



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
PETITION NO. 23 OF 2016
(CONSOLIDATED WITH PETITION NO. 11 OF 2016)

BETWEEN

OKIYA OMTATAH OKOITI 1ST PETITIONER

JOSHUA KIPTOO 2ND PETITIONER

VERSUS

CABINET SECRETARY

MINISTRY OF EDUCATION, SCIENCE &

TECHNOLOGY 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

STATE CORPORATIONS ADVISORY

COMMITTEE 4TH RESPONDENT

AND

KENYATTA UNIVERSITY

COUNCIL 1ST INTERESTED PARTY

UNIVERSITIES ACADEMIC

STAFF UNION 2ND INTERESTED PARTY

JUDGMENT

1. The petitioner, Okiya Omtata brought this petition seeking the following declarations and orders:
 - a) That a declaration is hereby issued declaring that the on-going opaque recruitment process

contravenes this Court's judgment in the case of **Joseph Mutuura Mbeeria and another vs. Cabinet Secretary for Education, Science & Technology & 2 others [2014] eKLR.**

b) That a declaration is hereby issued declaring the on-going opaque recruitment of chairpersons and members of governing councils of public universities and their constituent colleges does NOT accord to fair, open, competitive, merit based, accountable and inclusive process required by the Constitution and, therefore, is null and void *ab initio*.

c) That a declaration is hereby issued declaring that NO properly appointed and constituted governing councils of public universities and of their constituent colleges can result from the 1st respondent's on-going opaque recruitment process.

d) That a declaration is hereby issued declaring that NO legally and constitutionally valid reconstituted governing councils of public universities and their constituent colleges can result from the on-going opaque recruitment process.

e) That a declaration is hereby issued declaring that, in circumstances where neither the Constitution nor legislation assign the recruitment component to another body, the 2nd respondent, or another competent State organ, should carry out the recruitment exercise and then hand names of nominees to the appointing authorities for appointment.

f) That the Honourable Court be pleased to issue and hereby issues an order quashing the Press adverts published in the Daily Nation and in The Standard national newspapers on January 16 2016, and on January 21, 2016, and on any other dates, announcing vacancies and inviting applications from qualified members of the public to apply for appointment either as chairpersons or members on the councils of, *inter alia*:

i. University of Nairobi;

ii. Embu University College;

iii. Masinde Muliro University of Science and Technology;

iv. Multimedia University of Kenya;

v. Murang'a University College;

vi. Dedan kKimathi University of Technology;

vii. Kenyatta University; and

viii. Laikipia University.

g) That the Honourable Court be pleased to issue an order of Mandamus directing the 1st – 4th respondents to commence the recruitment process of chairpersons and members of governing councils of public universities and their constituent colleges in accordance with the law.

Grounds

2. The petition challenges the decision by the respondents to place an advertisement in the standard newspaper issue of 16th and 21st January of their intention to reconstitute Governing Councils of all Public University Colleges on the grounds summarized in paragraphs 6 – 10 of the petition as follows:

6. Under Article 23(1) of the Constitution read together with Articles 162(2) and 165 thereof, this Honourable Court has jurisdiction to hear and determine applications for redress of a

denial, violation or infringement of, or threat to a right or fundamental freedom.

7. Article 19(1) of the Constitution declares the Bill of Rights as an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

8. By virtue of Article 19(2)(a) and (c), the rights in the Bill of Rights belong to every person and only subject to the limitations contemplated in the Constitution.

9. Article 19(3)(a) provides that the fundamental rights inhere in persons and it is not the State which grants these rights and fundamental freedoms.

10. Article 20(1) decrees that the Bill of Rights applies to all and binds all State organs and all persons. Every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

3. Meanwhile petition no. 11 of 2016 was filed by Joshua Kiptoo against the Hon. Attorney General and the Cabinet Secretary Education following an advertisement by the Cabinet Secretary Education in the 16th January 2016 issue of the Daily Nation Newspaper to stating the respondent's intention to reconstitute the Governing council of the University of Nairobi.

4. Interim orders were issued in both petitions and the two petitions were consolidated since similar or related issues were up for determination in both matters.

5. The additional grounds set out in petition 11 are set out in paragraphs 20 to 38 of the petition as follows:

20. Public Universities in Kenya hold an integral place in the social fabric of our nation and hence their affairs are of great public interest to the general public and its stakeholders, particularly their students, staff and alumni. Indeed the Universities play a critical role in the provision of higher education and the development of the nation.

21. In accordance with Section 35 of the Universities Act, the Governing Council of a University is the organ charged with the responsibility of providing leadership and policy directions to the University. This is buttressed by Clause 18(7) of the University Charter which states *inter alia* that the government, control and administration of the University shall be vested in the Council.

22. On or about 9th December, 2015 the 2nd respondent wrote to the 1st respondent seeking a legal interpretation on the proposed intention by the said 2nd respondent to revoke and initiate a fresh process of appointment of members of the Governing council (the Council) of the University of Nairobi (the UoN) as provided under section 36(1) (a) and (d) of the Universities Act No. 42 of 2012 (the Universities Act).

