



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 39 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 11th December, 2019)

UNIVERSITIES ACADEMIC STAFF

UNION (UASU) (KENYATTA UNIVERSITY CHAPTER).....PETITIONER

-VERSUS-

KENYATTA UNIVERSITY COUNCIL.....1ST RESPONDENT

PROF. SHEM E. MIGOT ADHOLLA2ND RESPONDENT

AND

PROF. FATUMA CHEGE.....INTERESTED PARTY

RULING

1. The Petitioner, Universities Academic Staff Union (UASU) (Kenyatta University Chapter) filed a Petition together with a Notice of Motion application both dated 29th January 2019 against the Respondents, Kenyatta University Council and Prof. Shem Migot Adholla. Prof. Fatuma Chege is enjoined as an Interested Party and the supposed successful candidate recruited as the Deputy Vice Chancellor (DVC)–Administration, Kenyatta University.

2. In the Application, the Petitioner seeks for orders:-

a) Spent.

b) THAT pending the interparties hearing and determination of this Application and/or Petition to issue a temporary order of prohibition prohibiting the Respondents whether by themselves or any of their employees, agents, servants or any other person claiming to act under their authority from proceeding to give effect in any way whatsoever to the intended appointment of the Interested Party to the position of the Deputy Vice Chancellor Administration - Kenyatta University any time from now.

c) THAT pending the interparties hearing and determination of this application and/or Petition

herein the Honourable Court be pleased to issue a conservatory order staying the assumption of office by the Interested Party to the position of the Deputy Vice-Chancellor Administration - Kenyatta University.

d) THAT pending the interparties hearing and determination of this Petition and/ or the Petition herein the Honourable Court be pleased to issue a temporary order prohibiting the Respondent from acting in any way whatsoever to give effect to the resolutions of the successful candidate to take the position of the Deputy Vice Chancellor Administration - Kenyatta University.

e) THAT consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or in favour of justice.

f) THAT costs of this application be provided for.

3. The Application is based on the grounds that the Petitioner/Applicant seeks to protect the public from the discriminatory, oppressive and unreasonable actions of the Respondents.

4. That if the impugned interviews are not suspended to allow the Court time to determine their validity, the Application and Petition will be rendered nugatory more so if the orders sought are not granted.

5. Further, that the Respondents and Interested Party will suffer no prejudice if the said orders are granted and that this Court has unfettered powers and jurisdiction to grant the orders sought.

6. The Application is supported by the affidavit of Dr. George Lukoye Makokha who is the Chapter Secretary General of the Applicant union. He avers that the recruitment process was not transparent and lacked stakeholder participation having been initiated by an advertisement in the print media on the 4th and 11th July, 2018.

7. That there was no public disclosure in any print media or Kenyatta University Website on the candidates who had applied for the position of DVC (Administration) for concerned stakeholders to raise any objections or concerns.

8. That members of the Applicant union who are key stakeholders to be affected by actions and decisions taken by the appointed DVC (Administration), were denied participation in the whole recruitment process in violation of the Constitution.

9. That the appointment of the DVC, Kenyatta University failed to consider the constitutional requirement of regional balance and also equitable balance of top management positions within the various University schools which is clearly biased and skewed towards one ethnic group.

10. He avers that both the Application and the Petition seek to implement and defend the 2010 Constitution of Kenya including the enjoyment of fundamental rights and freedoms guaranteed by the Constitution and that he has a right of access to this Court to safeguard his and others' rights, which are in danger of further infringement.

11. That unless the application is urgently heard and determined, the Applicant and the people of Kenya will suffer great loss and damage should the DVC (Administration), Kenyatta University be appointed without considering public interest. He urges this Court to determine the issues to ensure protection of court orders, statute and the Constitution and for the law to henceforth be applied with certainty.

12. The facts as in the Petition are that on 11/07/2018, the 1st Respondent placed an advert in the local dailies inviting applications from qualified persons to fill the vacant position of Deputy Vice Chancellor (Administration) for Kenyatta University. It however did not advertise names of the applicants who had applied for the position, failed to publish the date, time and venue for interviewing the shortlisted candidates and allegedly secretly invited the shortlisted candidates for the interviews.

13. The Petitioner wrote to the 1st Respondent protesting the criteria for shortlisting and failure to be transparent. It has emerged that the 1st Respondent interviewed the shortlisted candidates on 14/01/2019 and forwarded the name of the Interested Party to the Ministry of Education Science and Technology for appointment.

