



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 512 OF 2019

PROFESSOR FREDRICK OTIENO.....CLAIMANT

V

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY.....2ND RESPONDENT

MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY.....3RD RESPONDENT

DR. JEREMY MIRITI BUNDI.....4TH RESPONDENT

RULING

1. Prof Fredrick Otieno (applicant) moved the Court on 7 August 2019 seeking orders

1. ...

2. **spent**

3. **THAT** pending the hearing and determination of the Statement of Claim, the Honourable Court be pleased to issue an interim order of injunction to restrain the Respondents from conducting any competitive recruitment process, or appointing howsoever any person in the position of the Vice Chancellor of the 3rd Respondent.

4. **spent**

5. **THAT** pending the hearing and determination of the Statement of Claim, the Honourable Court be pleased to grant an order staying the decision contained in the letter of 29th November 2018.

6. **THAT** this Honourable Court be pleased to issue such further orders as it may deem fit.

7. **THAT** the costs of this application be provided for.

2. When the application was placed before the Court at the first instance, it directed that the Respondents be served for *inter partes* hearing on 19 September 2019.

3. Dr Jeremy Bundi (4th Respondent) who is currently the Chairperson of the Council of Masinde Muliro University of Science and Technology (3rd Respondent) swore and filed a replying affidavit in opposition to the application on 16 September 2019 while Prof George Magoha, currently the Cabinet Secretary, Education (2nd Respondent) filed his replying affidavit on 17 September 2019.

4. When the application came up for *inter partes* hearing, the Court declined to entertain at that juncture an application by the Universities Academic Staff Union and Kenya Universities Staff Union to be joined into the proceedings as Interested Parties, thus paving way for the hearing to proceed.

Background

5. The applicant was appointed as the Vice Chancellor of the 3rd Respondent through a letter dated 17 October 2013 for a term of 5 years but renewable. The effective date of the contract was stated as 1 December 2013.
6. On 29 May 2018, the applicant applied to the Council of Masinde Muliro University of Science and Technology to consider renewing his contract. The application was addressed to the 4th Respondent.
7. The Council of the University met on 26 July 2018 to consider the applicant's request for renewal, amongst other agenda.
8. The Council resolved not to renew the contract.
9. Consequently, the 4th Respondent wrote to the Cabinet Secretary on 15 August 2018 advising that the Council had resolved that the applicant's contract should not be renewed and seeking concurrence to commence the recruitment process for a new Vice Chancellor.
10. The Cabinet Secretary gave a nod for the recruitment of a new Vice Chancellor through a letter dated 28 November 2018.
11. The applicant somehow got hold of a copy of the 4th Respondent's letter to the Cabinet Secretary and on 17 August 2018, he wrote to the Cabinet Secretary appealing against the recommendation not to renew his contract.
12. On the same day, the applicant wrote to the 4th Respondent decrying the introduction of a letter from the Ethics and Anti-Corruption Commission after the end of the evaluation process, and which letter he alleged was the basis of the recommendation not to renew his contract.
13. On 29 November 2018, the 4th Respondent formally wrote to the applicant to notify him that his contract would not be renewed and that he should arrange to hand over to the person appointed as acting Vice Chancellor.
14. The position of Vice Chancellor was thereafter advertised by the Public Service Commission.
15. The applicant was one of those who applied and he was shortlisted to appear for an interview on 5 August 2019.
16. Thereafter the applicant moved the Court on 7 August 2019, alleging that the non-renewal of his contract amounted to unfair and discriminatory termination of employment, and breached his constitutional and statutory rights.
17. The applicant sought in the Statement of Claim, primarily reinstatement and/or in the alternative compensation and terminal dues.

Applicant's contentions in the application

18. The applicant in seeking the orders outlined in paragraph 1 above contended that the process to recruit his successor was in violation of section 35 of the Universities Act, 2012 because the mandate was reposed in the Cabinet Secretary but after a recommendation by the Council of the 3rd Respondent; that his contract and the applicable statutes provided that his contract would be renewed upon satisfactory performance, which condition he met thus creating a legitimate expectation of renewal; that the Council of the 3rd Respondent used an unlawful letter to resolve not to renew the contract without affording him an opportunity to make representations thereto; that the Ethics and Anti-Corruption Commission subsequently cleared him and that his services as professor of civil and structural engineering were concurrently terminated with his vice-chancellorship without due process despite the roles being separate.

2nd Respondent's rebuttals

19. The Cabinet Secretary took the position that it was the function of the University Council to renew or not renew the applicant's contract and that he had no role to play in the termination of such contract, and that pursuant to the Universities Act as amended, it was Public Service Commission (1st Respondent) to conduct the recruitment of a Vice chancellor and that the applicant had not demonstrated how his rights had been violated.

3rd and 4th Respondents' rebuttals

20. These Respondents relied on a replying affidavit deposed by the 4th Respondent wherein it was asserted that the application was meritless and an abuse of the court process.

21. It was also deposed in the replying affidavit that the applicant had never been appointed as a professor of civil and structural engineering and if there was such an appointment, it was fraudulent and irregular; that renewal of the applicant's contract as vice chancellor was not automatic; that an amendment to the Universities Act which came into force on 18 January 2019 granted the Public Service Commission (1st Respondent) a role in the recruitment of vice chancellors of public universities; that the applicant applied and was shortlisted for the position of vice chancellor and could not turn round and purport the process was unlawful, and the court challenge was an afterthought.

Evaluation

22. The Court has keenly considered all the material placed before it.

23. The principles a party should satisfy before a Court grants an order of temporary injunction are well known. The principles were set out in the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696.

24. The applicant was in a contractual relationship with the 3rd Respondent and he contends that he had a legitimate expectation that his contract would be renewed for a further 5 years.

25. Granting an order staying the letter of 29 November 2018 which informed the applicant that his contract would not be renewed, would in the view of the Court, be tantamount to reinstating the applicant to a terminated contractual relationship at an interlocutory stage.

26. Reinstatement, in ordinary employment, such as is presented here, is a final remedy, granted after a hearing on the merits.

27. It is not lost to the Court that section 49(1) of the Employment Act, 2007 has provided for an array of remedies including reinstatement, which would effectively address the violations, wrongs or injuries alleged to have been occasioned to the applicant.

28. The Court has also noted that the applicant came to Court to challenge a decision taken over 9 months earlier, and only after he had participated in the process to recruit his replacement. There was no cogent reason given why the Court was not approached earlier. The delay was, in the view of the Court, inordinate.

29. Further, the applicant did not sufficiently explain why he decided to challenge his termination after deciding to participate in the recruitment process, and only 2 days after he was set to appear before the recruitment Commission for an interview.

30. All in all, it is the view of the Court that the applicant's primary cause of action being anchored on an employment contract, it would not be an arduous task to compute precisely the amount of damages the applicant would be entitled to if the Court were to eventually find in his favour.

Conclusion

31. In the final result, the Court comes to the conclusion that the applicant has not satisfied the test for the grant of the interim reliefs sought in the motion under discussion.

32. The motion is dismissed. Costs in the Cause.

Delivered, dated and signed in Nairobi on this 23rd day of October 2019.

Radido Stephen

Judge

Appearances

For applicant Mrs Arwa/Mr Change instructed by Arwa & Change Advocates

For 1st and 2nd Respondents Mr. Odukenya, Litigation Counsel, Office of the Attorney General

For 3rd and 4th Respondents Mr. Kitiwa instructed by Kitiwa & Co. Advocates

Court Assistant Lindsey