



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE NO 11 OF 2019**

**JULIUS SINGOEL.....PLAINTIFF**

**VERSUS**

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

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

**THE PUBLIC SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**J U D G E M E N T**

1. The petitioner herein stated among others that: -

(i) THAT the 3<sup>rd</sup> Respondent scheduled and invited interviews for the positions of Principal, Deputy Principal- Academic and Student Affairs and deputy Principal – Administration and Finance for the Bomet University College a duly constituent college of Moi University, Eldoret whose Council is the 5<sup>th</sup> Interested party 4<sup>th</sup> Respondent herein as established by dint of paragraph 3(1) of the **Bomet College University Order**, Legal Notice No 145 of 2017 scheduled for the 24<sup>th</sup> June, 2019 to the 27<sup>th</sup> June, 2019.

(ii) THAT amongst the candidates invited for the interviews for the aforesaid positions were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties herein and the 3<sup>rd</sup>, Respondent the juridical mandate based on section 35(1) (v) of the **Universities Act** no 42 of 2012 in conducting a competitive process of appointment to the said offices.

(iii) THAT on the 20<sup>th</sup> August, 2019 and 21<sup>st</sup> August, 2019, the 1<sup>st</sup> Respondent caused to be issued appointment letters to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties to the respective positions of Principal, Deputy Principal- Academic and Student Affairs and Deputy Principal -Academic & Student Affairs and Deputy Principal- Administration & Finance of the Bomet University College for a period of 5 years.

(iv) THAT in making the appointments the 1<sup>st</sup> Respondent indicated in the respective instruments of appointment that he was exercising the powers conferred upon him by Section 35(1) (v) of the **Universities Act**, 2012.

(v) THAT the petitioner is aggrieved by the acts of the Respondents in the appointments of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties to the said positions at Bomet University College on the basis that it is breach of the **Constitution of Kenya**, 2010 and the law for the reasons: -

(a) By dint of article 2(1) of the **Constitution of Kenya**, 2010 all persons are bound by it which includes the Respondents and the Interested parties hence bound to observe its commands to the letter and it is improper for the 1<sup>st</sup> Respondent to purport to exercise executive authority when the law does not vest any powers in his office to effect the appointments.

(b) By article 10 of the **Constitution of Kenya**, 2010 the National Values and Principles of governance are provided for by which the rule of law is a fundamental and inderogable facet therein and for the 1<sup>st</sup> Respondent to effect appointments which the law does not vest powers in him is a clear breach of the aforesaid provision.

(c) By paragraph 8(1) of the **Bomet College University Order** Legal Notice no. 145 of 2017 as made by the 1<sup>st</sup> Respondent the position of a Principal of the University College is established and whose occupant shall be appointed through a competitive process in accordance with section 35 (1) (a) (v) of the **Universities Act** no 42 of 2012 which vests the powers

of appointment of the substantive holder of the said position to the Council of the herein with only the role of consultation to the 1<sup>st</sup> Respondent.

(d) By paragraph 8 (4) of the **Bomet College University Order** , Legal Notice no. 145 of 2017 the 1<sup>st</sup> Respondent is only granted powers to appoint the first Principal of the University College in an acting capacity for a period of 6 months on the recommendation of the Council of the Moi University the 4<sup>th</sup> Interested Party herein and thereafter , the appointment process shall be conducted in -accordance with sub – paragraph (1) therein thus the appointments herein of 5 years is not authorized under the empowering provisions and amenable to review under the article 47 of the **Constitution of Kenya**, 2010 and the **Fair Administrative Actions Act**, 2015.

(e) By paragraph 9(1) of the **Bomet College University Order**, Legal Notice no. 145 of 2017 the position of Deputy Principal of the University College is established and the substantive holder is to be appointed through a competitive process in -accordance with Section 35(1) (a) (v) of the **Universities Act** , no. 42 of 2012 and the appointments by the 1<sup>st</sup> Respondent are a breach of the mandate of the 4<sup>th</sup> Respondent hence is not authorized under the law and amenable to review under the article 47 of the Constitution of Kenya , 2010 and the **Fair Administrative Action Act**, 2015.