14. The Petitioner avers that this court should move with speed to protect the rule of law and constitutionalism in general and insist that the proper procedure must be followed in appointing the DVC (Administration) for Kenyatta University.

15. The Petitioner particularises the violation of the Constitution in the Petition and avers that the Respondents violated the principle of the rule of law under **Article 10(2) (a)** by proceeding to recruit contrary to the agreed and published criterion and further violated the principle of transparency and accountability under **Articles 10(2) (c) and 232(e) and (f)** by failing to publish the date, time and the venue of interviewing the shortlisted candidates.

16. That the Respondents also violated the right to fair administrative action under **Article 47** by engaging in administrative action that is not expeditious, efficient, lawful, reasonable and procedurally fair.

17. It further avers that the 1st Respondent violated the principle of equality before the law and the right to fair labour practices under **Articles 27** and **Article 41(1)** respectively by favouring and shortlisting unqualified persons; it violated **Article 73(2)(a)** by shortlisting unqualified persons contrary to the guiding principles of leadership and integrity that requires selection to be on the basis of personal integrity, competence and suitability; it violated **Article 232(l) (d), (e) & (f)** by failing/refusing to provide a stakeholders forum for the shortlisted candidates to present their vision for the University; and violated **Article 259(1) and (3)** by setting out to defeat the purposes, values and principles of the Constitution.

18. The Petitioner prays for:-

i) A DECLARATION THAT

a) The 1st and 2nd Respondents have violated the Constitution of Kenya.

b) The recruitment of persons to the office of the Deputy Vice Chancellor (Administration) for Kenyatta University must be done strictly according to the agreed criterion and as advertised to the public.

c) According to the agreed and published criterion, the Interested Parties are not qualified for appointment to the office of the Deputy Vice Chancellor (Administration) of Kenyatta University.

d) The shortlisting of unqualified candidates for interview for the position of the Deputy Vice Chancellor (Administration) of Kenyatta University is invalid, null and void ab initio.

ii) AN ORDER

a) Quashing the intended appointment of the Interested Party as candidate for appointment to the office of the Deputy Vice Chancellor Administration for Kenyatta University.

b) Prohibiting the recruitment of the Interested Party as the Deputy Vice Chancellor Administration for Kenyatta University.

c) Compelling the 1st Respondent to provide a stakeholders forum for the shortlisted candidates to represent their vision for the university.

d) Compelling the 1st respondent to publish the date, time and venue for interviewing the intended Shortlisted candidates.

e) The costs of this suit be provided for.

f) Any other relief the court may deem just to grant.

19. In the affidavit supporting the Petition, Dr. George Lukoye Makokha avers that he is aggrieved that the 2nd Respondent who is the Chairman and member of the 1st Respondent participated in the process of recruiting the VC for Kenyatta University.

20. He is further aggrieved that the 1st Respondent did not conduct the said recruitment of the VC, Kenyatta University strictly in accordance with the agreed and published criterion and that the 1st and 2nd Respondents operated outside the law to achieve an undisclosed collateral purpose. He annexes a bundle marked exhibit *GLM-1* in support of his averments.

21. In response to both the Application and Petition herein, the Respondents filed a Replying Affidavit dated 14/02/2019 sworn by the VC of Kenyatta University, Prof. Paul Wainaina who avers that the Petition does not demonstrate a prima facie case with any likelihood of success to warrant grant of the orders sought in the Petitioner's Application.

22. That the Petition is fatal as it raises issues, which cannot be categorised as constitutional questions for determination by this Court. He contends that the recruitment process was transparent and competitive in accordance with the Universities Act and that the 14 applicants who applied for the position of DVC (Administration) comprised of numerous ethnic groups of Kenya.

23. He avers that on 30/11/2018 at the Kenya School of Monetary Studies, the Shortlisting Panel of Council considered the applicants on account of their key qualifications and experience including: academic qualifications, administrative experience, research publications, completed supervisions, seminars and conferences organized, structural, legislative and regulations of education, transformative leadership and compliance with Chapter 6 of the Constitution.

24. He further avers that the shortlisting committee then recommended 5 candidates to the 1st Respondent being Prof. Waceke Wanjohi, Prof. Fatuma Chege, Prof. James Biu Kung'u, Prof Caroline Langat Thoruwa and Prof. Esther Magiri.

