REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 23 OF 2016

(CONSOLIDATED WITH PETITION NO. 11 OF 2016)

OKIYA OMTATAH OKOITI….....1ST PETITIONER

JOSHUA KIPTOO…….…….....2ND PETITIONER

VERSUS

CABINET SECRETARY MINISTRY OF EDUCATION, SCIENCE

AND TECHNOLOGY…….....….1ST RESPONDENT

PUBLIC SERVICE COMMISSION…….....2ND RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL…….....4TH RESPONDENT

AND

KENYATTA UNIVERSITY COUNCIL…..….....1ST INTERESTED PARTY

UNIVERSITIES ACADEMIC STAFF UNION.....2ND INTERESTED PARTY

Okiya Omtatah for applicants

Odukenya for respondent

Enonda for 1st interested party

Kibe Mungai for 2nd interested party

RULING

1. The petitioners/applicants by a notice of motion dated 27th March 2017 have moved the court for orders: -

1. That upon the *interpartes* hearing and determination of the instant application, the Honourable Court be pleased to issue orders quashing all appointments the 1st respondent has made of chairpersons and members of governing councils of 22 public universities and of their constituent colleges pursuant to Gazette Notice No. 2334 – 2355, inclusive all dated 10th March 2017 and published in the Special Issue of the Kenya Gazette Vol. CXIX – No. 31 on the 14th day of March 2017.

2. That this Honourable Court be pleased to review, set aside and substitute appropriate findings and orders for its erroneous findings and orders contained in its judgment dated and delivered at Nairobi on the 2nd day of March 2017 with regard to the court's decision to uphold the 1st respondent's impugned process of recruiting and appointing chairpersons and members of governing councils of public universities and their constituent colleges.

3. That this Honourable Court be pleased to reinstate the consolidated petitions and determine them on merit as a matter of topmost priority.

2. The application is supported on grounds set out on the face of the notice of motion as follows: -

a. That the 1st petitioner/applicant has just learnt that on 10th March 2017, in a period of only 8 days upon the dismissal of the consolidated petitions on the 2nd day of March 2017 by this Honourable Court, the 1st respondent proceeded to appoint chairpersons and members of governing councils of 22 public universities and their constituent colleges without advertising the vacancies and inviting applications from qualified and interested members of the public.

b. That contrary to the national values and principles of governance [in Articles 4 (2) and 10 of the Constitution of Kenya], the guiding principles of leadership and integrity and the values and principles of public service (in Article 232 of the Constitution), the rule of law was totally ignored to the extent that there was no provision for public participation transparency, competitive recruitment and accountability in the impugned process of making the appointments.

c. That there was no due diligence in the opaque appointment process as some of the persons appointed to positions of chairpersons or members of governing councils of the 22 public universities and their constituent colleges are of questionable integrity or are conflicted and this would have been avoided had public participation been allowed.

d. That the 1st respondent ignored attempts by the 2nd interested party herein who went out of its way to write letters pointing out matters of integrity and conflict of interest concerning some of the people who have been appointed as members of the 1st interested party.

e. That without prejudice to the foregoing, the Honourable Court decision to dismiss the consolidated petitions resulted in a miscarriage of justice because it ignored the petitioners pleadings, *interalia* that the impugned recruitment process was not transparent and accountable and did not provide for public participation.

f. That whereas the Honourable Court made a finding that the 1st respondent was vested with jurisdiction to appoint chairpersons and members of governing councils of public universities and their constituent colleges, the issue was not at all in contention herein.

g. That the petitioners in the consolidated petitions never challenged the mandate of the 1st respondent to appoint chairpersons or members of governing councils of public universities and their constituent colleges, the petitioners challenged the exercise of that mandate in an opaque and totally unaccountable manner.

h. That notwithstanding the 1st respondent's undertaking in its impugned earlier advertisements

announcing vacancies in governing councils of public universities and their constituent colleges, which the Honourable Court quashed through its conservatory orders, that the exercise would be carried out in "*an open and competitive manner*," the 1st and 2nd petitioners were aggrieved that there was no process set in motion for ensuring the same. Further and in particular:

i. The names of applicants were not published anywhere. Ideally, names of all applicants who responded to the adverts ought to have been published in the mass media.

