



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 89 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 1st March, 2016)

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

KENYATTA UNIVERSITY COUNCIL1ST RESPONDENT

CABINET SECRETARY, EDUCATION,

SCIENCE AND TECHNOLOGY2ND RESPONDENT

STATE CORPORATIONS ADVISORY UNION3RD RESPONDENT

AND

OLIVE MWIHAKI MUGENDA1ST INTERESTED PARTY

UNIVERSITIES ACADEMIC STAFF UNION2ND INTERESTED PARTY

RULING

1. The Applications before Court are ones dated 25th of January 2016 and 1st of February 2016.
2. The application dated 25th January 2016 seeks the following Orders:
 1. *That the application be certified as urgent and be heard on a priority basis on a date to be allocated by the Court.*
 2. *That the Honourable Court be pleased to strike out the two Notice of Motions applications separately filed herein by the 1st Respondent and the 1st Interested Party, both dated the 21st December 2015.*
 3. *That the Honourable Court be pleased to strike out the 1st Respondent as a party to these proceedings and the petition be amended accordingly.*
 4. *That the 1st Interested Party be ordered to produce her employment contract in court to support/substantiate her pleadings that the Court has interfered with her contract and pursuant to Section 24 of the Government Proceedings Act 9 (Cap 40).*
 5. *That Consequent to the grant of the prayers above the Honourable Court be pleased to issue further directions and orders as may be necessary to give effect to the foregoing orders, and/ or favour the cause of justice.*

6. *That costs be in the cause.*

3. Which application is supported by the affidavit of Okiya Omtatah Okoiti and on grounds that:-

1. *The application is preliminary in nature and should be heard on priority to the two other applications dated 21st December 2015, and filed herein separately by the 1st Respondent and the 1st Interested Party.*
2. *On the December 15, 2016, Section 39 of Universities Act 2012 was amended by the Statute Law (Miscellaneous Amendment) Act 2015 to read as follows:*

39. (1) The Vice – Chancellor of a University shall be

appointed:

- a. *in the case of a public university, competitively by the Cabinet Secretary on the recommendation of the Council; and*
- b. *in the case of a private university, by the respective university Council in accordance with the provisions of the charter.*

(1A) the qualification for appointment as a vice-chancellor of a public university shall be prescribed in regulations

(2) The Vice – Chancellor shall be chief executive of

University and shall:

- a. *be the academic and administrative head of university;*
- b. *have the overall responsibility for direction, organisation, administration and programmes of the university*

(3) The Vice- Chancellor of public university shall hold office for a term of five years and shall be eligible for a further term of five years.

(4) The terms of the Vice – Chancellor of a private university shall be provided in the charter.

(5) The provisions of this section shall apply mutatis mutandis to the principal of constituent college.

3. *On Saturday, January 16, 2016, the Respondent published an advert in the Standard newspapers, stating that the Government would apply to all public Universities this Court's decision in the case of Joseph Mutuura Mberia and Another vs The Cabinet Secretary for Education, Science and Technology and Others, Petition No. 33 of 2015.*
4. *The application of the decision in Joseph Mutuura Mberia (Supra) to all public Universities renders the 1st Respondent incapable of transacting any new business for the University from the date thereof.*
5. *On Thursday, 21, 2016, the 2nd Respondent published another advert in the Standard newspaper, declaring vacancies in the 1st Respondent, effectively disbanding the 1st Respondent.*
6. *The changes in law and government policy render application by the 1st Respondent to be overtaken by events*
7. *The changes in law and government policy render Order 4 issued herein on December 18th 2015 redundant and therefore not capable of being stayed since the 1st Respondent herein has been disbanded by the 2nd Respondent; and the 2nd Respondent is now required by law to prescribe the criterion for the appointment of the Vice chancellor of Kenyatta University.*

8. *The changes in law and government policy enforce Orders 1 2, and 3 issued herein on December 18th 2015, making the orders not open to being stayed.*
9. *The 1st Respondent's and the 1st Interested Party applications pending herein constitute an abuse of the Court Process and should not be entertained.*
10. *The particulars of the abuse of the Court process is that the parties have simultaneously and concurrently filed similar applications in the Court of Appeal.*
11. *Even though the Court of Appeal adjourned the two applications, the fact is that 1st Respondent and the 1st Interested Party have not withdrawn their applications, and the two applications remain alive in the Court Appeal.*
12. *In the premises, the 1st Respondent's and the 1st Interested Party's concurrent Applications in the two Courts, seeking the same orders based on the same grounds amount to forum shopping and constitute a grave abuse of the court process.*
13. *The application filed herewith is urgent as the applicant intends to strike out the applications filed and served by the 1st Respondent and the 1st Interested party herein, and the current application needs to be heard independently and in priority to the 1st Respondents' and the 1st Interested Party's aforesaid application.*
14. *If the 1st Respondents and the 1st Interested Party's aforesaid applications are heard prior to the Application herein, the public interest in the rule of law will suffer grave prejudice as the two applications will be heard in circumstances where both constitute an abuse of the court process and, further, the one by the 1st Respondent will be absolutely unnecessary having been overtaken by events.*
15. *The applicant/ petitioner has a right to access to this court to safeguard his rights and those of other Kenyans which have been, are being and are in danger of further infringement.*
16. *The honourable court has unfettered powers and jurisdiction to make orders sought*
17. *It is mete and just, for purposes of justice and equity and overarching purpose of constitutional integrity and rule of law, to make orders sought.*
18. *The balance of convenience favours the granting of orders sought in this application*

4. The application dated 1st February 2016 seeks the following orders:

That the applications be certified urgent and be heard on a priority basis.