25. Four candidates were interviewed by the 1st Respondent with Prof. Esther Magiri being unable to attend and that the council had agreed that the pass mark for candidates would be 65%. That as per the scoring system, it forwarded the names of **Prof. Fatuma Chege, Prof. James Biu Kung'u and Prof Caroline Langat Thoruwa** to the CS Education for consideration.

26. That vide a letter dated 21/01/2019, the CS Education appointed Prof. Fatuma Chege to the position of DVC (Administration) for a period of 5 years and which appointment was accepted by the Interested Party vide a letter dated 26/01/2019.

27. He contends that since the CS Education is not a party to the proceedings herein as per **Section 35(1) (v) of the Universities Act 2012**, the Petition is defective.

28. Further, the Petition does not demonstrate with a reasonable degree of precision, the provisions of the constitution violated or threatened to be violated and the manner of violation and has thus not met the threshold established in **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154.**

29. That the questions posed for determination by this court are best suited for judicial review and that the instant Petition and application are a desperate attempt by the Applicant/Petitioner to use the court process to obtain interim orders that would amount to acceding to the main prayers sought in the Petition.

30. That the Respondents pray for both the Application and Petition to be dismissed with costs to them, averring that the orders sought in the Petition and the Notice of Motion have been overtaken by events.
31. The Interested Party also filed a replying affidavit dated 12/03/2019 opposing both the Application and Petition herein and averring that she has been working at Kenyatta University since July 2017 and is currently the Chairperson of the Board of the Kenya School of Law.
32. That she has been serving as the DVC (Administration) of Kenyatta University in an acting capacity since 01/11/2017 until 21/01/2019 when the CS Education appointed her to that position on a substantive basis following a competitive recruitment process.
33. That therefore when the Petition herein was filed on 31/01/2019, the recruitment process was already finalised and she had already been appointed and accepted appointment as DVC (Administration).
34. That consequently, the Petition has been overtaken by events and the prayers sought do not lie and that she wholly associates with the depositions made in the replying affidavit of Prof. Paul Wainaina.
35. She avers that she submitted her application for the position of DVC-Administration, received a letter signed by the 2nd Respondent dated 17/12/2018 inviting her for an interview for the said interview and was finally interviewed on 14/01/2019 between 2.00 pm and 4.00pm by a panel of the 1st Respondent's Council.
36. That she scored 70 with Prof. James Biu Kung'u and Prof Caroline Langat Thoruwa scoring 69 and 58 respectively. She is surprised that whereas there were several applicants for the said position and the abovementioned three names of shortlisted candidates having been forwarded to the CS, the Petitioner joined only her as an Interested Party in making demeaning and unsubstantiated allegations about the recruitment process.
37. That she is deeply aggrieved and scandalized by the Petitioner's averments that she is unqualified and her appointment would gravely prejudice public interest because her qualifications are well known as shown in the copy of her CV annexed in the bundle marked **FC7**.
38. The Interested Party further avers that there is no requirement under the applicable laws and regulations for public disclosure in the print media/ Kenyatta University Website on the applicants or shortlisted persons for the position of DVC-Administration.
39. That there is further no requirement for union members or other stakeholders to participate in the recruitment process and that on the contrary, the University Council and the CS act as guardians of public interest in the recruitment process.
40. That national diversity cannot trump qualifications and merit of the applicants to hold a specific position and believes the Respondents respected and enforced these requirements since she comes from a religious affiliation with very little representation.
41. That her understanding of the Petitioner's affidavit is that some of its members were opposed to appointment of any qualified Gikuyu despite the fact that members of this community were not precluded from applying.
42. She annexed **FC8** which is a copy of her PhD degree certificate from the University of Cambridge which was a major qualification for candidates applying for DVC-Administration. She beseeches this Court to dismiss the Petition and Application dated 29/01/2019 and to defend the right of all qualified persons to public positions they are qualified to hold.
43. The Petitioner then filed a Supplementary Affidavit dated 06/03/2019 sworn by Dr. George Lukoye Makokha who avers that the names of the first three qualified potential appointees were also not publicised before they forwarded to the CS even after they had raised concerns on the process.

44. That some requirements which were not in the advertised criterion were introduced for scoring during the shortlisting process which disadvantaged some shortlisted candidates who were locked out.