ii. There was no provision for members of the public to participate in the recruitment exercise. Ideally, the 1st respondent ought to have made provision for members of the public to participate in the recruitment exercise, especially as regards vetting the shortlisted candidates on integrity and conflict of interest issues.

iii. The composition of the recruitment/selection panel was not disclosed. Ideally, and in the spirit of transparency and accountability, members of the recruitment/selection panel ought to be published to among others ensure objectivity and impartiality in decision making and to guard against the possibility of decisions being influenced by nepotism, favoritism, other improper motives or corrupt practices, contrary to Article 73 (2) (b) of the Constitution

i. That there are totally no factual and legal bases for the court's decision to determine an issue that was not in contention before it and as a result, to dismiss the consolidated petitions without considering the merits.

j. That in the circumstances, the orders of the Honourable Court are repugnant to justice and oppressive and punitive to the petitioners.

k. That it is in the interests of fairness and justice to review the judgment.

l. That the material before the Honourable Court is sufficient to warrant a review of this court's adverse orders.

Grounds of Opposition

3. The 1st interested party Kenyatta University Council filed grounds of opposition to the application as follows;

i. the petitioners' grievances regarding the judgment dated and delivered on 2nd March, 2017 can only be ventilated through an appeal as opposed to an application for review in this Honourable Court.

ii. The petitioners' application seeks orders against persons who are not parties to these proceedings.

iii. The petitioners' application is incurably defective.

iv. There are no valid grounds for this Honourable Court to review or set aside its judgment.

v. The petitioners' application constitutes gross abuse of the court process.

vi. Given that the petitioners invoked the court's jurisdiction to enforce fundamental rights and freedoms, under Articles 20 – 22 of the constitution, the petitioners are estopped from resorting to Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 or Order 45 of the Civil Procedure Rules to review or set aside the judgment dated and delivered on 2nd March 2017.

vii. The petitioners' application offends the national values and principles of governance set out in

Article 10 of the Constitution.

4. The 2nd interested party is in support of the application.

5. The respondents filed preliminary objection dated 6th April 2017 and filed on 7th April 2017 as follows: -

> 1. The petitioners/applicants have not satisfied the requirement of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 in that:-
>
> > a. The applicants have not produced new and important evidence which was upon the exercise of due diligence, not within their knowledge or could not be produced at trial or at the time when judgment was delivered.
> >
> > b. The applicants have not shown any mistake or error apparent on the face of the record/judgment.
> >
> > c. The applicants have not moved court that the judgment requires clarification.
> >
> > d. The applicant has not shown any other sufficed reasons for the Honourable Court to review its judgment or at all.

6. All the parties filed written submissions and a careful analysis of the contents of the papers filed have in my view crystalized to one major issue for determination as follows; -

Have the applicants satisfied the requirements of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 to warrant the court to review its judgment delivered on 2nd March 2017?

7. The rest of the prayers depend on whether or not this question is answered in the affirmative or not.

Applicant's Case

8. A careful perusal of the supporting affidavit of Okiya Omtatah Okoiti sworn on 27th March 2017 sets out the grounds for review as follows: -

> "The court be pleased to review, set aside and substitute appropriate finding and orders for its erroneous findings and orders contained in its judgment dated and delivered at Nairobi on 2nd day of March 2017 with regard to the court's decision to uphold the 1st respondent's impugned process of recruiting and appointing chairpersons and members of governing councils of public universities and the constituent colleges." (emphasis mine)

9. The deponent further avers that;-

> "The 1st petitioner/applicant has just learnt that on 10th March 2017, in a period of only 8 days upon the dismissal of the consolidated petition on the 2nd day of March 2017 by this Honourable Court, the 1st respondent proceeded to appoint chairpersons and members of governing councils of 22 public universities and their constituent colleges without advertising the vacancies and inviting applications from the qualified and interested members of the public"

10. It is further submitted by the applicants that the court in arriving at its decision "*ignored the petitioners'' pleading interalia that the impugned recruitment process was not transparent and accountable and did not provide for public participation*."

11. The applicant further avers that there is something fundamentally wrong with the judgment of the

court in that the conclusion reached does not match the reasoning and it seems to have been done in a hurried and not well thought out manner that totally missed the merits of the consolidated petitions.

