



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2098 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 24th September, 2018)

PROF. JOSEPH MUNAGI KERIKO.....CLAIMANT

-VERSUS-

COUNCIL OF JOMO KENYATTA

UNIVERSITY OF AGRICULTURE & TECHNOLOGY.....1ST RESPONDENT

VICE CHANCELLOR JOMO KENYATTA

UNIVERSITY OF AGRICULTURE & TECHNOLOGY....2ND RESPONDENT

CABINET SECRETARY MINISTRY FOR

EDUCATION, SCIENCE AND TECHNOLOGY.....3RD RESPONDENT

PROF MARY ABUKUTSA ONYANGO.....4TH RESPONDENT

RULING

1. The Application before Court is one dated 18th October 2017 brought under Section 3A of Civil Procedure Act cap 21, Order 51 Rule 1 of Civil Procedure Rules, Section 12 & 20 of Employment and Labour Relations Court Act Cap 234 B of the Laws of Kenya, & all other enabling provisions of the Law seeking orders:

- a. That this application be certified as urgent and be heard ex-parte on the first instance.**
- b. That court be pleased to order that this application be heard on priority basis.**
- c. That court be pleased to order the main suit be heard on priority basis.**
- d. That court be pleased to order that the Occupancy in office of DVC (Research, production and Extension) by 4th Respondent at Jomo Kenyatta University of Agriculture and Technology is suspended pending hearing and determination of this application.**
- e. That court be pleased to order that the Occupancy in office of DVC (Research, production and Extension) by 4th Respondent at Jomo Kenyatta University of Agriculture and Technology is suspended pending hearing and determination of the main suit.**
- f. Costs of and incidental to the application be provided for.**

2. The Application which is supported by the affidavit of one Prof. Joseph Mungai Keriko is premised on the grounds:

1. That the decisions were made on hate, nepotism and the existence of discrimination.
2. The decisions were illegal, arbitrary, unreasonable and biased.
3. 4th Respondent was given undue advantage than the applicant and was based on nepotism being a relative of Vice Chancellor, the 2nd Respondent.
4. The appointment is illegal, irrational or unprocedurally flawed.
5. The decision was actuated by ulterior motives or purpose.
6. There was lack of fairness, equity and transparency.
7. Applicant is highly qualified for the position but denied the chance on the basis of 3 above.
8. The Respondents are subject to the supervisory jurisdiction of this Honourable Court.
9. The decision/appointment put into account irrelevant considerations and failed to take into account relevant considerations and was an abuse of discretion.
10. The Respondents acted ultra vires its powers under the Public Service Commission Regulations in making the decision purporting to appoint the 4th Respondent against public interest.
11. The first interview with 4 candidates on 18/4/2017 was postponed to allow inclusion of 4 others who are the Vice Chancellor's choices on the 2nd interview on 25/4/2017 to create bias.
12. The 3 names sent to the 3rd Respondent were all from the added list.
13. Such other and further reasons to be adduced at the hearing hereof.

3. The 1st Respondent filed their Replying Affidavit where they aver that it is clear that the Claimant has an axe to grind with the Jomo Kenyatta University of Agriculture and Technology (JKUAT) and its administration in general.

4. He states that he was aware that a vacancy arose in the office of Deputy Vice-Chancellor (Research Production and Extension) and an advertisement was duly published in the Newspaper inviting candidates to apply to fill the said position. Several applications were received and only 12 Applicants were forwarded to the Chairman who appointed an independent panel to conduct shortlisting.

5. The panel met on 4th April 2017 and prepared its report shortlisting 4 candidates and presented its report to a special meeting held on 6th April 2017. The Council shortlisting Committee met on 18th April 2017 to receive the full shortlisting report from the Independent Panel and the Claimant's name was among the 4 names put forward. The Council resolved to review the applications of the other 8 applicants to ensure all eligible candidates were invited for interview.

6. He further avers that the Appointment Committee of the Council was held on 25th April 2017 when the 7 shortlisted candidates appeared for interviews. They were interviewed including the Claimant and Prof. Abukutsa and all of them were scored in accordance with the criteria set. From the aggregate scoring of the Council members Prof. Abukutsa emerged 1st while the Claimant was last as number 7.

7. He avers that contrary to the Claimant's averments, the recruitment exercise was carried out in the most professional and independent manner required for such a high office. The Claimant's application has been overtaken by events and it is not merited and should thus be dismissed with costs.