45. That the third candidate, Prof Caroline Thoruwa did not meet the 65% threshold agreed as the pass mark to be considered an appointee yet her name was forwarded to the pointing authority.

46. That the recruitment process was therefore flawed from the beginning and the results are a nullity and that the notification of the CS Education in the appointment of the Interested Party cannot regularise the flawed process.

47. It denies that the prayers sought in the Application and Petition are overtaken by events and avers that since the appointment of the Interested Party was irregular, it can only be challenged as has been sought in the Petition no matter the stage such actions are discovered.

Submissions as highlighted in Court

48. Ms. Guserwa for the Petitioner/Applicant stated they have summarised their arguments in the submissions filed on 25/06/2019 which they wished to adopt on behalf of the Petitioner.

49. She stated that this matter touches on recruitment of a Senior Office holder to Office of the DVC (Administration) by the Respondents, which the Petitioner terms as flawed because various sections of the law were violated in the process.

50. That **Section 35 of the Universities Act as read together with Section 10 of Public Service Act** guides the recruitment of a public servant and in addition, constitutional requirements are as under **Article 10** that deals with national values and principles of governance and **Articles 73, 232 and 259**.

51. That the recruitment should be transparent and open to the public but the Respondents failed to publish the names of the applicants and further failed to give to the public, names of the shortlisted candidates who included the Interested Party. That these names have since resurfaced at *para 23 of the Interested Party's Affidavit* sworn on 12/03/2019 and filed in Court on 15/03/2019.

52. She stated that the Petitioner asked the CS about the issue of interviews but their protests were ignored and recruitment went on with the Interested Party being appointed. That the result of a flawed process is a wasted effort and the process must start afresh.

53. She contended that people must interrogate the ability and leadership skills of the Interested Party before she is appointed and asked the court to look at the authorities they had filed.

54. Mr. Kibe for the Respondents stated he had seven points to raise as follows:-

1. In the replying affidavit referred to by the VC, he sets out the process used to appoint the Interested Party which culminated in her appointment on 21/01/2019. On the basis of authorities cited, the process met all the requirements of law with regard to rationality and competitive recruitment.

2. From correspondence of the Petitioner, they knew the process was taking place, people who applied and candidates shortlisted. People who participated have not taken issue with the process and there was no evidence of fundamental nature in the process.

3. The letter of appointment is dated 21/01/2019 and the Petition was filed on 29/01/2019 and so the Petitioner was aware the Interested Party had been appointed and hence included her as an interested party. The Petitioner was further aware that the process had concluded.

4. On the issue of qualifications, the affidavit of the Interested Party is clear about the qualifications and how she was ranked and from the qualifications and process, she was the best person to be appointed.

5. On facts in court, the Respondents are dealing with the appointment by the CS vide a letter of 29/01/2019 and which appointment has not been challenged. The CS is also not a party to these proceedings and even if the Petitioner was excused for coming to court without challenging appointment of the Interested Party, after service of the replying affidavit, these proceedings should proceed on actual facts to ensure the real dispute proceeds.

6. It is the Respondents' submission that all prayers deal with the process but the Petitioner seeks substantive prayers.

7. On JR, the Respondents submit that where entirely the question relates to process then the procedure by law is JR. He urges the Court to disallow the Petition with costs.

55. Mr. Nyawara for the Interested Party stated they oppose the Application and that what is in the Petition is an allegation that there was no public participation in the process. He referred the court to the supporting affidavit by George Makokha and *Folio 3 to 13 of the replying affidavit*, which is an exchange of correspondence between the union and 1st Respondent.

56. He stated that the Petitioner was aware of the process and that *Folio 8* is a long response by Prof. Shem explaining the position with subsequent letters being well documented. That the process was also well known by the union and its members and there can therefore be no claim that there was no public participation. That *page 5 of the replying affidavit of the Interested Party* is a letter of 14/01/2019, which shows the union is privy to what is happening.

57. Mr. Nyawara further stated that the complaint is about ethnicity and that the Constitution demands that for one to allege breach of a right, the breach must be well explained.

58. That the Petitioner were also aware of the selection criteria used by the Respondents and that the union should not be interested in such process but should be dealing with welfare of their members. He urged the Court to disregard the complaints and allow recruitment of the Interested Party to continue.

59. Ms. Guserwa for the Petitioner/Applicant responded that the Petitioner fits within parties that can challenge violation of Constitution vide **Article 22 of the Constitution** and that it is not just about qualifications but about qualifications as compared to who.

60. That they do not know the qualifications of those who applied and who was shortlisted and contended that there is a difference between an appointment and validity of the appointment.

61. In its submissions, the Petitioner submits that it has made out a case for issuance of orders sought in the Petition and the Application so as to correct the flawed actions of the Respondent and that in urging the Court to grant the said orders, it has made reference to the following case law:-

a) JR No. 506 of 2017: Thadayo Obanda –v- The University of Nairobi and the Cabinet Secretary Ministry of Education – The Court issued an order of certiorari to quash the appointment of the chairperson and members of the University of Nairobi who had been appointed irregularly and unconstitutionally.

b) JR No. 196 of 2015: Tom Odoyo Oloo –v- The Hon. Attorney General, The Anti-Counterfeit Agency & 2 others – the High Court issued an order of certiorari against the appointment and gazettement of the interested party as the Chairman of the Board of Directors of the 2nd respondents. The trial court went further to state that the court was not direct the Respondents on the manner in which they ought to exercise their discretion and powers.

62. The Respondents filed their list of Authorities on 16/09/2019 dated 13/09/2019 and annexed two authorities: **Consumer Federation of Kenya (COFEK) v Attorney General & 2 others [2012] eKLR and Commissioner for Human Rights & Justice v Kenya Maritime Authority [2018] eKLR.**

63. The Interested Party filed her Submissions dated 09/09/2019. She submits that the principles governing the grant or denial of the injunctive orders were laid down in the case of **Giella -v- Cassman Brown (1973) E.A 358** where the Court held that:-

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is what an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above two requirements, then it will decide the application on the balance of convenience.”

64. That in this instant case, there is no prima facie case with a possibility of success as the Petitioner has only raised issues but not given particulars and/or instances of violation of any rights.

65. That she was also a member of the Petitioner union and that the Petitioner has not stated that it brought the Petition on behalf of any of the candidates. That a prima facie case is one which can be established if the evidence led in support of the same was believed.

66. That for a prima facie case to be found it would mean that the Court should be satisfied there is a serious question to be tried at the hearing and there is a probability of the Applicant obtaining the relief at the conclusion of the trial on basis of the material placed before the court. She cites the case of **Mrao Ltd -v- First American Bank of Kenya Ltd & 2 Others [2003]** where Bosire JA while considering what constitutes a prima facie case in civil cases observed:-

“So what is prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

...It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

67. She submits that the court cannot “***stop her intended appointment or her assumption of office***” and that despite this fact being known to the Petitioner, it has not sought to amend its prayers in the application.

68. That the Court of Appeal at Nairobi in **Eric V.J. Makokha & 4 others v Lawrence Sagini & 2 others [1994] eKLR** held that Courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes.

69. That the Court in **Nicholas Mahimu v Ndima Tea Factory Ltd & another [2009] eKLR** held that the orders sought in that case if so granted would have no effect as the action had already been done.

70. She further cites the case of **Mussolini Kithome v Attorney General & another [2016] eKLR where the High Court referred to the case of B vs. Attorney General [2004] 1 KLR 431** whereby Ojwang J as he then was expressed himself that:-

“The Court does not, and ought not to be seen to make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

71. I have considered the averments of the Parties herein. The main issue for this Court to determine is whether there is a prima facie case established by the Applicants to warrant issuance of the orders sought.

72. From the submissions made, the Applicants contend that the process of recruitment of the Interested Party was shrouded in mystery as the names of Applicants and shortlisted candidates was not published and neither was the time of interview published.

73. The Respondents have not denied this contention by the Applicants. Without going into details of qualification of the Interested Party, on the face of it, there are issues that need to be clarified to explain the process leading to the appointment of the Applicants. These issues can only be resolved in the main Petition.

74. In order to preserve the substratum of this petition, I will confirm Interim orders in force pending hearing and determination of this Petition.

75. Costs in the Petition.

Dated and delivered in open Court this **11th day of December, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muyiana holding brief Kibe Mungai for Respondent – Present

Ndegwa holding brief Guserwa for Petitioner – Present

Miss Mburu holding brief Nyawara for Interested Party – Present