1. *That the Honourable Court be pleased to admit the amended Petition filed herein as if it was filed with the leave of the Court.*
2. *That pending the hearing and determination of this Application and/ or the Petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to recruit and appoint a new Vice Chancellor of Kenyatta University.*
3. *That pending the enactment of the regulations stating the qualifications for appointment as a Vice Chancellor of all public university pursuant to Section 39 (1A) and 70 (1) of the amended Universities Act 2012, the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Respondents whether by themselves, or any of their employees or agents or any other persons claiming to act under their authority from proceeding to recruit and appoint the new Vice Chancellor or Kenyatta University.*
4. *That consequent to the grant of the prayers above the Honourable Court be please to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or labour the cause of justice.*
5. *That costs be in the cause.*

5. Which application is supported by the annexed affidavit of Okiya Omtatah Okoiti and on grounds that:

1. *The amendment to the Petition has been precipitated by recent changes in law and in Government policy, development outside the Petitioners Control.*

2. *On December 15 2016, Section 39 of the Universities Act 2012 was amended by Statute Law (Miscellaneous Amendments) Act 2015.*
 3. *On Saturday, January 16, 2016, the 2nd Respondent published an advert in The Standard newspaper, stating that the Government would apply to all public universities this court's decision in the case of Josephine Mberia and Another vs the Cabinet Secretary for Education, Science and Technology and Others, Petition No. 33 of 2015*
 4. *On Thursday, January 21, 2016 the 2nd Respondent published another advert in The Standard newspaper, declaring vacancies in the 1st Respondent effectively disbanding the 1st Respondent*
 5. *The changes in law and Government policy require amending the Petition to accord with the new reality.*
 6. *The applicant/petitioner has a right of access to this court to safeguard his rights and those of other Kenyans which have been, are being and are in danger of further infringement.*
 7. *The honourable court has unfettered powers and jurisdiction to make orders sought*
 8. *It is mete and just, for purposes of justice and equity and overarching purpose of constitutional integrity and rule of law, to make orders sought.*
 9. *The balance of convenience favours the granting of orders sought in this application*
6. The 1st Respondent has opposed the Petitioner's Applications via grounds of opposition filed and dated 2nd of February 2016 and 19th of February 2016.
 7. The 1st Respondent avers that given the subject matter of the Petition dated 21st October, 2015, they cannot be struck out as a party to the proceedings.
 8. They argue that the applications are an abuse of Court Process as there is already an order in place prohibiting the Respondents from recruiting and appointing a new Vice Chancellor.
 9. They further argue that no legal instrument has been issued to disband it, their existence has not been affected by the amendment to Section 39 of the Universities Act, nor have their powers to recruit a new Vice Chancellor been ousted, curtailed, or otherwise compromised.
 10. They argue that 4 of the orders made on the 18th of December has not been rendered redundant by changes in law and Government Policy forfeits the need to stay the same as its enforcement wont violate the law.
 11. They further state that Section 39 (1A) is not enforceable by this Honourable Court unless and until the 2nd Respondent has operationalized it through prescription of qualifications for appointment of a Vice Chancellor of a public University in the Regulations.
 12. They also argue that they have not taken any steps towards the recruitment and appointment of a Vice Chancellor of Kenyatta University and there is no factual basis for the order of prohibition sought by the Petitioner.
 13. The 2nd, 3rd and 4th Respondents oppose the Petitioners Applications and filed their Replying Affidavit deponed to by one Fenny Mwakisha Higher Education Director, State Department of Higher Education at the Ministry of Education, Science & Technology.
 14. They state that the Cabinet Secretary declared vacancies for the Chairpersons and members of the Councils in various Public Universities and Constituent Colleges on the 21st of January 2016, but the current council remains in office until the council is reconstructed.
 15. They further state that the Cabinet Secretary has since appointed a panel to shortlist the candidates for the declared positions and the panel has commenced exercise.
 16. They also state that following the amendment of the Universities Act 2012, the Ministry has embarked on the process of developing the regulations on the appointment of Vice Chancellors of

public universities in consultation with key stakeholders.

17.They state that applications are an abuse of court process and law as there is not legal issue raised for determination.

18.The 1st Interested Party opposed the application via a Replying Affidavit filed on the 1st of February 2016 deponed by Prof. Olive Mwihiaki Mugenda the Vice Chancellor of Kenyatta University.

