



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 195 OF 2019

(Originally Nairobi High Court Petition No. 69 of 2019)

IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 27, 28, 47, 94, 165, 258 & 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 3, 4, 5, 23, 29 & 70 OF THE UNIVERSITIES ACT, 2012

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 3, 4, 5, 22(1) & (24) OF THE STATUTORY INSTRUMENTS ACT, 2013

IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY OF THE PURPORTED "HARMONISED CRITERIA AND GUIDELINES FOR APPOINTMENT AND PROMOTION OF ACADEMIC STAFF IN UNIVERSITIES IN KENYA" DATED 27TH OCTOBER 2014.

BETWEEN

ADRIAN KAMOTHO NJENGA.....PETITIONER

v

CABINET SECRETARY, MINISTRY OF EDUCATION,

SCIENCE AND TECHNOLOGY.....1ST RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....2ND RESPONDENT

RULING

1. The High Court transferred this Petition to this Court on 23 October 2019 on the ground that the factual and legal issues raised in the Petition were similar to the Issues raised in Petition No. 43 of 2019, *Universities Academic Staff Union v Cabinet Secretary, Education & Commission for University Education* which was pending before this Court.
2. Before the transfer order, the Universities Academic Staff Union (UASA) had applied to the High Court to be joined into the Petition as an Interested Party. The High Court was yet to determine the application for joinder when it ordered the transfer.
3. At the appearance where the transfer was ordered, the 2nd Respondent drew the attention of the High Court to the fact that UASU had commenced legal proceedings against the Cabinet Secretary, Education and the Commission University Education before this Court.
4. Both the Petitioner and the 2nd Respondent indicated to the High Court that they would not object to the application by UASU for joinder as an Interested Party because according to them UASU was a relevant party.
5. The 1st Respondent, however, indicated an intention to oppose the joinder of UASU to the proceedings.
6. Without determining the joinder application, the High Court, in a brief Ruling directed that the Petition be transferred to this Court because it raised similar factual and legal questions to Petition No. 43 of 2019, *Universities Academic Staff Union v Cabinet Secretary, Education & Ar* already adverted to.
7. When the Petition was placed before this Court on 24 October 2019, the Court requested the parties to make brief submissions on the question of whether this Court had jurisdiction because none of the substantive litigants was in an employment relationship pursuant to

section 12 of the Employment and Labour Relations Court Act or any relationship as envisaged under the Labour Relations Act.

8. The Petitioner, the 2nd Respondent and UASU (the proposed Interested Party) readily agreed and submitted that this Court had no jurisdiction because there was no employer/employee relationship between the Petitioner and the Respondents and/or a labour relationship as contemplated by section 12 of the Employment and Labour Relations Court Act, or the Labour Relations Act.

9. The State Counsel representing the 1st Respondent did not make any submissions on the ground that her instructions were limited.

10. The Court has perused this Petition and the Petition which has been pending before this Court. It is correct as submitted by the parties that both factual and legal issues underpinning both Petitions are the same.

11. This Court draws its jurisdiction from the Employment and Labour Relations Court Act, the Employment Act, the Labour Relations Act, the Labour Institutions Act and any other written law vesting it with jurisdiction.

12. Section 12 of the Employment and Labour Relations Court Act serves as one of the main legal anchors on jurisdiction for this Court, and it vests jurisdiction on this Court where there is both *party standing/locus* and *subject matter/ locus* within the employment and labour relations relationship.

13. The state of pleadings as were before the High Court at the time of transfer of the Petition to this Court did not on the face thereof suggest any *party standing/locus* anchored on an employment relationship between the Petitioner and the Respondents.

14. Equally, there was no suggestion on the face of the pleadings that there was a *trade dispute* as contemplated by the Labour Relations Act between the parties (UASU had not even been admitted as an Interested Party before the transfer).

15. Admittedly, the *subject matter* of this Petition is one that directly affects the terms and conditions of service of academic staff in universities, both an employment and labour dispute and therefore it cannot be denied that UASU has an identifiable and legal interest in the outcome of the Petition.

16. However, UASU had already launched a legal challenge in Petition No. 43 of 2019 and the Petition was on the penultimate stretch and parties were expected to make oral highlights of their submissions on 24 October 2019 (which they did) and judgment has been reserved.

17. The record in this file also indicates that the High Court had on 26 June 2019 directed the parties to file and exchange submissions, and on 7 October 2019 directed that the submissions be highlighted on 17 December 2019. This Petition was also on the homestretch.

18. In the circumstances was it prudent to transfer this Petition to this Court?

19. *Public policy and legal certainty* would require and demand that disputes are instituted, heard and determined in one proper forum in order to avoid possibilities of inconsistent decisions.

20. In the humble view of this Court, the *public policy* and need for *legal certainty* must be subject to the Court having jurisdiction. Before a court assumes jurisdiction, it must locate the jurisdiction in some written law.

21. The Constitution has expanded the limits of *locus standi* to an extent which could not have been imagined over a decade ago in this jurisdiction.

22. In this case, the Court finds that it has no jurisdiction and therefore directs that the Petition be transferred back and be placed before the High Court on 17 December 2019 as had earlier been scheduled.

23. Before penning off, the Court notes that the question of the propriety of a party filing a Petition in the guise of public interest where a party directly affected has already instituted and/or may institute legal proceedings to advance its rights and interests may require addressing through appropriate legal instruments.

24. No order as to costs.

Delivered, dated and signed in Nairobi on this 8th day of November 2019.

Radido Stephen

Judge

Appearances

For Petitioner in person

For 1st Respondent Ms. Wangeci, State Counsel, Office of the Attorney General

For 2nd Respondent

Mr. Maina instructed by Karanja-Njenga & Co. Advocates

For Proposed Interested Party

Ms. Maina instructed by Koceyo & Co. Advocates

Court Assistant

Lindsey