



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 73 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> October, 2018)**

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE JUDICATURE ACT CHAPTER 8 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 23 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007**

**IN THE MATTER OF INDUSTRIAL COURT ACT NO. 20 OF 2011**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010**

**IN THE MATTER OF AN APPLICATION BY PROFESSOR FRANCIS MWIHURIH NJERUH FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**CHIEF OF STAFF AND HEAD OF THE PUBLIC SERVICE....1<sup>ST</sup> RESPONDENT**

**THE SECRETARY, STATE CORPORATIONS**

**ADVISORY COMMITTEE.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE UNIVERSITY OF NAIROBI.....3<sup>RD</sup> RESPONDENT EXPARTE**

**PROFESSOR FRANCIS MWIHURIH NJERU.....EXPARTE APPLICANT**

**JUDGEMENT**

**Introduction**

1. The Application before me is the Notice of Motion dated 4<sup>th</sup> September 2015 filed by the Applicant herein seeking the following orders:-
  - a) ***THAT** an order of Certiorari do issue to remove to the Employment and Labour Relations Court and Quash the Circular*

*Letter by the 1<sup>st</sup> Respondent Reference No. OP/SCA.1/12 (11) dated 14<sup>th</sup> May 2015.*

***b) THAT an order of prohibition do issue prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from amending, varying, vacating or in any manner interfering with Applicant's remuneration of Basic Salary of Kshs. 430,895/= and House Allowance of Kshs. 80,518/= as set out in the 3<sup>rd</sup> Respondent's Letter of confirmation of such payments to the applicant dated 26<sup>th</sup> August 2014.***

***c) THAT the costs incidental to the entire proceedings be awarded to the Ex-Parte Applicant.***

2. Prior to filling of the said Notice of Motion the Applicant had sought leave of Court by way of Chamber Summons dated 19<sup>th</sup> August 2015, supported by a Statement dated the same day and a Verifying Affidavit sworn by the Applicant on the 18<sup>th</sup> of September 2018.

3. The Attorney General representing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed an application in Miscellaneous Application No 64 of 2015 seeking to consolidate this matter with Nakuru HCJR No 1 of 2016 and Miscellaneous Application No 64 of 2015. The application was not allowed.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Grounds of Objection on the 25<sup>th</sup> April 2018 through the office of the Attorney General. They raised the grounds that: - the proceedings are an abuse of the Court process and lack merit. They also contended that the engagement of the Applicant as a Vice Chancellor was an independent contract and when the same came to an end then he ceased to reap the benefits of the said office.

5. They contended that this Court cannot usurp the powers of the State Corporations Advisory Committee which sets salaries of state corporations' officers by varying the circular in contention herein.

6. The 3<sup>rd</sup> Respondent filed Grounds of Objection dated 25<sup>th</sup> April 2018 relating to a Notice of Motion dated 23<sup>rd</sup> July 2015 which the Applicant submitted was an application unknown to them and hence no response is on record for any of the Respondents.

7. In their Grounds filed in Court by the 3<sup>rd</sup> Respondent, they aver that orders sought in the application cannot be granted as the Applicant was dismissed as Deputy Vice Chancellor of JKUAT and should therefore not enjoy the benefits accruing to the office.

#### **Brief facts of the Application**

8. The Applicant was first employed by the 3<sup>rd</sup> Respondent as a lecturer in the 3<sup>rd</sup> Respondent's Department of Public Health, College of Agriculture & Veterinary Services, University of Nairobi and rose to level of Associate Professor of Public Health.

9. On 1<sup>st</sup> August 2014, the Applicant returned from study leave and joined once more, the 3<sup>rd</sup> Respondent's teaching staff at the Department of Public Health, Pharmacology and Toxicology.

10. The Applicant then renegotiated his terms of engagement and was allowed to retain the basic salary and house allowance that were payable to him while serving as DVC-APD JKUAT University.

11. The 3<sup>rd</sup> Respondent vide a letter dated 26<sup>th</sup> August 2014 then approved and confirmed the said terms to the effect that the Applicant would retain the basic salary of Kshs.430,895 and house allowance of 80,518/=. This letter is attached to the Applicant's Affidavit as FMN 1.

12. The 3<sup>rd</sup> Respondent thereafter attempted to vary the negotiated terms of Contract by revising the Applicant's salary downwards and later on justifying the same that there is a circular Reference No. 0P/SCAC.1/12(11).

13. These facts are set out herein and in detail in the Statutory Statement dated 19<sup>th</sup> August 2015 and the Applicant's Verifying Affidavit sworn on the 18<sup>th</sup> of August 2015 are admitted by the Respondents.