19.She stated that the allegations raised by the Petitioner that the Court interfered with her contract was a misunderstanding of the issue raised in the case of **National Bank of Kenya versus Pipe Plastic Sankolit (K) Ltd. & another [2001]eKLR** where the court held that:

“A court of law cannot rewrite a contract between the parties. The Parties are bound by the terms of the Contract unless coercion, fraud or undue influence are pleaded and proved.”

20.Further, she stated that the Court compelling her to go on terminal leave, which is not provided for within her contract is tantamount to rewriting a contract which is an arguable issue that would merit an appeal hence the application for stay.

21.I have considered the submissions of both parties and the issues for determination by this Court are as follows:

1. **Whether the 1st Respondent can be struck out of these proceedings.**
2. **Whether this Court can strike out the application by the 1st Respondent and 1st Interested Party.**
3. **Whether the Vice Chancellor Prof Mugendi contract should be produced in Court.**
4. **Whether the Respondents should be prohibited from advertising and recruiting a new Vice Chancellor until regulations are developed pursuant to Section 39(1) A of the Universities Act.**

22.On the 1st issue, on 21.10.2015, the Petitioner filed the Petition and application before this Court against the Respondents and Interested Parties herein. Following the said application, this Court granted orders against the 1st Respondent and 1st Interested Party on 18/12/2015. The orders have been contested and the matter is still pending in Court.

23.On 1.2.2016, the petitioner filed an Amended Petition and still included the 1st Respondent as a Party. It will therefore be prejudicial to the 1st Respondent for this Court to give orders against them and at the same time strike them out of these proceedings. In the circumstances, an order seeking to strike out the 1st Respondent from these proceedings is untenable.

24.The reason given by the Petitioner in seeking to strike out 1st Respondent from the proceedings is derived from the Amendment to Universities Act and he avers that as currently constituted, the Council is in capable of transacting any business.

25.Section 23 (3) (c) of Cap 2 reads as follows:

“ where a written law repeals in whole or in part any written law unless a contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed or”

26. Section 25 of Cap 2 also states as follows:

“where one written law amends another written law, the amending written law shall, so far as it is consistent with the tenor thereof, and unless a contrary intention appears, be construed as one with the amended written law”.

27. My reading of the above provisions indicate that the obligation already placed on 1st Respondent cannot be washed away by the amendment to the law and therefore 1st Respondent will stay as a party to these proceedings.

28. On the 2nd issue, the Petitioner has submitted that the application by 1st Respondent and 1st Interested Party be struck out as the application constitutes an abuse of the Court process as the parties have simultaneously and concurrently filed similar application in the Court of Appeal.

29. I have looked at the orders given in the Court of Appeal in C.A No. 310 of 2015 by the Hon. J.J.A and they stated that: ***“indeed Application Nos. Nai 310 of 2015 and 312 of 2015 essentially seek stay of execution/implementation of the Interlocutory Orders of the Employment and Labour Relations Court (Wasilwa J.) made on 18th December 2015 in Petition No. 89 of 2015 pending the hearing of the intended appeals...”***

30. On 5th January 2016, the Employment and Labour Relations Court (Nderi Nduma J) granted an order of stay of execution of Order No. 4 & 5 of the orders of Wasilwa J. Made on 18th December 2015 pending the hearing and determination of the application for stay of execution made in that Court on 21st December 2015 --- ***“the Orders of stay of section given by the Employment and Labour Relations Court (Nduma Nderi J) on 5th January 2016 shall remain inforce unless set aside or varied by the Employment and Labour Relations Court”.***

31. It is true that the Respondents have simultaneously sought orders of stay before this Court and before the Court of Appeal which is an abuse of the Court process.

32. However, given that the Court of Appeal pronounced that the orders of stay given by this Court will remain inforce unless set aside or varied by this Court, then it follows that this Court ought to hear the applications and make a determination on the same and therefore it will not be in order for this Court to strike out the 2 applications. The applications will therefore remain and be heard accordingly.

33. On the 3rd issue, the 1st Interested Party has indeed averred that this Court in making orders pronounced on 18/12/2015 have interfered with her contract and the Court has infact gone head to rewrite her contract. This Court cannot in the circumstances determine whether her contention is correct or not without seeing the copy of the said contract.

34. The Petitioner cannot also reply to this averment without the benefit of the said contract. In the circumstances, this Court finds that production of the said contract is necessary for proper determination of the matter in Court and orders that the 1st Interested Party do produce in Court a copy of the said contract for purposes of determining the applications pending in Court within three (3) days.

35. On the 4th issue, the issue of recruitment of the new Vice Chancellor has already been made by this Court in the Interim where the Court ordered recruitment of a new Vice Chancellor stopped on 18.12.2015 pending the hearing and determination of this Petition.

36. I still believe that, that is the position and that orders can only be made upon the conclusion of the Petition.

37. No other orders will be made in respect of that issue until the Petition is determined.

Dated and delivered in open court this 1st day of March, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Petitioner – Absent

Kiragu & Kibe for 1st Respondent – Present

Mwihuri holding brief for Regeru for 1st Interested Party – Present

Oyombe holding brief for Mr. Enonda for 2nd Interested Party – Present

Chacha for 2nd & 3rd Respondents – Present