(f) There was lack of transparency in the appointment process as the advertisements for the vacancies were never placed in a newspaper and the results of the interviewed candidates were never communicated to the public at large schedule of interviews were made known to the public through media but the outcome of the interviews were never communicated thus a further breach of public participation hence under 10 of the Constitution of Kenya, 2010 was never upheld.

2. In response to the petition the 1<sup>st</sup> and 2<sup>nd</sup> interested Party stated among others that: -

(a) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties deny that the Petitioners are public spirited individuals and committed to the observance of national values and tenets of governance together with the Bill of rights as alleged or at all and shall put the Petitioners to strict proof thereof.

(b) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents admit that the 3<sup>rd</sup> Respondent herein the Public Service Commission invited and scheduled interviews for the positions of Principal, deputy Principal (Academic and Student Affairs) and Deputy Principal (Administration and Finance) for Bomet University College which is a duly constituent college of Moi University as established by the provisions of paragraph 3(1) of the Bomet University College Order Legal notice number 145 of 2017 which interviews were scheduled for 24<sup>th</sup> June 2019 to the 27<sup>th</sup> June,2019.

(c) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties admit that they were invited for interviews by the third respondent herein having applied for the aforesaid vacant positions at Bomet University College.

(d) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties deny that the 3<sup>rd</sup> Respondent ought to have coordinated the interviews based on Section 35(1) (v) of the Universities Act No. 42 of 2012 and shall aver at the hearing hereof that the interviews were conducted in accordance with the Section 35(1) (a) (V) as amended by Statute Law (Miscellaneous Amendment Act 2018) which came into force on 4<sup>th</sup> January,2019.

(e) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties shall aver at the hearing hereof that the 4<sup>th</sup> Respondent in a meeting held on the 6<sup>th</sup> of September,2019 unanimously agreed with the appointment of the first and second Interested party and further that the 4<sup>th</sup> Respondent has not in any way complained about the process of appointment of the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties.

(f) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties shall at the hearing hereof aver that the process of appointment of Principal and Deputy Principal of a University college vests in the 3<sup>rd</sup> Respondent and not as alleged by the Petitioners.

(g) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties deny that there was lack of transparency in the appointment process as alleged by the Petitioners and shall at the hearing hereof put the Petitioners to strict proof thereof.

(h) The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties shall aver that the Petitioners have not demonstrated the breach in the process of appointment, how their constitutional rights have been infringed and how they stand to suffer.

3. The 1<sup>st</sup> and second interested party further filed a replying affidavit through one Professor Anne Kisaka Nangulu in which she deponed on the main that: -

(a) THAT the fourth Respondent herein Bomet University College put up advertisements to recruit senior management to fill vacant positions at the University College.

(b) THAT the advertisements were for the positions of Principal, Deputy Principal (Academic and Student Affairs) and Deputy Principal (Administration and Finance).

(c) THAT I applied for the position of the Principal and the second interested Party applied for the position of Deputy Principal (Academic and Student Affairs).

(d) THAT the second Interested Party, myself and other applicants were duly invited for interviews by the third Respondent herein Public Service Commission.

(e) THAT contrary to the allegations by the Petitioners, the process was therefore open, transparent and competitive as contemplated by the relevant provisions of the law.

(f) THAT the advertisement for vacancies were duly published in the daily newspapers and even after shortlisting of candidates, the general public were requested to make any adverse comments in respect of the candidates.

(g) THAT the first, second and third Interested Parties emerged the best in the interviews and the first Respondent vide a letter dated 4<sup>th</sup> September,2019 requested the fourth Respondent to issue appointment letters to the successful candidates.