14. The Parties herein filed their respective submissions. I have considered the submissions raised herein and I set the issues for determination as follows:-

***1. Whether the prayers Sought by the Applicant can be granted as prayed.***

***2. Who is entitled to costs herein.***

#### **Whether the prayers sought by the applicant can be granted as prayed.**

15. The Applicants seeks an order to quash the Circular Ref No. OP/SCAC.1/12(11) dated 14<sup>th</sup> May 2015, and further prohibit the Respondents from amending, varying, vacating or in any manner interfering with the Applicant's remuneration as set out in the 3<sup>rd</sup> Respondent's letter dated 26<sup>th</sup> August 2014.

16. These are Judicial orders being sought by the Applicant which by dint of Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011, the Court has Jurisdiction to grant.

17. This Court indeed has jurisdiction to grant a raft of orders including the ones sought in appropriate circumstances as has been held in various cases including in Margaret Nyaruai Theuri v National Police Service Commission [2016] eKLR where Byram Ongaya J in agreeing with Rika J in Seven Seas Technologies Limited –Versus- Eric Chege [2014] eKLR held as follows:-

*“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The Court holds that the compass or golden test for the Court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the Court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”*

18. The Applicant submitted that the decision by the Respondents to vary the terms of employment after the same had been negotiated and agreed upon unilaterally was not only *ultra vires*, but breached the Applicant’s legitimate expectations to a process that complies with the law as set out under Section 10 of the Employment Act, and the right to a fair administrative action by the Respondents.

19. The Applicant sought to rely on Section 10(5) of Employment Act 2007 provides as follows:-

*“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”*

20. The Applicants also referred Court to Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280 where the Honourable Court held as follows:-

*“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognized and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”*

21. They also cited Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR where the Court held that:

*“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”*

22. They contend that the 3<sup>rd</sup> Respondent confirmed in writing and approved the Applicant’s request to be allowed to retain the basic salary and house allowance. It is on this basis that they hold that the Applicant’s legitimate expectation was well placed and quite reasonable in the circumstances.

23. They submitted that the circular letter breached the principle of legitimate expectation by the Respondents and violates the established principles of law as they have set out.

24. The Applicants also cited Republic v Chief of Staff & Head of the Public Service & 2 others Ex-parte George A. O. Magoha [2018] eKLR where this Court in examining whether there is a fair administrative process followed in circular Ref No: OP/SCAC.1/12(11) of 14<sup>th</sup> May 2015 said as follows:-

*“My understanding of the above provisions is that where an administrative action would affect an individual, that individual should be given an opportunity to be heard. The Applicant was however never heard on an administrative action that adversely affected him.”*

25. This Court proceeded in **George A.O Magoha case** to analyse the provisions of Article 47(3) of the Constitution, as read with Section 4 of the Fair Administration Action Act No. 4 of 2015 and established that the circular in question breached the principle of fair administrative action and proceeded to declare it *ultra vires*.

26. The Applicants have also cited **Nakuru ELRC JR No. 1/2016 Professor James Tuitoek vs Chief of Staff and Head of Public Service and Egerton University**, where the issues were similar to those in the current case. The Learned Judge J. Radido found the circular OP/SCAC.1/12(11) as taking away entitlements accruing under an employment contract that was to the advantage of the Applicant. The Learned Judge found the circular a general circular and issued orders of prohibition and mandamus vindicating the Applicant's rights, a position this Court adopts.

27. It is true that indeed the circular was made unilaterally without engaging those that it was bound to engage. This circular was also issued without considering legitimate expectations of the Applicant and others it was bound to effect. This Court has already made extensive findings on the said circular in the **Prof Magoha case. (Supra)**. My learned brother J Radido has also made similar finding on the same circular in the **Prof. Tuitoek case above (supra)**.

28. The Applicants asked this Court to make a finding on a circular the subject matter of this Application by quashing it. It would be an abuse of the powers of this Court for this Court to deviate from its own finding thus breathing both cold and hot in the same sitting. I decline to make any deviant finding in the circumstances and find the circular not tenable and issue the following orders:-

a) ***THAT an order of Certiorari do issue to remove to this Court and Quash the Circular Letter by the 1<sup>st</sup> Respondent Reference No. OP/SCA.1/12 (11) dated 14<sup>th</sup> May 2015.***

b) ***THAT an order of prohibition do issue prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from amending, varying, vacating or in any manner interfering with Applicant's remuneration based on the impugned circular.***

c) ***THAT the costs incidental to the entire proceedings be awarded to the Ex-Parte Applicant.***

Dated and delivered in open Court this 15<sup>th</sup> day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

No appearance for Parties