contested that in the budget statement for the financial year 2019/2020 the Cabinet Secretary for National Treasury and Planning stated that –

*“University reforms are critical at this stage. We shall review all the universities’ public financial and management systems; appraise ongoing projects with a view to restructuring them: and implement radical measures that will include merger or closure of some universities and university campuses that are not able to sustain their operations against the number of students admitted or degree courses offered.”*

It is further not contested that the petitioner is registered as a union to represent the interests of lecturers in public universities and has entered into a recognition agreement and negotiated several collective bargaining agreements with the Inter Public Universities Council's Consultative Forum (IPUCCF) with respect to terms and conditions of service for its members. Who are lecturers of public universities. It is therefore within the mandate of the petitioner/applicant to discuss and to be involved in any forum in which the terms of employment, including loss or reduction of employment of its members is to be discussed.

The Cabinet Secretary, Ministry of Education has not denied that on 19<sup>th</sup> June 2019, he directed the Vice Chancellors of Public Universities and the Chief Executive Officer/Secretary of the 1<sup>st</sup> Interested Party to prepare a list of public universities to be merged and higher educational institutions to be shut down as alleged by the petitioner/applicant. On the contrary Prof. Magoha in his replying affidavit has admitted at paragraph 8 that the Ministry has commenced engagements with relevant stakeholders in the higher education sector with a view to initiating reforms to come up with ways of ensuring sustainability of public universities.

As pointed out by the petitioner/applicant, it is a major stakeholder but has not been included in the initiatives of the 1<sup>st</sup> respondent that are referred to at paragraph 8 of Prof. Magoha's replying affidavit.

Prof. Mwenda Ntarangwi has also admitted at paragraph 5 of his replying affidavit that the 1<sup>st</sup> respondent met the Vice Chancellors of Public universities on 19<sup>th</sup> June 2019, where he was invited, to discuss improvement of management of public universities.

Prof. Magoha in his replying affidavit has detailed initiatives taken by the 1<sup>st</sup> respondent through the National Quality Audit Inspection, Joint Working Group on Quality Assurance (JWG-QA), members of University Councils and the Consultative Forum on the Review of Growth and Development of Public Universities, all of which he states involved stakeholders, but in which the petitioner/applicant was not included as a stakeholder.

In the present application, the petitioner/applicant has sought conservatory orders against the respondents implementing the budget statement for 2019/2020 on merging and shutting down of public universities without inclusion of the petitioner's input pending hearing and determination of the petition. In the petition, the petitioner/applicant seeks the following orders –

- a) A Declaration that the 1<sup>st</sup> Respondent's intended merger and shutting down of Public Universities is un-constitutional, null and void in relation to Articles 10, 41, 47, 118 and 232 of the Constitution, the Universities Act No. 42 of 2012 and the Employment Act 2007.
- b) A Declaration that the Respondents have infringed on the Petitioners Constitutional rights under Articles 10, 41, 47, 118 and 232 of the Constitution, 2010.
- c) A Permanent Injunction be issued against the 1<sup>st</sup> Respondent whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the intended merger of Public universities and shutting down of campuses without the inclusion of the Petitioners input.
- d) Any other or further order the Court may deem fit to grant in the circumstances.
- e) Interest at Court rates on (c) above

At this point therefore all I have to consider is whether the petitioner/applicant has persuaded me that it is deserving of the interlocutory orders preserving its interest pending the hearing of the petition.

In the case of **Ezra Chiloba -V- Wafula Wanyonyi Chebukati and 7 Others (2018) eKLR**, Radido J. set out the principles to be considered in the grant of interlocutory conservative orders thus –

*The test for grant of conservatory orders was outlined by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others (2014) eKLR**, and the test has been explained in several decisions of the High Court and Court of Appeal (see **Lipisha Consortium Ltd & Ar. v Safaricom Ltd (2015) eKLR**.*

*The Supreme Court laid the test thus –*

*“Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within 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 merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*

*In summary, a party seeking conservatory orders should demonstrate, a prima facie case with a likelihood of success; prejudice likely to be suffered if the orders are not granted; grant of the orders would enhance constitutional values and objects; that a Petition would be rendered nugatory if the orders are declined and that public interest favours grant of the orders (see **Lipisha Consortium Ltd & Ar. v Safaricom Ltd (2015) eKLR**.*

*This Court is therefore enjoined to consider whether the case material placed before it by the applicant fall within the threshold principles set out above to warrant grant of conservatory order(s) as sought.*

*And because the Petition is still pending hearing on the merits, the Court cautions itself that it must avoid making definitive findings on the facts or the law before hearing full addresses, unless it is absolutely necessary.”*

### **Prima Facie Case**

In the present application the applicant has demonstrated that it is stakeholder and has been left out in the consultations on the budget statement as commenced by the 1<sup>st</sup> respondent thus it has established a prima facie case with a likelihood of success against the respondents. It has further demonstrated that it is probable that the discussions on the budget speech may lead to the closure or merge of certain universities and or colleges with the consequence of loss of employment for some of its members who are lecturers in the campuses and colleges. It has further established that should the orders not be granted its rights and the rights of its members under Articles 41, 47 and 232 being fair labour practice, fair administrative action and involvement in the process of policy making are likely to be infringed and should this happen damages will not be an adequate remedy.

For the foregoing reason it is my finding that the applicant has met the threshold for grant of conservatory orders as sought.

### **Orders**

For the foregoing reasons I make the following orders –

**That a Conservatory Order be and is hereby issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the budget statement for the year 2019/2020 on merging and shutting down of Public Universities without the inclusion of the Petitioner’s input pending the hearing and determination of this petition.**

Costs of the application shall be in the cause.

For avoidance of doubt, the court clarifies that it has not stopped the implementation of the budget statement of merger or shut down of public universities. What it has stopped is the same being down without involvement of the petitioner.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF AUGUST 2019**

**MAUREEN ONYANGO**

**JUDGE**