23. On or about 4th January 2016, the 1st respondent gave sound legal opinion to the request made by the 2nd respondent on 9th December 2015 aforesaid.

24. In the said legal opinion of the 1st respondent, while noting the supreme public interest to protect the Constitution and the law against blatant violation that would inform the 2nd respondent intention to revoke the membership of the governing council for purposes of upholding the Constitution and in compliance with Article 10(1) thereof, the 1st respondent advised *inter alia* as follows:

“However, any action premised on public interest, in our considered view, constitutes an administrative discretion and in the performance of this duty, the Cabinet Secretary would be obliged to uphold the principles of fair administrative action as enshrined in

Article 47 of the constitution and the provisions of the Fair Administrative Act No.4 of 2015.”

25. The 1st respondent further advised the 2nd respondent *inter alia* as follows:

“it is instructive to note the critical role played by University in the provision of higher education and the development of the nation and the Council in the administration and management of the University.”

It is therefore, advisable that the proposed act to revoke membership to the Council ought to be handled judiciously and in accordance with the law so as to avoid creating a vacuum and disrupting the life of the University.”

26. Despite the express legal advice from the 1st respondent aforesaid, the 2nd respondent has gone ahead to blatantly disregard the said advice including clear provisions of Article 47 of the constitution together with Section 4 of the Fair Administrative Action Act thereby greatly prejudicing the constitutional rights of the serving members of the Governing Council of the University of Nairobi and those of the Universities’ staff, students and alumni.

27. On or about 16th January 2016 the 2nd respondent placed an advertisement in The Standard newspaper purporting the same to serve as notice to the serving members of the Governing council (the Council) of the University of Nairobi (UoN) of the 2nd respondent’s intention to reconstitute the Council of the UoN.

28. The said notice was purported to have been issued pursuant to the provisions of Article 47 as read together with those of Fair Administrative Action Act No. 4 of 2012 requiring serving members of the respective councils be given notice of the Ministry’s intention to reconstitute the said councils. Indeed the 2nd respondent admits that its decision to reconstitute the council of the UoN amounts to administrative action that is subject to Article 47 of the Constitution and Fair Administrative Action Act.

29. The foregoing notwithstanding, the said 2nd respondent failed and/or refused to comply fully with the provisions of Article 47 of the constitution and section 4 of the Fair Administrative Action Act. In particular, *inter alia*, the 2nd respondent failed and/or refused to give the serving members of the council of the UoN, as the persons affected by the decision aforesaid:

- a) Prior and adequate notice of the nature and reasons for the proposed administrative action.
- b) An opportunity to be heard and to make representation in that regard.
- c) Notice of a right to a review or internal appeal against an administrative decision.
- d) An opportunity to attend proceedings, in person or in the company of an expert.

30. The said purported notice of 16th January 2016 did not afford the serving members of the Council of the UoN an opportunity to be heard and to make representation on the 2nd respondent’s intention to reconstitute the council as required by section 4(3) (b) of the Fair Administration Action Act.

31. The said purported notice of 16th January 2016 did not give to the serving members of the Council of the UoN of their right to a review or internal appeal against the said intended administrative decision to reconstitute the Council as required by section 4(3) (c) of the Fair Administrative Action Act.

32. Contrary to the 2nd respondent's statement in the notice of 16th January 2016 and the impression created thereof, the decision of this Honourable court in **Petition No. 33 of 2013; Joseph Mutuura Mbeeria & another vs. Cabinet Secretary Ministry of Education, Science and Technology** did not direct the reconstitution of governing council of all public universities.

33. The said decision of this Honourable court merely directed that where there is appointment of chairman and members of the council of all Public Universities, the minimum standards to be applied are those enshrined Articles 10 and 232 of the constitution and Section 36(1)(d) of the Universities Act.

34. The order of *mandamus* issued by this Honourable Court in **Petition No. 33 of 2013; Joseph Mutuura Mbeeria & another vs. Cabinet Secretary Ministry of Education, Science and Technology** aforesaid was specific. It directed the 2nd respondent herein to commence the recruitment process of members of JKUAT Council in accordance with the law.

35. The said order of *Mandamus* did not direct the 2nd respondent to commence the recruitment process of all governing councils of Public Universities. The same therefore cannot be the reason for the 2nd respondent intention to constitute the Council of the UoN as stated by the 2nd respondent in the notice of 16th January, 2016. In the circumstances it behoves the 2nd respondent to expressly give prior and adequate notice of the nature and reasons of the intention to reconstitute the Council of the UoN as required by Article 47 of the Constitution and Section 43)(a) of the Fair Administrative Action Act.

36. In addition, despite stating in the said notice that it intends to reconstitute all governing councils of public universities and constituent university colleges, the 2nd respondent proceeded to brazenly discriminate against the Council of the UoN by effectively revoking the appointment of the serving members of the said council of the UoN and issuing a vacancy notice thereof.

37. The 2nd respondent therefore singled out the said members of the Council of the UoN and excluded serving members of governing councils of other public universities contrary to Article 10 and 27 of the Constitution and Section 3(2)(f) of the Universities Act.

38. On the basis of the manifestly unconstitutional notice and process aforesaid, the 2nd respondent has effectively purported to revoke the appointment of the serving members of the Council of the UoN and advertised the vacancies thereof for all interested and qualified persons to apply, in complete violation of express fundamental rights of the serving members of the council as guaranteed by the constitution.

6. And the following orders are sought:

a) This Honourable Court be pleased to declare that the purported notice of the intention to reconstitute the Governing Council of the University of Nairobi dated 16th January 2016 is unconstitutional, null and void.

b) This Honourable Court be pleased to declare that the purported revocation of the appointment of serving members of the Governing Council of the University of Nairobi and subsequent declaration of vacancies and call for applications to fill the positions of Chairperson and five (5) members made on 16th January 2016 is unconstitutional, null and void.

c) Honourable Court be pleased to make an order quashing the purported revocation of the appointment of serving members of the Governing Council of the University of Nairobi and resultant declaration of vacancies and call for applications to fill the positions of chairperson and five (5) members made on 16th January 2016.

d) This Honourable Court be pleased to make an order of *Mandamus* directing the 2nd respondent to comply fully with the Constitution and the Fair Administrative Action Act in the intended reconstitution of the Governing Council of the University of Nairobi.

Responses

7. The Honourable Attorney General filed Notice of preliminary objection dated 26th April 2016 on 26th April 2016 in which he challenged the jurisdiction of the court to entertain the consolidated petitions. A ruling was rendered by Mbaru J. on 25th November 2016 dismissing the preliminary objection.

8. I have not found on record any replying affidavit filed by the Attorney General for the respondents nor have I seen any directions in the record of the court with regard to the filing of a replying affidavit to the consolidated petitions. To this extent, the facts set out in the consolidated petitions are not controverted. However, the orders sought must be supported by sound legal foundations to be granted by the court.

Submissions

9. The petitioner and the 1st and 2nd interested parties filed their written submissions on 13th and 19th December 2016.

10. The issues for determination are as follows;

i. Whether the decision of the court in **Joseph Mutuoria Mbeeria and another V. Cabinet Secretary for Education, Science & Technology & 2 others [2014]eKLR** mandated Cabinet Secretary to reconstitute all university councils prior to expiry of their term.

ii. Whether the intended action by the respondents violates or threatens violation of the constitutional rights set out in the petition.

iii. Whether the petitioners are entitled to the reliefs sought.

11. Determination

Issue (i)

The decision of the court in **Petition No.33 of 2013, Joseph Mutuura Mbeeria & another Vs. Cabinet Secretary for Education Science and Technology and another and The Council, Jomo Kenyatta University of Agriculture & Technology – interested party [2014] eKLR** spells the legal position clearly on this matter and the same has not been set aside by the Court of Appeal.

12. Accordingly, any university council that is in existence and its term has not expired is subject to reconstitution in terms of the new constitutional dispensation.

13. It is only a council that was constituted before the 2010 Constitution took effect that may survive the effect of the decision in **Joseph Mutuura Mbeeria case (supra)**.

14. The answer to the 1st question is therefore in the affirmative and does not amount to applying the law retroactively. The decision simply interpreted the law as it is since the year 2010.

Issue (ii)

15. Going by the answer in (i) above, the intended action by the 1st respondent does not violate or threaten violation of the constitutional rights set out in the petition. The Cabinet Secretary only seeks to regularize appointment of chairpersons and members of Governing councils of Public Universities.

16. The University Act, 2012 does not separate the recruitment process with the appointment itself. If this was the intention of the Legislature, nothing would have been easier than to provide for the selection process to be carried out by the Public Service Commission and for the appointment itself to be done by the Cabinet Secretary.

17. The fact that an ex-officio member of the Governing council of public universities is nominated from the Ministry of Education, Science and Technology under Section 31 (1) (b) of the Universities Act, 2012 does not in the court's view create a conflict of interest in the role of the Cabinet Secretary to appoint the chairperson and other members of the Governing Council of public universities.

18. The petitioners have failed to demonstrate that the 1st respondent acted ultravires the Universities Act, 2012 nor has he violated any named Article of the constitution.

19. The term appointment is defined in the Concise Oxford English Dictionary 12th Edition to mean *inter alia* “the action or process of appointing someone.”

It is therefore clear that the statute entrusts the Cabinet Secretary with the power to appoint and the process of appointment.

Unless there is a statutory provision to the contrary, this court cannot arrogate itself the power to designate a different organ to carry out the process of recruitment of the chairpersons and members of the governing councils of public universities.

20. The impugned advertisement clearly stated that the recruitment exercise will be carried out in “an open and competitive manner.”

There is no evidence presented to this court to the contrary by the petitioners.

The court notes however that it may be prudent to revisit the law to allow the Public Service Commission or any designated Government agency to carry out recruitment of chairpersons and members of Governing Councils of Public Universities.

21. The petition lacks merit and is dismissed with no order as to costs.

Dated and delivered at Nairobi this 2nd day of March 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE