



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 9 OF 2017

DAVID MUTINDA MUMO PETITIONER

VERSUS

CABINET SECRETARY FOR EDUCATION

(DR.FRED MATIANG'I).....1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

PROFESSOR PAUL MUSILI WAMBUA 3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 20th December, 2017)

JUDGMENT

The petition was filed on 11.04.2017 through A.N. Munga Mwadumbo & Company Advocates. The petition was in the matter of Articles 1, 2, 3, 10, 20, 21, 22, 23, 27, 35 (1), 41(1), 47, 48, 50(1), 159, 232, 258, and 259 of the Constitution of Kenya; and in the matter of Rules 4, 13, 15, 23, and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; in the matter of alleged violation of Articles 1, 2, 3, 10, 23, 27, 35 (1), 41(1), 47, 73, 75, 232, 234, 258, and 259 (1) of the Constitution; in the matter of the alleged violation of section 38(4) and Rule 6 of the 2nd schedule of the Universities Act, Act No.42 of 2012; and in the matter of the constitutional and legal validity of the handpicking and appointing of Professor Paul Musili Wambua as the Chancellor of the University of Embu without going through a fair, open, merit based, and inclusive process. The petitioner prayed for:

- a) A declaration that recruitment of persons to be recommended to the President for appointment as the Chancellor of a public university of recent establishment, must be through the fair, open, competitive, merit based, and inclusive process enshrined in Articles 10, 27, and 232 of the Constitution.
- b) A declaration that the handpicking and appointment of the interested party as the Chancellor of the University of Embu is irregular, illegal, unlawful and therefore, unconstitutional, invalid, null, and void *ab initio* and of no consequence in law for not having been made through a fair, open, competitive, merit based, and inclusive process as required by the Constitution.
- c) An order quashing in its entirety the Gazette Notice No. 8310 (Vol. CXVIII – No.123 of

01.10.2016 announcing the appointment of the interested party as the chancellor of the University of Embu.

d) An order of mandamus directing the 1st respondent to commence the recruitment of persons to be recommended to the President for appointment as the Chancellor of a public university of recent establishment, must be through the fair, open, competitive, merit based, and inclusive process and to make public the names of persons so recruited.

e) Any other or further remedy that the honourable court shall deem fit to grant.

f) The respondents to pay costs of the petition.

The petition is supported with the petitioner's affidavit together with the attached affidavits as filed together with the petition.

In exercise of the powers conferred by section 38 (1) (a) and (2) of the Universities Act, the President appointed the interested party to be the Chancellor of the University of Embu with effect from 07.10.2016 for a period of five (5) years. It is that appointment that prompted the petitioner to file the present proceedings. The petitioner states that he has brought the petition as a citizen and acting in the public interest.

The petitioner's case is as follows:

a) The 1st respondent has failed, in contravention of Article 35 on the right to access information, to avail the names of the two (2) other individuals recommended to the president alongside the interested party for appointment to the position of the Chancellor of the University of Embu.

b) The petitioner faults as irregular, misinformed, unlawful and, therefore, unconstitutional, null and void, the appointment of the interested party as the Chancellor of the University of Embu, without adhering to the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, merit, and openness in public appointments.

c) The 1st respondent recommended the interested party for the appointment in contravention of Article 73 of the Constitution on responsibility of leadership because the 1st respondent failed to consider the moral and ethical standing of the interested party and his ability to espouse the leadership and integrity principles as set out in the Article 73.

d) The appointment of the interested party was in violation of Article 232(1) (g) of the Constitution which proclaims that appointments in the public service must be based on fair competition and merit.

e) The appointment offended Article 232 (1) (i) of the Constitution which demands that the state affords equal opportunities for appointment, training and advancement at all levels of the public service of – (i) men and women; (ii) the members of all ethnic groups; and (iii) persons with disabilities.

f) The appointment violated Article 234 (2) (a) of the Constitution which declares that subject to the Constitution, the Public Service Commission shall establish and abolish offices in the public service, and appoint persons to hold or act in those offices, and to confirm appointments.

g) The appointment was inconsistent with the provisions of section 38(4) of the Universities Act, 2012 which provides that a person shall only be appointed as a Chancellor where the person is a person of high moral character and integrity in accordance with Chapter Six of the Constitution.

h) Section 38(1) (a) of the Act states that every university shall have a Chancellor, who shall be

appointed, in the case of a public university, by the President in accordance with the procedure set out in the Second Schedule. The University of Embu was a recently established public university and section 6 of the Second Schedule applied and it states thus, **“6. Where a Public University is of recent establishment and has no alumni the President shall, from three names recommended by the Cabinet Secretary, appoint the person to be the Chancellor of the university.”** The petitioner’s case is that the 1st respondent failed to comply with that provision as three names that were to be recommended for appointment have not been disclosed.

i) The recommendation of the three names under section 6 of the second schedule was to be carried out in a transparent and merit based process governed by the overriding principles of equality and merit based process as provided in Articles 10, 27, 35, 41(1), 47, 73, and 232 of the Constitution of Kenya. The provisions were not applied in the recommendation of the interested party for appointment as the process was not inclusive, accountable, merit-based, transparent and public participation. The position had not been advertised, candidates shortlisted, suitable candidates interviewed, and 3 names of successful candidates recommended for appointment as per section 6 of the second schedule.

j) If the process had been transparent and interviews carried out through public participation, it would have been discovered that the interested party was not suited to hold the office of Chancellor or public office as per criteria in section 38 (4) of the Act a Chancellor must be a person of high moral character and integrity.

k) The petitioner was aware of numerous aspersions cast on the integrity and character of the interested party and as published in the print media on diverse dates and as exhibited on the supporting affidavit. The petitioner had investigated the matter through his advocate and the interested party being an advocate, the Advocates’ Disciplinary Tribunal of Law Society of Kenya had convicted the interested party with respect to misappropriating some funds in his capacity or dealings as an advocate. There were also some pending disciplinary cases against the interested party at the Advocates’ Disciplinary Tribunal of Law Society of Kenya. Further, the interested party was subject to investigations with respect to some complaint levelled before the Bank Fraud Investigating Unit relating to alleged issuance of certain cheques by the claimant from his law firm and drawn against an account which was allegedly dormant.

l) The interested party had been appointed without necessary public participation; scrutiny; vetting; and the appointment had not been transparent, fair and merit-based.

m) By handpicking the interested party, the 1st respondent violated the right of qualified persons to equal benefit and protection of the law as provided in Article 27 of the Constitution.

n) By failing to conduct transparent, public, fair and merit-based recruitment of persons to be recommended for the appointment, the 1st respondent violated the provisions of Article 41(1) of the Constitution as far as the same provides for fair labour practices as there is no fairness when individuals are handpicked for public offices. Similarly, Articles 73 and 232(1) (d) and (e) and (g) of the Constitution had been violated.

The interested party filed his replying affidavit on 16.06.2017 through M.M Gitonga Advocates. The interested party stated that the 1st respondent had reliably informed him that he had been appointed Chancellor out of 3 names recommended by the 1st respondent to the President. That he was duly qualified for the appointment by reason of his educational qualifications, work experience, personal integrity, character, competence and suitability to hold the office of Chancellor of any university in Kenya. The appointment had been in accordance with the Universities Act, 2012 and the petitioner’s case was based on the exhibited defamatory newspaper articles and the exhibits would not provide material facts to enable the court to make a determination with regard to the personal character and integrity of the interested party to hold public office. Thus, the interested party exhibited the plaint in Civil Cause No.2128 of 2017 in the Chief Magistrate’s Court at Nairobi where he has sued Headlink Publishers

Limited T/A Weekly Citizen Newspaper and Kennedy Ngumbau Mulwa for defamation in relation to the press reports relied upon by the petitioner. The petition was therefore mischievous and maliciously calculated to hound the interested party out of the office of Chancellor. Further, for about 60 years of his adult life, the interested party had not been convicted of any criminal offence or been subjected to investigation by the police with respect to alleged criminal activities. He had applied for review of the judgment in disciplinary cause no. 4 of 2015 which as far as the interested party was concerned, had been irregularly obtained by his former law firm partner one John Katiku with whom he had bitterly fell out (at Musyoka Wambua & Katiku Advocates). The interested party stated that he considered himself a person of high moral character and integrity which he had painstakingly developed for over close to six decades; and he had exhibited exemplary performance both at national and international levels.

The interested party further stated that his former law firm partner one John Katiku had filed four disciplinary cases against him and the interested party had filed two disciplinary cases against the said John Katiku before the Advocates Disciplinary Tribunal and the cases were pending before the Tribunal and thus, the *sub-judice* rule applied in so far as the court's jurisdiction was concerned to make a determination on merits about the pending cases as before the Tribunal. The petitioner had also filed Civil Suit No. 516 of 2016 at the High Court at Nairobi, Milimani, against Cyrus Maina & Company Advocates and Kennedy Ngumbau Mulwa and that the court should consider that the said Kennedy Ngumbau Mulwa and John Katiku had sponsored the present petition in view of the pending disputes. Thus, behind the present petition, as far as the interested party was concerned, was the pending dispute about a professional undertaking issued to the said Kennedy Ngumbau Mulwa to secure funds for a client's (Michael Mwongera Arimbi) business transaction that eventually fell through and where Kennedy Ngumbau Mulwa stands to lose money to the default by the client (Michael Mwongera Arimbi). Finally, the interested party stated that the present suit was anchored upon Article 35 of the Constitution on access to information but the petitioner had not demonstrated that he had requested for the information and the information denied or not provided by the 1st respondent.

The 1st respondent filed on 06.09.2017 the replying affidavit of James M. Kiburi, the Deputy Director of University Education at the Ministry of Education. Learned Litigation Counsel, A.M. Njagi for the Attorney General appeared for the 1st and 2nd respondent. The 1st respondent's case as per the replying affidavit is as follows:

- a) On 07.10.2016 the President granted Charters to certain seven universities in accordance with the Universities Act, 2012.
- b) The universities granted the Charter on that date included University of Embu, Murang'a University of Technology, Co-operative University of Kenya, Machakos University, Kirinyaga University, Taita Taveta University, and Rongo University.
- c) The 1st respondent had compiled a pool of qualified persons from whom he recommended for appointment in accordance with the law.
- d) Those principles of governance as alleged for the petitioner had not been contravened in the appointment of the Chancellors including the appointment of the interested party.
- e) Further, the 1st respondent did not have a record of professional misconduct or conviction against the interested party.
- f) The position of the Chancellor was not employment as such and therefore Article 41 of the Constitution did not apply. The court has considered that line of pleading and returns that the position of Chancellor in a public university is clearly an office in the public service subject to such employment norms and public service law and practices. The relevant public service code of conduct and ethics will therefore apply. The court further notes that the respondents abandoned the pleading as no submissions were made in that regard and the issue will not be further addressed in this judgment.

The petitioner filed a further supporting affidavit on 03.10.2017 and all the parties filed their final submissions.

The **1st issue** for determination is whether the petitioner had standing to file the present petition. The court has considered the replying affidavits and the submissions filed for the respondents and the interested party. Nowhere is it urged that the petitioner lacked standing. The petitioner made submissions to show that he had standing. The court returns that it was not in dispute that he had standing and in any event he was entitled to file the petition as standing was conferred under Articles 22 and 258 of the Constitution.