8. The 2nd and 3rd Respondents filed their Replying Affidavits where they aver that the Claimant has bitterness against the 1st and 2nd Respondents as he is raising issues which are subject matter of the pending case.

9. They state that the 4th Respondent was appointed by the Cabinet Secretary by a letter dated 18th May 2017 and upon execution of the contract of service between JKUAT and the 4th Respondent, the Vice-Chancellor duly communicated the 4th Respondents' appointment to the JKUAT community by an Internal Memo. Therefore, the Claimant's case lacks merit and ought to be dismissed with costs.

10. The Claimant/Applicant filed his supplementary affidavit where he avers that he has no bitterness against the Respondents as claimed but rather he is merely claiming his right. He states that the said internal Memo was never made public, as he could have seen it as a member of the staff. Furthermore, the appointment was never gazetted in Kenya gazette.

11. He further avers that there is entrenched nepotism and favourism at JKUAT, which is being perpetuated by the 2nd Respondent who is Prof. Mabel O. Imbuga with the blessings of 1st and 3rd Respondents. This is clearly manifested in the appointment in top positions in University. A case in point, the appointment of 4th Respondent, a relative of 2nd Respondent.

12. He further states that it is clear that majority of the people holding top positions are related to 2nd Respondent either as a relative or tribe which is clearly against the Constitution and expectation of Applicant and Kenyans, hence, prays that his application be allowed.

Submissions

13. The 3rd Respondent filed their submissions where they submit that the Cabinet Secretary lacks the legal and contractual capacity to fire or reinstate a university staff/employee as he is not the employer as provided under Section 35 1(a)(v) of the University Act No. 42 of 2012. In the event that the Claimant's terms and conditions of service were violated by the 1st and 2nd Respondents, then the claimant cannot get redress from the 3rd Respondent. They relied on the case of **ELC Cause No. 352 of 2016 Josephat K. Mwatela Vs Technical University of Mombasa Counsel and 2 Others.**

14. They further aver that the 3rd Respondent is the Cabinet Secretary not the employer to the Claimant but also, the 3rd Respondent neither carried out nor took part in the advertising of the job opportunity, shortlisting of the candidates, interviewing or recommending the successful candidates.

15. They also aver that they did not have the mandate to act without the 1st Respondent's recommendations and actions. This is clearly shown in the case of **Nairobi High Court Judiciary Review Misc. Civil Application No. 52 of 2017, Republic Vs CS Ministry of Education.**

16. They also submit that the claim is defective and bad in law as it does not disclose a clear cause of action alleged/disclosed against the 3rd Respondent according to Order VI Rule 3 which deals with the format of a pleading namely a claim in this case.

17. They therefore, they submit that the Cabinet Secretary could not come out/appoint any person outside the list that was submitted to him and that was all the law permitted him to do. Therefore they persuade this court to adopt their line of argument that the Cabinet secretary and by extension the Attorney General has not been properly enjoined in this claim that is itself defective ab initio.

18. The 1st, 2nd and 4th Respondents filed their submissions where they submit that the orders sought by the Claimant will result in hardship in respect to the operations of JKUAT. It is trite in law that Court will not grant orders, which will result in hardship. They relied on the case of **Shitakha Vs Mwamodo & 4 Others [1986] KLR 445.**

19. They aver that the order the Claimant is seeking has been overtaken by events. The 4th Respondent was appointed and took office more than 1 year ago which cannot be "suspended" so to speak. There can be no "suspension of occupancy" as prayed. Therefore the Claimant's application and suit are an abuse of the process of the Court, propelled by malice and ought to be dismissed with costs.

20. I have examined all the averments of both Parties. The Applicant seeks orders, which are tantamount to dismissing from office an occupier therein. The orders sought in the application are also similar to those sought in the man claim.

21. In order to fully appraise itself of this matter, evidence has to be produced to verify averments made. The orders sought are also orders, which can have grave repercussions on the operations of the Jomo Kenyatta University of Agriculture and Technology (JKUAT) as a learning institution.

22. In order to properly understand the issues raised, I will decline to grant any interim orders as sought and direct that the Parties proceed with the hearing of the main claim.

23. Costs in the cause.

Dated and delivered in open Court this **24th day of September, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ndungu for Claimant – Present

Shitubi for 3rd and 4th Respondents – Present

Atenya holding brief for Lutta for 1st and 2nd Respondents – Present