(h) THAT the fourth Respondent thereafter held a council meeting on the 6<sup>th</sup> September,2019 and confirmed the decision of the first Respondent.

(i) THAT we consequently took over our respective offices and have indeed been performing the functions of the office until when we learned of the existence of this case.

(j) THAT if am advised by my advocate on record which advise I verily believe to be true that the recruitment process was properly conducted in accordance with the provisions of Section 35(1) (a) (v) of the Universities Act 2012 as amended by The Stature Law (Miscellaneous Amendment) Act.

(k) THAT I am further advised that the process of our appointment is therefore in accordance with the relevant laws and therefore proper therefore in accordance with the relevant laws and therefore proper.

(l) THAT the Petitioners have not demonstrated how their constitutional rights under the Bill of rights have been infringed or at all.

4. The 1<sup>st</sup> respondent filed a replying affidavit through one Darius Mogaka in which he deponed on the main that: -

(i) THAT I am the Director of University Education in the State Department for University Education and Research and I have the authority of the 1<sup>st</sup> Respondent to swear this Affidavit on his behalf.

(ii) THAT the 1<sup>st</sup> Respondent is in charge of the overall administration and management of the Directorate for University Education, Ministry of Education.

(iii) THAT the Public Service Commission (PSC) advertised positions for Principle and Deputy Principal for Academic and Student Affairs, and Administration and Finance, respectively, Bomet University College. The PSC conducted the interviews for the three positions in which the Council was duly represented by the Chairperson.

(iv) THAT pursuant to the provisions of section 35 (1) (a) (v) of the Universities Act, 2012 which provides that in the case of Public Universities , Vice Chancellors, Deputy Vice Chancellor, Principals and Deputy Principals of Constituent College will be appointed by the Council in consultation with the Cabinet Secretary, the names of the successful candidates were forwarded to the Cabinet Secretary for consideration.

(v) THAT the Cabinet Secretary considered the names of the successful candidates and through a letter dated 4<sup>th</sup> September,2019 requested the University Council to consider Prof. Anne Kisaka Nangulu for Principal, Prof. George Otieno for Deputy Principal-Academic and Student Affairs and Prof. Loice Chepngetich Maru for Deputy Principal – Administration and Finance.

(vi) THAT the Council issued the three successful candidates with letters of appointment.

(vii) THAT I am advised by the Counsel on record which advise I verily believe to the true that due process was followed in the recruitment and appointment of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties as Principal, Deputy Principal (Administration and Finance) and Deputy Principal (Academic and Students Affairs) – respectively.

5. In the submissions in support of the petition Mr. Kigamwa for the petitioner submitted that the advertisement by the 4<sup>th</sup> respondent was a reality as it had no power to carry out the advertisement.

6. Further the said advertisement had no date when it was done and details of the media used to carry it out.

7. Mr. Kigamwa further submitted that the advertisement was indeed done before the current law based on the assumption that the date of tendering of the applications was on 12<sup>th</sup> November, 2018. Further said advertisement was done by the 4<sup>th</sup> respondent which is an interested party raising issues as to the integrity and breach of the values on public service as it assumed the order of the 3<sup>rd</sup> respondent under article 234(2)(j) of the Constitution.

8. Counsel further submitted that no competitive process can occur where the recruiter as public service commission has not informed the public of the existence of the vacant positions in acceptable media with wide coverage.

9. Mr. Kigamwa further submitted that the recruitment process began when the University Act 2012 was amended and got Presidential assent but the Public Service Commission accepted the list of all applicants for the positions of Principals and Deputy Principals. This meant no short listing was done. The change of law was not adhered to as the advertisement ought to have been done by Public Service Commission.
10. Counsel further contended that the letters of appointment to the successful candidates had not been copied to the Bomet University Council by the Cabinet Secretary. This clearly meant he had acted unilaterally in making the appointments yet he had no power to act to the exclusion of the Council.
11. Mr. Kigamwa further submitted that the minutes by the Council indicate that the Cabinet Secretary had recommended the appointment of the candidates as listed as failing to appoint meant that the process would start a fresh. Further all the candidate had accepted the appointments and letters received at the Ministry. One would wonder which appointment were being done by the university Counsel while the Cabinet Secretary had in August,2019 already appointed person without authority.
12. Mr. Wabwire for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent submitted that the vacancies in respect of the positions of Principal, Deputy Principal, Academic and Student Affairs and deputy Principal Administration and Finance of Bomet University were advertised via 3<sup>rd</sup> respondent's website as supported by the 5<sup>th</sup> Interested Party's annature number EWMT1. After the application process, candidates were vetted and a notice then issued by the 3<sup>rd</sup> respondent for the shortlisted candidates to appear for interviews as per the 5<sup>th</sup> Interested Party's annature number EWMT3. The notice and more particularly the last paragraph thereof requested for any information from members of the public including the petitioners, in respect of the short-listed individuals of which none was received from the petitioners.
13. According to Counsel, paragraph 7 of the Petition confirm that indeed the 3<sup>rd</sup> respondent scheduled interviews for the positions. The petitioners further confirm at paragraph 8 that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were invited and interviewed by the 3<sup>rd</sup> respondent. It was further confirmed by the petitioner's hat after the interviews, shortlisted candidates were forwarded to the 1<sup>st</sup> respondent as part of the consultation pursuant to the provisions of the University Act. The 1<sup>st</sup> respondent after receiving the names of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties did not appoint them but instead did a letter dated 4<sup>th</sup> September,2019 forwarding the names to the 4<sup>th</sup> respondent for consideration in line with its mandate.
14. Counsel submitted that upon receipt of the letter dated 4<sup>th</sup> September,2019 from the 1<sup>st</sup> respondent, the 4<sup>th</sup> respondent in exercise of its mandate as provided under Section 35(1)(9) (v) of the University Act appointed the Interested Parties to their respective positions.
15. This Court in its ruling delivered on 3<sup>rd</sup> October,2019 issued conservatory orders staying the implementation of the decision of the University Council appointing the interested parties to their respective positions. This order was issued when the Court felt persuaded that there were substantial procedural as well as legal breaches in the process of appointment. More particularly, the Court was of the view that the University Council had no power under the Universities Act to appoint the interested parties to their respective positions and that such power was only vested on the Cabinet Secretary. The Court's attention has since been drawn to Stature Law (Miscellaneous Amendments) Act, 2018 which amended Section 35(1)(v) of the Universities Act conferring the power of appointment of Vice Chancellors, Deputy Vice Chancellors, Principals and Deputy Principals of Constituent Colleges to University Councils in consultation with the Cabinet Secretary after competitive selection process conducted by the public service commission. The aspect of the Court's ruling which faulted the appointment by the University Council therefore was made per incuriam. The law as amended came into force in January, 2019.
16. The petitioner's major complaint was that there was no advertisement of the concerned positions in print media. They have questioned the evidence of the advertisement produced by the 5<sup>th</sup> Interested Party which stated the advertisement was made on-line on the 3<sup>rd</sup> respondent's website using what was called Web solution Focus.
17. In the amended petition the petitioners state that the 3<sup>rd</sup> respondent (PSC) scheduled and invited interviews for the positions concerned and amongst the candidates invited for the interviews were the 1<sup>st</sup> to 3<sup>rd</sup> Interested Party and that on 20<sup>th</sup> August, 2019 or thereabouts, the 1<sup>st</sup> respondent caused to be issued appointment letters to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.
18. The University Act as amended confers the power to select suitable candidates for appointment to PSC which is what happened in this particular case. The petitioners account of events if anything to go by confirms that PSC scheduled and conducted interviews. What the petitioners seems to have a problem with was the mode of advertisement. This was done on-line. The Court takes judicial notice of the e-government policy and therefore notes that there would be nothing wrong if PSC uses its on-line portal to advertise for positions.
19. The Court noted that some twenty-seven candidates were shortlisted. In order to fault the mode of advertisement therefore the petitioners should have demonstrated that by adopting the on-line method a significant number of qualified people were left out. This has not been demonstrated by the petitioners.
20. On the issue of whether the issues raised by the petitioners meet the minimum threshold for a constitutional question, the Court has noted that the petition is brought among others as a matter under Fair Administrative Actions Act, and in the matter of appointment of principal, deputy principals of Bomet University as contained in the letters dated 20<sup>th</sup> August, 2019 and 21<sup>st</sup> August, 2019 by Cabinet Secretary Ministry of Education.
21. Further the petition states that by dint of article 2(1) of the Constitution all persons are bound by it including the 1<sup>st</sup> respondent hence he lacked power to exercise executive authority to effect the appointments. The petitioners further complained that article 10 of the Constitution provides for national values and principles of governance for which rule of law is a fundamental and underogable facet therein hence the action by the 1<sup>st</sup> respondent to affect the appointments which the law does not vest powers in him was a clear breach of article 10.
22. As observed earlier in the judgement, the Statute Law (Miscellaneous Amendments) Act, 2018 amended section 35(1)(v) of the

Universities Act and removed the power to appoint Vice Chancellors, Deputy Principals of Constituent Colleges from the Cabinet Secretary and vested the same on the Universities Council in consultation with the Cabinet Secretary after a competitive selection process conducted by the Public Service Commission.

23. There are two sets of letters of appointment issued to the interested parties herein. The first set are dated 20<sup>th</sup> August, 2019 and signed by the Cabinet Secretary -Education Professor George Magoha as the appointing authority. The second set of letters are dated 9<sup>th</sup> September, 2019 signed by Professor Esther W.N. Tirima as the Chair of Bomet University College Council. These second set of letters signed by Professor Tirima are the valid appointment letters in line with Statute Law Miscellaneous Amendment's Act 2018. The first set by CS-Education were issued without proper apprehension of the Law as amended hence of no legal effect.

24. The complaint by the petitioners revolved around two main issues. First on the mode of advertisement of the vacant positions and dissemination of the information on those shortlisted and those who eventually became successful. According to the petitioners the respondents should have carried out these processes by way of advertisement in at least a newspaper of wide circulation. The Court has already stated that it took judicial notice of the e-government policy which leans more towards digitization of government processes. The Court is therefore not persuaded that by not advertising the positions in print media if at all violated the cited provisions of the Constitution or any at all.

25. The second complaint was on the issue of who was the proper appointing authority. This complaint has been adequately addressed above hence need no more repeating.

26. Going by the often -cited case of ***Anerita Karimi Njeri -v- R*** it is now almost settled that Constitutional petitions must specifically set out the provisions in the Constitution that have been allegedly violated, provide the particulars of the alleged violations and provide particulars in which the respondent has purportedly infringed these rights.

27. The petition before me cites article 2(1) which concerns the supremacy of the Constitution and its binding effect on all persons and all state organs at both levels of government. It further cites article 10 which deals with national values and principles of government. The petitioners however have not succinctly demonstrated in what way these provisions of the Constitution have been violated by any of the respondent and the interested parties in this petition. The infractions the 1<sup>st</sup> respondent was accused of have been addressed through the Statute Law miscellaneous amendment Act, 2018 and in any event, if they be infractions at all they could have been adequately addressed by invoking the provisions of the Universities Act through a Judicial Review application without resort to the Constitution.

28. In conclusion the Court finds and holds that the petition does not raise Constitutional issues to warrant the making of the orders sought.

29. The petition is therefore dismissed but being a public interest litigation, there will be no order as to costs.

30. It is so ordered.

Dated at Eldoret this 5th day of December 2019

**Abuodha Jorum Nelson**

**Judge**

Delivered this 5th day of December 2019

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**