The **2nd issue** for determination is whether the interested party was not a person of high moral character and integrity to be appointed as the Chancellor of the University of Embu. First, the court returns that the interested party has established that he has challenged in a civil suit the adverse print media publications about his character and which he says are defamatory. Second, the interested party has established that there are pending disciplinary cases before the Advocates Disciplinary Tribunal and it is not denied that he has filed a review to challenge the one conviction issued in a judgment by the Tribunal against him. The interested party has also showed that there is a pending civil suit at the High Court about the adverse reports about certain financial transactions it was alleged he was involved in as an Advocate. Thus, the court considers that the adverse allegations as urged by the petitioner about the moral character and integrity of the interested party have not been established because the allegations are clearly subject of pending and lawful proceedings before competent adjudicating authorities namely the High Court, the Advocates Disciplinary Tribunal and the Magistrate's Court.

To answer the 2nd issue for determination the court returns that in the circumstances of the case and taking into account the material on record the court declines to make a finding on the moral character and integrity of the interested party to hold public office as that determination may be possible only after the conclusive determination of the said pending cases. Further, such a finding can only be made by the relevant authority exercising disciplinary control over the interested party as a public officer in a proceeding under which the interested party would be called upon to defend himself and in a specific allegation of breach of a provision of the code of conduct and ethics for the time being applicable to such office as held. The court further holds that its jurisdiction would then accrue only if the findings by such authority exercising disciplinary control over the concerned public officer become subject of legal proceedings before the court such as by way of judicial review or other action.

While making that finding, the court has further considered that a finding by a competent authority that a person is liable one way or the other would not by itself mean that a person's moral character and integrity to hold a public office is thereby necessarily impaired. The court says it in other words as follows. While persons are engaged in transactions of life including performance of professional duty, disputes may arise one way or the other. The resolution of those disputes may find that a person was liable. The court holds that such finding of liability will not always mean that such person is of questionable moral character and integrity but the finding may only be definitive of the disputants' rights, obligations, and positions with respect to the dispute that was at hand.

In the opinion of the court, to make or arrive at a consideration that a person's moral character and integrity falls short of the standard to hold public office is a consideration that may properly be done by the recruitment, selection and appointing authority in a process that affords the affected person a chance to address the allegations prior to the informed consideration being taken one way or the other. The court says a consideration and not a finding or decision because such recruitment, selection and appointing authority in the recruitment, selection and appointment proceedings is not an adjudicator or judge of character and integrity of the candidates but merely an authority that scores the candidates one way or the other. Thus the court considers that in a recruitment and selection proceeding, the recruitment and selection panel invites the candidate to show his or her suitability for the available job or position and not to defend his or her moral character and integrity in which the panel returns a finding that the candidate holds or does not hold the requisite moral character and integrity. In the court's opinion, the panel makes a score on the considered level of candidate's moral character and integrity just as it will score the candidate on the other criteria on the score sheet and such scoring does not thereby make a finding or

decision that the candidate is of low or high moral character and integrity. The court has also considered that within the realm of public service, a determination about a person's moral character and integrity can be made by the relevant authority exercising disciplinary control over the officer and only if a disciplinary case against such person being a public officer has been taken out in which the person is given an opportunity to defend himself or herself and the findings would be limited to the specific allegations about the breach of the stated provision of the public officer code of conduct and ethics. Thus, for those persons aspiring to become public officers, their moral character and integrity becomes a mere consideration within the scoring criteria about which the recruitment and selection panel makes a consideration and informs itself; but since it is not a process putting the candidate on self-defence as such, it cannot be said that the panel can thereby make a hard decision or finding about the candidate's moral character and integrity.

Further, the court finds that the purported copy of the judgment in the Law Society of Kenya Disciplinary Committee Case No.4 of 2015 said to have been against the petitioner is endorsed "**draft**", is not signed by all the mentioned makers and it was not a certified copy. Accordingly, the court found it impossible to rely on such a document with doubtful authenticity towards making the all important determination about the moral character and integrity of the interested party.

To answer the **3rd issue** for determination the court returns that it is clear that office of Chancellor of a university is established under the Universities Act, 2012 and the appointment to hold that office is in accordance with section 38(1) of the Act. In the case of a public university like the University of Embu, the appointment is in accordance with the procedure in the Second Schedule to the Act. The petitioner has not alleged that the procedure in the Second Schedule offended any constitutional provision and the court returns that the procedure was capable of being applied constitutionally. The procedure cannot be said to be unconstitutional or in contravention of the values or principles in Articles 10, 232 or Chapter 6 of the Constitution because in the wisdom of Parliament, the relevant stakeholders and safeguards towards merits, suitability of the candidate and participation have been carefully designed to apply.

To answer the **4th issue** for determination, the court returns that the claimant has not showed that he demanded that the 1st respondent provides information about the appointment of the interested party and the 1st respondent failed to comply. Indeed, in the present case the petitioner has not prayed that the 1st respondent provides such information. Thus, the court returns that the petitioner has failed to establish violation of Article 35 of the Constitution on access to information.

To answer the **5th issue** for determination, the court finds that it was misconceived for the petitioner to urge that the office of Chancellor in a university was subject to establishment and appointment by the Public Service Commission under Article 234 (2) (a). Under that constitutional provision, the power of the Commission to establish offices and to make appointments to public offices is subject to the Constitution and the law. It is obvious that such power is subject to the legislative power of the Parliament provided the enactment by Parliament is not unconstitutional. Thus, the court returns that the Parliament was entitled to establish the office of Chancellor of a university as was done under section 38 of the Universities Act, 2012 and to further provide for the procedure for recruitment and selection of the candidate as well as the appointing authority under the section and as per the procedure in the Second Schedule to the Act. For avoidance of doubt, the court holds that the Constitutional Commissions and Independent Offices are subject only to the Constitution and law as provided under Article 249 (2)(a) of the Constitution. Thus, as long as an Act of Parliament is not said and found to be inconsistent with the Constitution, the Constitutional Commissions and the Independent Officers would be bound accordingly.

The **6th issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The petitioner prayed for a declaration that recruitment of persons to be recommended to the President for appointment as the Chancellor of a public university of recent establishment, must be through the fair, open, competitive, merit based, and inclusive process enshrined in Articles 10, 27, and 232 of the Constitution. The court has found that the cited provisions of the Constitution would

apply within the framework established by Parliament in section 38 as read with the Second Schedule to the Universities Act, 2012. In so far as the procedure in the Act was not challenged as being unconstitutional, the court returns that it would be superfluous to issue the declaration as prayed for.

b) The petitioner prayed for a declaration that the handpicking and appointment of the interested party as the Chancellor of the University of Embu is irregular, illegal, unlawful and therefore, unconstitutional, invalid, null, and void *ab initio* and of no consequence in law for not having been made through a fair, open, competitive, merit based, and inclusive process as required by the Constitution. The court has found that the appointment of the interested party was pursuant to section 6 of the Second Schedule thus, **“6. Where a Public University is of recent establishment and has no alumni the President shall, from three names recommended by the Cabinet Secretary, appoint the person to be the Chancellor of the university.”** The court has considered the provisions of the Second Schedule on appointment of a Chancellor where the university has long been in existence with alumni. As submitted for the respondents, in such cases, the Schedule provides that a vacancy in the office of the Chancellor would be filled through the senate of the university, in consultation of the university’s alumni association identifying suitable person to be appointed by the President to fill the vacancy. The procedure appears to bear in mind certain considerations which do not make advertisement mandatory. It would appear that the considerations are to be in the discretion of the senate in consultation with the alumni association. Taking into account that procedure, the court returns that similar considerations must have been designed to be in the discretion of the Cabinet Secretary for appointment of Chancellor under section 6 of the Second Schedule. In the court’s opinion, the discretion by the Cabinet Secretary or the senate in consultation with the alumni association is not chained except by the doctrine of reasonableness. In the present case, it has not been established that the Cabinet Secretary acted unreasonably and therefore, the court returns that the recommendation cannot be said to have fallen short of the constitutional values and principles. The court has further considered that the duty of the Cabinet Secretary was to recommend within the framework of stating that in his opinion, a given person would be suitable for the appointment. The scope of the duty was limited accordingly and the court returns as much. While making that finding, the court returns that the petitioner did not seek or demand and subsequently pray that the 1st respondent provides the relevant information including the matters the Cabinet Secretary may have taken into account in including the interested party in the pooled persons to be appointed by the President. Thus, the court considers that it would be unreasonable to recall and quash the recommendation and the appointment without full information surrounding the recommendation and subsequent appointment of the interested party. The prayer will therefore fail.

c) The petitioner prayed for a declaration that recruitment of persons to be recommended to the President for appointment as the Chancellor of a public university of recent establishment, must be through the fair, open, competitive, merit based, and inclusive process enshrined in Articles 10, 27, and 232 of the Constitution. The court has already found that the procedure for the appointment is as per section 38 of the Universities Act, 2012 as read with section 6 of the Second Schedule to the Act. The court has also found that the provisions have not been shown to have been unconstitutional or to have been applied unconstitutionally. The remedy as prayed for would be superfluous and would therefore not issue.

d) The petitioner has prayed for a declaration that the handpicking and appointment of the interested party as the Chancellor of the University of Embu is irregular, illegal, unlawful and therefore, unconstitutional, invalid, null, and void *ab initio* and of no consequence in law for not having been made through a fair, open, competitive, merit based, and inclusive process as required by the Constitution. The court has returned that the full information and considerations surrounding the appointment of the interested party are not before the court. There is no material before the court showing that the interested party was handpicked and recommended for appointment without due considerations of his suitability. The court considers that the issue in the instant case is not so much whether there were other citizens suited for the appointment but whether the interested party as appointed was suited; and the court returns that there is no material before the court for a finding

to be made that the interested party was not so suited. The court considers that the 1st respondent says he had a pool of qualified persons for appointment and the court is inclined to find that in absence of any other material before the court, the 1st respondent substantially complied with section 6 of the Second Schedule especially that there was no complaint or grievance on the part of the appointing authority, the President, about contravention of the provision about the three names being recommended. The prayer will therefore fail especially that the petitioner did not pray or demand for full disclosure of the considerations made prior to the recommendation of the interested party for appointment. The prayer will therefore fail as unjustified.

e) The petitioner prayed for an order quashing in its entirety the Gazette Notice No. 8310 (Vol. CXVIII – No.123 of 01.10.2016 announcing the appointment of the interested party as the chancellor of the University of Embu. The court has found no justification for quashing of the appointment. The prayer will therefore be declined.

f) The petitioner prayed for an order of mandamus directing the 1st respondent to commence the recruitment of persons to be recommended to the President for appointment as the Chancellor of a public university of recent establishment, must be through the fair, open, competitive, merit based, and inclusive process and to make public the names of persons so recruited. It is law that mandamus will issue to compel performance of a duty which was the respondent's duty to perform but despite demand or request to perform, the respondent has refused, neglected or declined to perform. The petitioner has not established that a demand was made and the 1st respondent declined to perform the duty in question and as prayed for. The court further finds that the material on record establish that the nature of the present case was an allegation that the 1st respondent had failed to properly perform his statutory duty in making a recommendation under section 6 of the Second Schedule to the Universities Act, 2012. Thus the court returns that a judicial review order of mandamus would not be available to remedy such an allegation about alleged improper performance of a public duty – as it would be sufficient that the improper performance is set aside or quashed as the offending proceeding or decision as the court may find necessary, or, that the offending decision or proceeding is declared unlawful or a nullity, as the court would find appropriate. The prayer will fail as either misconceived or unjustified.

The court has considered that the petitioner moved the court as a private citizen and in the public interest pursuant to Articles 22 and 258 of the Constitution. In the interests of growth of jurisprudence surrounding the implementation of the Constitution of Kenya, 2010, the court considers that each party shall bear own costs of the petition.

In conclusion, the petition is hereby dismissed with orders that each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at Nyeri this **Wednesday, 20th December, 2017.**

BYRAM ONGAYA

JUDGE