12. The above are the grounds the court has extracted from the notice of motion and the supporting affidavit to be the basis for wanting the court to review and set aside its judgment.

13. These grounds are opposed by the respondents and the 1st interested party on the basis that they do not satisfy the requirements for review in that the applicant: -

> 1. Has not produced any new and important evidence which was upon the exercise of due diligence not within the knowledge of the petitioners and could not be produced at trial or at the time when judgment was delivered.
>
> 2. That the applicant has not shown any mistake or error apparent on the face of the judgment.
>
> 3. That the court has not been moved to clarify any aspect of the judgment.

14. The respondents and 1st interested party have submitted that the applicant seeks to introduce a new cause of action in the already determined suit and in respect of persons or appointees who were not parties in the old suit and have not been cited as parties in the new suit.

15. That the applicants purport to introduce Gazette Notice showing the appointments of these persons as chairpersons and members of council of various public universities and constituent colleges and impugn their appointments without giving them opportunity to be heard. That this kind of information is not one that is contemplated under Rule 33 (1) of the rules of the court.

16. That the applicants purport to produce letters dated 16th June 2017, 17th January 2017 and 20th March 2017 which letters were clearly not in existence at the time of the hearing and or judgment of this matter.

17. With regard to the letter dated 17th Janaury 2017, the letter was written by the 2nd interested party herein to the 1st respondent and is of no evidential value to the already decided case and therefore cannot be the basis for review of the judgment of the court.

18. As a matter of fact all these letters cited above were complaints by the 2nd interested party to the 1st respondent and cannot be said to comprise new evidence warranting a review of the judgment of court delivered on 2nd March 2017 before the said letters had been written by the interested party.

19. In the case of **Karmali Tarmohamed –vs– Lakhani [1958] E. A 567 at page 574 Sir Kenneth O' Connor, P.** held;

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Secondly, the evidence must be such that if given, it would probably have an important influence on the result of the case though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible."

20. The purported evidence fails to pass the first hurdle in that it is material generated by the 2nd interested party who is in support of this application after the conclusion of the hearing of this case and after judgment was delivered except the letter dated 20th March 2017 which in the court's view would have not much influence on the decision the court delivered on 2nd March 2017.

21. Indeed, the evidence is in the court's view irrelevant to the issues at hand in the decided matter.

22. In the Court of Appeal at Nairobi, Civil Appeal No. 275 of 2010 between **Pancreas T. Swai –vs– Kenya Breweries Limited G. G. M Kariuki, Kiage and J. Mohammed, JJA** rendered themselves thus;

> *"[29] it seems clear to us that the appellant in basing his review application on the failure by the court to apply the law correctly faulted the decisions on a point of law. That was a good ground of appeal but not a ground for an application for review. If parties were allowed to seek review of the decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly, or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction*."

23. The applicants specifically in the notice of motion and supporting affidavit fault the court for "*erroneous findings*" of fact or law; ignoring pleadings by the petitioner and failure to consider documents which clearly were generated after the conclusion of the trial and delivery of judgment.

24. The applicant further prays the court to injunct and or nullify appointments that were done after judgment was rendered in this matter on the basis that the court ought to have nullified the recruitment process that was challenged by the petitioners and in respect of which the court made a finding of fact and law that the petitioners have failed to demonstrate that the 1st respondent acted ultra vires the Universities Act, 2012 nor had violated any named Article of the Constitution.

25. The court further found that;

> "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 the court to the contrary by the petitioners."

26. The court made these findings upon considering the facts before it and the law applicable to the facts. If the applicants are dissatisfied with the decision of the court, these are proper grounds for appeal and not review.

27. Furthermore, the Court of Appeal held in **Pancreas T. Swai supra**

> "The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reasons in Rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issue of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in Rule 1, refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."

28. Order 45 referred to above is *mutatis mutandis* with Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 applicable in this court.

29. It is the court's considered view that the reasons advanced by the applicants in their application do not meet the test set out herein before and the application must therefore fail in its entirety.

30. This is simply a new cause of action disguised as an application for review. Furthermore, the court is being asked to sit on appeal on its own decision and clearly lacks jurisdiction to do so.

31. Costs to follow the outcome

Dated, Signed and Delivered on this 10th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE